

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

CYNTHIA WULF,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2024-0016
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On May 29, 2024, 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, Cynthia Wulf, and upon counsel for the Respondent. On June 10, 2024, Petitioner timely filed what she deemed as an exception 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 EXCEPTION TO THE RECOMMENDED
ORDER**

Petitioner’s exception claims that she received her distribution on April 30, 2023, rather than on May 1, 2023, since banks process a distribution “like this” at midnight. First, none of Petitioner’s statements in her June 10th letter identifies any disputed portions

of the Recommended Order by page number or paragraph; identifies any legal basis for the exceptions; or sets 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.

Second, Petitioner made the same argument during the hearing which was rejected by the Presiding Officer. Petitioner stated that she believed that the distribution "...could have been distributed on April 30th, which would be one day before May 1st, based on different time zones." [emphasis added] [Hearing Transcript, Page 10, lines 23-25; page 11, line 1]. The Presiding Officer did not consider the Petitioner's different time zone argument in her Recommended Order, because distributions from an FRS Investment Plan account are based on the trading hours of financial markets (expressed in Eastern Time, the time zone of New York, where Wall Street is), and not on the processing hours of banks.

Petitioner ignores the fact that she was specifically advised at the time she established a pending distribution that her distribution could not be processed until 4:00 p.m. on May 1, 2023, at which time the amount of the payment to be made to Petitioner from her FRS Investment Plan account would be based on the market close of May 1, 2023 (4:00 p.m. EST). [Respondent's Exhibit 3, page 7]

Thus, the Presiding Officer's finding that Petitioner's distribution was made on May 1, 2023, was correct on based on substantial competent evidence.

Based on the foregoing, Petitioner's exception hereby is rejected *in toto*.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. Petitioner received an invalid distribution from her FRS Investment Plan account since she did not wait six full calendar months from the date she retired before obtaining employment with an FRS-participating employer. 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 31st day of July, 2024, 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.



Hillary Eason
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Cynthia Wulf, *pro se*, both by email transmission to [REDACTED] and [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ian White, Esq. (iwhite@ausley.com); jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 31st day of July 2024.



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

EXCEPTION

Cynthia Wulf



Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd, Suite 100
Tallahassee, Florida 32308

June 10, 2024

To Whom It May Concern;

I, Cynthia Wulf, Petitioner, am filing an exception to the Recommended Order I received on May 29, 2024 due to incorrect facts.

Petitioner contends that she received her distribution on April 30, 2023. In Section 121.4501(2)(k), Florida Statutes, a member is considered a "retiree" once they terminate their employment and take a distribution from their Investment Plan account.

The distribution is considered a valid distribution if the retiree waits six full calendar months from **their distribution date**, before becoming reemployed with a FRS-participating employer. If Petitioner's distribution was available on April 30, 2023, then her reemployment date would be November 1, 2023. Petitioner was reemployed with Brevard County Public Schools on November 27, 2023.

Petitioner contends that banks process a distribution like this at midnight, thus making the distribution date as early as April 30, 2023 in more than twenty-seven States in the U.S. **including the western part of the Florida Panhandle**. If this distribution was available to the Petitioner on April 30, 2023, then that would be the date of the distribution. Petitioner contends that she is not at fault for the early distribution date of April 30, 2023 but the fact IS, her distribution date would be the earliest it was available to her as she had no control over the deposit. The reemployment rule was not set by the Petitioner, but her distribution was in fact available to her on April 30, 2023, which serves as her distribution date and is subject to the correct reemployment date of November 1, 2023.

In order to uphold the Statute and the parameters of compliance for reemployment, the Committee or Counsel **MUST** find the Petitioner in compliance and order full relief to the Petitioner due to the simple fact that her distribution date is the earliest date that it was available to her, April 30, 2023; otherwise the Committee or Counsel has failed to follow the Statute and it's governing laws.

Sincerely,
Cynthia Wulf

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CYNTHIA WULF,

Petitioner,

vs.

CASE NO. 2024-0016

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on April 3, 2024, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA).

APPEARANCES

For Petitioner: Cynthia Wulf, *pro se*



For Respondent: Ian C. White, Esq.
Ausley McMullen, P.A.
P.O. Box 391
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner must repay an invalid distribution she received from her Florida Retirement System (FRS) Investment Plan account or terminate her current employment with an FRS-participating employer because she did not wait a full six calendar months from the date she retired before obtaining employment at an FRS-participating employer.

PRELIMINARY STATEMENT

Petitioner testified on her 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 without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on April 19, 2024. The parties were invited to submit proposed recommended orders within 30 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.

FINDINGS OF FACTS

1. Petitioner became a member of the FRS Investment Plan on May 1, 2019.
2. On January 6, 2023, Petitioner terminated her employment with the Brevard County School Board, an FRS-participating employer.
3. On March 21, 2023, Petitioner spoke with a customer service representative with the Investment Plan Administrator and established a pending distribution to be paid from her Investment Plan account on May 1, 2023.
4. Petitioner was asked a series of questions during this call, and was informed that once she took a distribution from her Investment Plan account, she would be considered retired from the FRS and could not be reemployed by any FRS-participating employer in any position for six calendar months or before December 1, 2023. Petitioner was also informed that if she returned to work with an FRS-participating employer before this date, her distribution would be considered invalid and she would have to either terminate her employment or pay back the invalid distribution within 90 days.

5. On May 1, 2023, Petitioner received a full distribution from her Investment Plan account in the gross amount of \$14,284.30.

6. On November 27, 2023, Petitioner was re-employed with the Brevard County School Board.

7. This reemployment occurred within the first six calendar months from the date when Petitioner was considered retired from the FRS.

8. Because Petitioner was considered retired on May 1, 2023, Petitioner was required to wait until December 1, 2023 before being employed at any FRS-participating employer.

9. When Petitioner was re-hired by the Brevard County School Board on November 27, 2023, Petitioner's distribution from her Investment Plan account was determined to be invalid.

CONCLUSIONS OF LAW

10. Pursuant to Section 121.4501(2)(k), Florida Statutes, a member is considered a "retiree" once they terminate employment with an FRS-participating employer and take a distribution from their Investment Plan account.

11. Pursuant to Section 121.091(9)(d), Florida Statutes, "[a] retiree may not be reemployed with an employer participating in the Florida Retirement System until such person has been retired for 6 calendar months." A retiree who violates this requirement and any employing agency who employs such retiree are jointly and severally liable for returning any funds distributed.

12. Because Petitioner was considered retired on May 1, 2023 when she took a full distribution from her Investment Plan account, she had to wait until December 1, 2023 before being reemployed at any FRS-participating employer.

13. Petitioner was re-employed at the Brevard County School Board on November 27, 2023, three days early. Therefore, pursuant to Section 121.591(1)(a)5, Florida Statutes, the distribution Petitioner received on May 1, 2023 was an invalid distribution which required her to either pay back the full amount of the distribution within 90 days so that she could remain in her employed position or terminate her employment and wait the required time needed to meet the six calendar months before she could be employed with an FRS-participating employer.

14. Respondent is not authorized to depart from the requirements of the statutes cited above when exercising its jurisdiction and has no power to enlarge, modify, or contravene the authority granted to it by the legislature. *State, Dept. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d 65, 66 (Fla. 1st DCA 1984); *Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement*, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency “is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction”).

15. Respondent, as an administrative entity of the State of Florida, 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).

16. 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.

17. Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements before being granted the relief requested. *Young v. Dep't of Community*

Affairs, 625 So. 2d 831 (Fla. 1993); *Dep't of Transp. v. J.W.C.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

18. Although her re-employment was only premature by a short period, Petitioner cannot demonstrate entitlement to the relief she has requested under the applicable law and must either terminate her employment with the Brevard County School Board or pay back the invalid distribution in full.

RECOMMENDATION

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

DATED this 29th day of May 2024.

s/Anne Longman

Anne Longman, Esquire

Presiding Officer

For the State Board of Administration

Lewis, Longman & Walker, P.A.

106 East College Avenue, Suite 1500

Tallahassee, FL 32301-1872

alongman@llw-law.com

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 Boulevard, Suite 100
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COPIES FURNISHED via mail and electronic mail to:

Cynthia Wulf



Petitioner

and via electronic mail only to:

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