

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEVIN MULLALLY, PhD,

Petitioner,

vs.

Case No. 20-1292

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 19, 2020, via video teleconference in Tallahassee and Altamonte Springs, Florida, before Lynne A. Quimby-Pennock, an Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Kevin Andrew Mullally, PhD, pro se
1821 Carollee Lane
Winter Park, Florida 32789

For Respondent: Gayla Grant, Esquire
Thomas E. Wright, Esquire
Office of the General Counsel
Department of Management Services
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STATEMENT OF THE ISSUE

Whether Petitioner, Kevin Mullally, PhD, is entitled to a direct entry into the State University System Optional Retirement Program (SUSORP) as of

August 8, 2019, the day he began teaching at the University of Central Florida (UCF).

PRELIMINARY STATEMENT

Dr. Mullally was notified by letter dated February 6, 2020, that the Department of Management Services, Division of Retirement (Respondent or DOR), had “no statutory authority to agree to” his requests.¹ Dr. Mullally timely requested an administrative hearing to contest the decision, which is taken as the Petition for Administrative Hearing (Petition) in this case.

DOR forwarded the Petition to the Division on March 9, 2020. The matter was originally scheduled for hearing on May 12, 2020, but was continued once following the parties’ Joint Motion to Continue. The matter was rescheduled and heard on June 19, 2020.

On June 15, 2020, Dr. Mullally filed his proposed exhibits with the Division. On June 16, 2020, Dr. Mullally filed a Motion for Confidentiality (Motion) with respect to the proposed exhibits. The Motion was presented prior to any testimony being received at the hearing. Dr. Mullally revised his Motion to ensure that only his personal information was redacted in the exhibits that were admitted in evidence. DOR did not object to the Motion, as revised, and the Motion was granted.

At the final hearing, one witness was named by both parties, Joyce Morgan, PhD, DOR’s Bureau Chief of Enrollments and Contributions. The undersigned allowed wide latitude in Dr. Morgan’s examination such that both parties completed their case presentations. Additionally, Dr. Mullally

¹ Dr. Mullally requested that DOR allow “a direct transfer to the State University System Optional Retirement Program (SUSORP) from the Florida Retirement System (FRS) Investment Plan (IP)” without making a “2nd election transfer from the FRS IP to the FRS Pension Plan (PP)”.

testified on his own behalf. Dr. Mullally's Exhibits 1 through 6, 9 through 11, 21, 23, and 24 were offered and received in evidence without objection. Respondent's Exhibits 1 through 10 were offered and received in evidence without objection.²

The one-volume Transcript was filed with the Division on July 7, 2020. Dr. Mullally filed his Proposed Recommended Order (PRO) on July 7, 2020. Respondent timely filed its PRO on July 17, 2020. Both PROs were carefully reviewed in the preparation of this Recommended Order.

All references to statutes and administrative rules are to the 2019 versions of the Florida Statutes and Florida Administrative Code unless otherwise noted.

FINDINGS OF FACT

Based upon the oral and documentary evidence presented at hearing, the following facts are found:

Parties

1. Dr. Mullally is currently an Assistant Professor of Finance at UCF, having started in that position on August 8, 2019.
2. Respondent is the state agency with the responsibility to administer the FRS PP and the SUSORP. *See* §§ 121.125 and 121.035 Fla. Stat. DOR authorizes provider companies to assist SUSORP members with investments. *See* § 121.035 Fla. Stat.

Background

3. Dr. Mullally graduated from UCF in December 2005. He accepted an Orange County Public Schools teaching position in January 2006.

² Respondent's Exhibits 8 through 10 are contained on a single compact disk (CD) containing audio files of telephone conversations between Dr. Mullally and DOR employees, other State employees, or agents.

Dr. Mullally taught at Timber Creek High School in Orlando, Florida, from January 2006 to late July 2006.

4. At some point in 2006, Dr. Mullally chose to enroll in the FRS IP.³ The Orange County Public Schools system contributed a sum equal to 3.3 percent of Dr. Mullally's earnings to his FRS IP. Dr. Mullally testified that, at that time, he was "21, young and dumb" and did not contribute any of his own earnings to his FRS IP.

5. Dr. Mullally left his Timber Creek High School teaching position in late July 2006. Dr. Mullally lived in Atlanta for seven years, went to graduate school, and graduated with his doctorate degree in finance.

6. On or about February 2, 2011, FRS IP sent a letter to Dr. Mullally that provided his FRS IP benefits "may be forfeited in the near future." The letter also provided in part:

Because you were not fully vested in this portion of your account balance when you terminated FRS-covered employment, and did NOT take a distribution from your FRS Investment Plan account, the unvested portion was moved to a suspense account. According to our records, as of the date of this letter you have not returned to FRS-covered employment. If you return to work within five years from the date of termination noted above [July 27, 2006], the unvested portion of the account will be reinstated to your FRS Investment Plan account plus earnings. If you do not return to work in an FRS-covered position within five years from the date of termination noted above the unvested portion of your benefit will be forfeited.

