

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

CARLOS SARDUY,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3565
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On July 7, 2016, 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, Carlos Sarduy, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on July 22, 2016. 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.

ORDERED

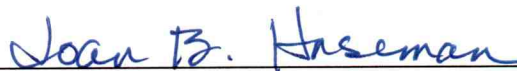
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that he be exempted from the statutory provisions requiring him to be a member of the Florida Retirement System ("FRS") and further that he make a 3% of

salary contribution to his retirement plan account hereby is denied. There are no statutory exemptions from mandatory participation on account of financial hardship.

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 27th day of July 2016, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan B. Haseman

Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

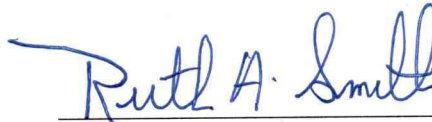
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Carlos Sarduy, pro se, both by email transmission, [REDACTED] and by U.S. Mail to [REDACTED] and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 27th day of July, 2016.



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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CARLOS SARDUY,

Petitioner,

vs.

Case No.: 2016-3565

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on May 17, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Carlos Sarduy, pro se



For Respondent: Brandice D. Dickson, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether the SBA correctly denied Petitioner's request not to be a member of the Florida Retirement System (FRS) and not to have to contribute 3% of his salary to his retirement.

PRELIMINARY STATEMENT

Petitioner attended the hearing in person and testified on his own behalf, along with his wife, Virginia Sarduy. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 4 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner is an employee of the State of Florida Department of Management Services (DMS).
2. DMS is a participating employer in the Florida Retirement System (FRS).
3. Petitioner was hired by DMS on November 1, 2015.
4. As a result of his employment by DMS, Petitioner was given the option of selecting between the two plans offered by the FRS: the defined benefit Pension Plan and the defined contribution Investment Plan.
5. Petitioner had until April 29, 2016 to make his initial election, and defaulted into the Pension Plan.
6. Petitioner seeks not to be a member of either FRS plan and not to have to contribute any portion of his salary to the FRS because he cannot afford to have any portion of his salary contributed to a retirement plan at this time.

CONCLUSIONS OF LAW

7. The FRS is a mandatory retirement system, meaning that all employees in regularly established positions with FRS-participating employers are members of the FRS upon employment and cannot opt out. §121.051(1)(a), Fla. Stat. (2015). In 2011, the Florida Legislature enacted laws that changed the FRS from a noncontributory retirement system to a contributory retirement system. *See* 2011-68, Laws of Florida.

8. Section 121.071, Florida Statutes states, in pertinent part:

Contributions to the system shall be made as follows: ...

(2)(a) Effective January 1, 1975, or October 1, 1975, as applicable, and through June 30, 2011, each employer shall make the contribution required by subsection (1) by a procedure in which no employee's gross salary is reduced. **Effective July 1, 2011, each employer and employee shall pay retirement contributions as specified in s. 121.71.**

§ 121.071 (1) and (2), Fla.Stat. (2015)(emphasis added)

9. Section 121.571, Florida Statutes states, in pertinent part:

Contributions to the Florida Retirement System Investment Plan shall be made as follows:

(1) Contributory plan.--**Each employer and employee shall submit contributions as required by s. 121.71.**

(2) Contribution rates generally.--Contributions to fund the retirement and disability benefits provided under this part must be based on the uniform contribution rates established by s. 121.71 and on the membership class or subclass of the member. Such contributions must be allocated as provided in ss. 121.72 and 121.73.

§121.571(1) and (2), Fla.Stat. (2015)(emphasis added)

10. Section 121.71, Florida Statutes states, in pertinent part:

(1) In conducting the system actuarial study required under s. 121.031, the actuary shall follow all requirements specified to determine, by Florida Retirement System employee membership class, the dollar contribution amounts necessary for the next fiscal year for the pension plan. In addition,

the actuary shall determine, by Florida Retirement System membership class, based on an estimate for the next fiscal year of the gross compensation of employees participating in the investment plan, the dollar contribution amounts necessary to make the allocations required under ss. 121.72 and 121.73. For each employee membership class and subclass, the actuarial study must establish a uniform rate necessary to fund the benefit obligations under both Florida Retirement System retirement plans by dividing the sum of total dollars required by the estimated gross compensation of members in both plans.