Dr. Mullally worked less than the required six years to vest in the state retirement system. In July 2011, Dr. Mullally forfeited both the seven months of FRS eligible employment service and those Orange County Public Schools contributions held in a suspense account.

³ The State Board of Administration (SBA) administers the FRS IP.

7. Dr. Mullally worked for three years at the University of Alabama as a Finance Professor just before returning to Florida, where he began his employment at UCF in 2019.

UCF Employment

8. On August 8, 2019, Dr. Mullally started his employment with UCF as a tenure track Assistant Professor of Finance.

9. On August 9, 2019, Dr. Mullally received TIAA confirmation that he had successfully enrolled in a retirement plan of UCF. TIAA is an approved SUSORP provider.

10. On August 20, 2019, Dr. Mullally executed a SUSORP Retirement Plan Enrollment form (the Form). In the Form's section III, Dr. Mullally indicated he wanted to be a SUSORP member by checking the statement: "I am a new member and wish to enroll in the SUSORP." Dr. Mullally also provided that he had elected to use "TIAA-CREF ORP" as the provider company for his financial investments.

11. Dr. Mullally's employer, UCF, provided that Dr. Mullally was eligible for enrollment in SUSORP as of August 8, 2019, the day he began his employment.

12. Dr. Mullally did not exercise the Form's option found in section II pertaining to FRS membership when he became employed by UCF.

13. At hearing, Dr. Mullally provided copies of his first three payroll statements dated August 16, August 30, and September 13, 2019. Each statement provided a before-tax deduction to the Optional Retirement Program (ORP), which represented the SUSORP contribution.

14. On September 18, 2019, Respondent, not the SBA, sent a letter to UCF (with a copy to Dr. Mullally) ordering UCF to redirect Dr. Mullally's retirement withholdings from SUSORP to the FRS IP.

15. DOR's letter provided the following:

You reported the above member under an incorrect retirement plan on the August 2019 retirement report.

Incorrect Plan: OP Correct Plan: PA

This member [Dr. Mullally] is a participant in the Florida Retirement System (FRS) Investment Plan based on his previous employment with the Orange County School Board and should not be reported under the default State University System Optional Retirement Plan (SUSORP) by the University of Central Florida. There are no statutory provisions that allow a direct transfer from the Investment Plan to the SUSORP. If the member prefers to participate in the SUSORP instead of the Investment Plan, he must use his second election to return to the FRS Pension Plan and then elect to participate in the SUSORP.

To initiate this process, the member must complete the 2nd Election Retirement Plan Enrollment Form (ELE-2) to return to the Pension Plan and mail the form to the FRS Plan Choice Administrator at the address listed on page 3 of the form. Once the form is approved, the Division of Retirement will determine the cost to buy back into the Pension Plan. For information on the calculation of the cost, he may want to call the division toll-free at (844)377-1888 or locally at (850) 907-6500.

The member should refer to the enclosed Transfer Information Sheet for additional information on the process. The member has 90 days from his date of SUSORP eligibility to initiate the process of transferring from the Investment Plan to the Pension Plan.

Future payrolls should reflect the plan correction to PA. If you have any questions, please contact the Contributions Section.

16. Dr. Mullally completed and submitted the ELE-2 form that DOR stated “must” be completed. After waiting approximately 45 days, DOR, not SBA, advised Dr. Mullally that the cost for him to buy into the FRS PP was \$19,408.00. Further, Dr. Mullally understood that once he bought into the FRS PP, all his money would not transfer to his SUSORP election. Dr. Mullally did not submit the “buy-in” amount, but instead, began additional inquiries that led to this hearing.

17. On September 27, 2019, Dr. Mullally received his fourth payroll statement which showed the before-tax deduction for contributions to the “Florida Retirement System” in the same amount previously provided as contributions to the ORP. Additionally, the statement provided a “YTD” (year-to-date) deduction for contributions to the ORP (the SUSORP).

18. At the hearing, a brochure titled, “WELCOME to the FLORIDA RETIREMENT SYYSTEM For State University System SUSORP-Eligible Employees” (brochure) was offered by DOR and accepted in evidence. This brochure provides information on the three retirement plans available to eligible State University System employees: SUSORP; FRS IP; and FRS PP. At hearing, DOR advanced the principle that footnote 4, found on page 5 of the brochure (below), provided the mechanism by which Dr. Mullally could move to SUSORP.

4. If you are enrolled in the Investment Plan and move to a SUSORP-eligible position, you must use your 2nd Election (if available) to buy back into the Pension Plan in order to enroll in the SUSORP. You are not permitted to make a direct transfer from the Investment Plan to the SUSORP (unless in a mandatory SUSORP position).

However, the footnote does not provide any statutory authority for the second election to “buy back” into the FRS PP to then transfer to SUSORP. At the hearing, Dr. Morgan was unable to identify any statutory authority for the second election to “buy back” into the FRS PP to then transfer to SUSORP.

Further, DOR concedes in its PRO: “It does not appear that any statute or rule contains this requirement, only this publication by the SBA.”⁴ (Resp. PRO at ¶7)

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter of, and the parties to, this proceeding. *See* §§ 120.569 and 120.57(1), Fla. Stat.

20. As the party asserting the affirmative of the issues, the burden rests with Dr. Mullally to prove his position. *Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977). The standard of proof in this proceeding is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

21. DOR is responsible for the administration of the FRS PP and the SUSORP under chapter 121, Florida Statutes.

22. SUSORP is authorized by section 121.35, Florida Statutes. Section 121.35 provides, in pertinent part, as follows:

(1) **OPTIONAL RETIREMENT PROGRAM ESTABLISHED.**—The Department of Management Services shall establish an optional retirement program under which contracts providing retirement and death benefits may be purchased for eligible members of the State University System who elect to participate in the program. The benefits to be provided for or on behalf of participants in such optional retirement program shall be provided through individual contracts or individual certificates issued for group annuity or other contracts, which may be fixed, variable, or a combination thereof, in accordance with s. 403(b) of the Internal Revenue Code.

* * *

⁴ Although Respondent characterized the brochure as an SBA publication, the undersigned finds that position to be disingenuous based on the requirement that there is to be coordination between DOR and SBA for the dissemination of information regarding FRS plans. *See* § 121.4501(10), Fla. Stat.

(2) ELIGIBILITY FOR PARTICIPATION IN OPTIONAL PROGRAM.—

(a) Participation in the optional retirement program provided by this section shall be limited to persons who are otherwise eligible for membership or renewed membership in the Florida Retirement System and who are employed in one of the following State University System positions:

1. Positions classified as instructional and research faculty which are exempt from the career service under the provisions of s. 110.205(2)(d).
2. Positions classified as administrative and professional which are exempt from the career service under the provisions of s. 110.205(2)(d).

* * *

(3) ELECTION OF OPTIONAL PROGRAM.—

* * *

(c) Any employee who becomes eligible to participate in the optional retirement program on or after January 1, 1993, shall be a compulsory participant of the program unless such employee elects membership in the Florida Retirement System. Such election shall be made in writing and filed with the personnel officer of the employer. Any eligible employee who fails to make such election within the prescribed time period shall be deemed to have elected to participate in the optional retirement program.

* * *

2. Any employee whose optional retirement program eligibility results from a change in status due to the subsequent designation of the employee's position as one of those specified in paragraph (2)(a) or due to the employee's appointment, promotion, transfer, or reclassification to a position specified in paragraph (2)(a) shall be enrolled in the

optional retirement program upon such change in status and shall be notified by the employer of such action. If, within 90 days after the date of such notification, the employee elects to retain membership in the Florida Retirement System, such continuation of membership shall be retroactive to the date of the change in status.

3. Notwithstanding the provisions of this paragraph, effective July 1, 1997, any employee who is eligible to participate in the Optional Retirement Program and who fails to execute a contract with one of the approved companies and to notify the department in writing as provided in subsection (4) within 90 days after the date of eligibility shall be deemed to have elected membership in the Florida Retirement System, except as provided in s. 121.051(1)(a).^[5] (Emphasis added).

23. Dr. Mullally timely undertook the two actions required to enroll in SUSORP by contracting with an approved service provider (TIAA-CREF ORP) and notifying DOR of his SUSORP selection. Dr. Mullally did not exercise the option to elect or retain FRS membership.

⁵ In its PRO, DOR relied on section 121.35(3)(g) to postulate that there is no statutory authority to prevent Dr. Mullally from being an inactive member of the FRS IP and becoming a compulsory member of SUSORP. This is nothing but a red herring. DOR has conceded there is no statutory authority for requiring a “second election” from the FRS IP to the FRS PP to then go in to SUSORP. To require Dr. Mullally to make a “second election” to “inactivate his FRS IP participation” is likewise without statutory authority. Further, Dr. Mullally’s “active” participation in the FRS IP terminated (i.e., ended) in late July 2011, and he forfeited any “credit” at that time. DOR’s position is emphatically contradicted by section 121.35(3)(c)2. which provides: “Any employee whose optional retirement program eligibility results from a change in status . . . *shall be enrolled* in the optional retirement program upon such change in status and shall be notified by the employer of such action.” (Emphasis added). Dr. Mullally lost any “active” participation in the FRS network when, after five years, he had not obtained FRS employment. He changed his status when he accepted a teaching position at UCF.

24. The statute is clear. Dr. Mullally became a “compulsory participant of the” SUSORP upon his employment with UCF on August 8, 2019. To quote the late U.S. Supreme Court Justice Antonin Scalia, “[t]he words of a governing text are of paramount concern, and what they convey in their context is what the text means.” Nothing should have prevented Dr. Mullally from being immediately enrolled in SUSORP.

25. Dr. Mullally proved by a preponderance of the evidence that he is entitled to membership in the SUSORP as of August 8, 2019.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED⁶ that the Department of Management Services, Division of Retirement, enter a final order allowing Dr. Mullally’s enrollment in SUSORP as of August 8, 2019.

DONE AND ENTERED this 3rd day of August, 2020, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of August, 2020.

⁶ The undersigned is without the statutory authority to require the Department of Management, Division of Retirement to reimburse Petitioner “for the cost of the transcripts purchased in this matter”.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.