(2) Based on the uniform rates set forth in subsections (3), (4), and (5), employees and employers shall make monthly contributions to the Division of Retirement as required in s. 121.061(1), which shall initially deposit the funds into the Florida Retirement System Contributions Clearing Trust Fund. A change in a contribution rate is effective the first day of the month for which a full month's employer and employee contribution may be made on or after the beginning date of the change. **Beginning July 1, 2011, each employee shall contribute the contributions required in subsection (3).** The employer shall deduct the contribution from the employee's monthly salary, and the contribution shall be submitted to the division. These contributions shall be reported as employer-paid employee contributions, and credited to the account of the employee. The contributions shall be deducted from the employee's salary before the computation of applicable federal taxes and treated as employer contributions under 26 U.S.C. s. 414(h)(2). The employer specifies that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee. **The employee does not have the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the plan. Such contributions are mandatory, and each employee is considered to have consented to payroll deductions.** Payment of an employee's salary or wages, less the contribution, is a full and complete discharge and satisfaction of all claims and demands for the service rendered by employees during the period covered by the payment, except their claims to the benefits to which they may be entitled under this chapter.

(3) **Required employee retirement contribution rates for each membership class and subclass of the Florida Retirement System for both retirement plans are as follows:**

MEMBERSHIP CLASS	PERCENTAGE OF GROSS COMPENSATION, EFFECTIVE JULY 1, 2011
Regular Class	3.00%
Special Risk Class	3.00%
Special Risk Administrative Support Class	3.00%
Elected Officers' Class - Legislators, Governor, Lt. Governor, Cabinet Officers, State Attorneys, Public Defenders	3.00%
Elected Officers' Class - Justices, Judges	3.00%
Elected Officers' Class - County Elected Officers	3.00%
Senior Management Service Class	3.00%
DROP	0.00%

§ 121.71(1) – (3), Fla.Stat. (2015)(emphasis added)

11. Under Section 1121.051(1)(a), Florida Statutes participation in the FRS is compulsory for all employees. Section 121.021, Florida Statutes, “Definitions” states, in pertinent part,

(10) **“Employer” means any agency, branch, department, institution, university, institution of higher education, or board of the state,** or any county agency, branch, department, board, district school board, municipality, metropolitan planning organization, or special district of the state which participates in the system for the benefit of certain of its employees, or a charter school or charter technical career center that participates as provided in s. 121.051(2)(d). Employers are not agents of the department, the state board, or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.

...

(11) **“Officer or employee” means any person receiving salary payments for work performed in a regularly established position** and, if employed by a

municipality, a metropolitan planning organization, or a special district, employed in a covered group. The term does not apply to state employees covered by a leasing agreement under s. 110.191, other public employees covered by a leasing agreement, or a coemployer relationship.

...

(52) "Regularly established position" means:

(a) With respect to a state employer, a position that is authorized and established pursuant to law and is compensated from a salaries and benefits appropriation pursuant to s. 216.011(1)(mm), or an established position that is authorized pursuant to s. 216.262(1)(a) and (b) and is compensated from a salaries account as provided in s. 216.011(1)(nn).

§121.021, (10), (11), and (52), Fla.Stat. (2015)(emphasis added.)

12. Because Petitioner was, and is, employed by an FRS-participating employer, in a regularly established position, his membership in the FRS is mandatory. As such, his employer's payroll deduction of 3% of his salary to fund his FRS retirement benefit is compulsory. The mandatory 3% contribution by employees to the FRS has been found constitutional. Scott v. Williams, 107 So.3d 379 (Fla. 2013).

13. Respondent has not questioned Petitioner's assertion that he simply cannot afford at present to participate in the FRS, but unfortunately that fact has no bearing on the question at issue here. Petitioner has also complained of use of the word "optional" in FRS materials referring to the Investment Plan, stating that it is misleading because FRS participation is mandatory. At hearing, Respondent's counsel explained that when the Investment Plan was created in 2002, it was described as optional because participants could then choose between the Pension Plan and the Investment Plan, and in fact, the Investment Plan was referred to and is still referred to in the Part II heading of Chapter 121 as the Public Employee Optional Retirement Program.

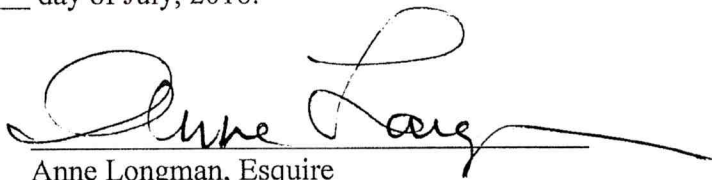
14. The SBA cannot deviate from Florida Statutes creating and governing the Florida Retirement System. Balezentis v. Department of Management Services, Division of Retirement,

2005 WL 517476 (Fla.Div.Admin.Hrgs. March 2, 2005), and has no authority to grant the relief requested by Petitioner.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 7th day of July, 2016.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

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
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Carlos Sarduy



Petitioner

and via electronic mail only to:

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Brandice D. Dickson, Esquire
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Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent