IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SERGIO ALVAREZ,

Appellant,

v. Case No. 5D19-2679

STATE BOARD OF ADMINISTRATION,

Appellee.

_____/

Opinion filed August 6, 2021

Administrative Appeal from the State Board of Administration.

Sergio Alvarez, Orlando, pro se.

Ruth E. Vafek and Deborah S. Minnis, of Ausley McMullen, Tallahassee, for Appellee.

EDWARDS, J.

Pro se Appellant Sergio Alvarez ("Alvarez"), appeals from a final order of the State Board of Administration ("SBA"), denying his request to transfer his fully vested retirement assets from his current Florida Retirement System

("FRS") Investment Plan into the State University System Optional Retirement Program ("SUSORP"). Alvarez argues that SBA misinterpreted the plain meaning of the provisions of chapter 121, Florida Statutes, pertaining to his participation in the SUSORP and regarding what will become of his already vested FRS Investment Plan assets. We agree and reverse SBA's final order. We hold that Alvarez is entitled to enroll in the SUSORP, retroactive to his first date of current employment with the University of Central Florida ("UCF"), without any requirement to convert his Investment Plan account to a Pension Plan account nor any requirement that he forfeit his Investment Plan retirement assets. We remand this matter to SBA and the Department of Management Services ("DMS") for further proceedings consistent with this opinion.

Background on Florida's Retirement Plans and Programs

Prior to 2000, FRS offered only a Pension Plan, or "defined benefit," option to eligible employees. The Pension Plan is established under Part I of chapter 121, Florida Statutes, and is administered by DMS pursuant to section 121.025, Florida Statutes (2018). In 2000, the legislature created the FRS Investment Plan or "defined contribution" option, established under Part II of chapter 121, *see* ch. 2000-169, § 3, Laws of Fla., and authorized

SBA[1] to administer it. § 121.4501, Fla. Stat. (2018). Nowadays, FRS contains two general plans—the Pension Plan and the Investment Plan. § 121.021(3), Fla. Stat. (2018); § 121.70(1), Fla. Stat. (2018) ("The Legislature recognizes and declares that the Florida Retirement System is a single retirement system, consisting of two retirement plans and other nonintegrated programs."). These two plans are administered by different entities, as DMS administers the Pension Plan and SBA administers the Investment Plan.

The Florida Legislature also created certain optional retirement programs offered in lieu of participation in FRS. *See, e.g.*, § 121.35, Fla. Stat. (2018) (specifically stating that the SUSORP is an Internal Revenue Code Section 403(b) plan that is offered "in lieu of participation in the Florida Retirement System"). The optional retirement program applicable to this proceeding is the SUSORP, which was created in 1984 and is only available to certain classes of state university employees. § 121.35(2)(a)(1)–(3), Fla. Stat. (delineating the classes of eligible employees). DMS is also the administrator of SUSORP. § 121.35(6), Fla. Stat. SUSORP is a desirable plan because the employer contributes more to an eligible employee's

[1] SBA is an entity created by the Florida Constitution. *See* Art. IV, § 4(e), Fla. Const. ("The governor as chair, the chief financial officer, and the attorney general shall constitute the state board of administration . . . .").

SUSORP account than the State contributes to an employee's FRS Investment Plan.[2]

Alvarez's History of State Employment

Alvarez commenced his employment as a Chief Economist with the Florida Department of Agriculture and Consumer Services on June 3, 2013, an FRS-participating employer. He had until November 27, 2013, to make an initial election between the FRS defined contribution Investment Plan and the FRS defined benefit Pension Plan. He made a timely election to enroll in the Investment Plan pursuant to section 121.4501(4)(a), Florida Statutes. This election became final and irrevocable on September 30, 2013. *See* Fla. Admin. Code R. 19-11.006(3) (2013). Alvarez was employed with the Department of Agriculture and Consumer Services from June 3, 2013, through August 3, 2018. Alvarez is fully vested in his current FRS Investment

[2] *Compare* § 121.35(4)(a)(4), Fla. Stat. (2018) ("Effective July 1, 2012, each member of the optional retirement program shall contribute an amount equal to the employee contribution required in s. 121.71(3). The employer shall contribute on behalf of each such member an amount equal to the difference between 8.15 percent of the employee's gross monthly compensation and the amount equal to the employee's required contribution based on the employee's gross monthly compensation."), *with* § 121.571, Fla. Stat. (2018). *See also* Welcome to the Florida Retirement System For State University System SUSORP-Eligible Employees, available at https://www.myfrs.com/pdf/forms/SUSORP-Newsltr%206-22FP.pdf (last visited July 2, 2021).

Plan account (including employer contributions made thereto). *See* § 121.4501(6)(a)–(b), Fla. Stat.

On August 8, 2018, Appellant became employed with UCF as a research and instructional faculty, a SUSORP eligible position. He completed and submitted the paperwork necessary to enroll in SUSORP.

Denial of Enrollment in SUSORP Absent $41,000 Forfeiture

When Alvarez attempted to enroll in SUSORP, the Division of Retirement ("the Division") within DMS determined that he could not do so, because he was already a participant in the FRS Investment Plan. The Division stated that there was no statutory provision allowing a direct transfer of funds from the FRS Investment Plan to SUSORP; only FRS Pension Plan members could transfer the current value of their pension account directly into the SUSORP. The Division advised that if Alvarez wished to join the SUSORP, he must first exercise his second ~~e~~lection under section 121.4501(4)(f) to transfer from the FRS Investment Plan to the Pension Plan, at an estimated cost to him of approximately $41,000. Upon transfer into the SUSORP, he would effectively forfeit the $41,000 because he did not meet the vesting requirements of the Pension Plan, and because he would be a SUSORP participant, he would not accumulate any additional vesting credits for the Pension Plan.

Not surprisingly, Alvarez did not accept the Division's interpretation and pointed out that in his new position at UCF he was eligible for and had made a written demand, that was sent to DMS, requesting to be enrolled in SUSORP. DMS consulted with SBA, and SBA advised Alvarez that the decision was final: either stay in the Investment Plan or convert his Investment Plan account into a Pension Plan account with a forfeiture of $41,000 as a means to access SUSORP. DMS by its action or inaction adopted SBA's position on that.

Alvarez timely exercised his right to an informal administrative hearing in order to formally contest DMS's and SBA's refusal to allow him to directly enroll in and transfer his vested assets to SUSORP. He made it clear that he wished to participate in that program and suggested two options. First, he offered to buy into the Pension Plan if his remaining balance would then be transferred to his SUSORP account. Alternatively, he offered to leave the current balance in his Investment Plan account untouched until retirement and begin a new account in SUSORP with a zero starting balance. He saw no justification for having to forfeit over $41,000 when there was no obvious statutory requirement for the Division's position. Nor did he see any justification requiring him to forgo the estimated additional $250,000 he projects that he will receive as a participant in SUSORP compared to the

FRS Investment Plan if he stays in his current position until normal retirement age.

Hearing and Recommended Order

An informal hearing was held in December 2018. SBA confirmed that Alvarez was eligible to participate in SUSORP but stated there were two questions to be answered by the hearing officer. First, whether Alvarez could directly transfer the assets from his Investment Plan to SUSORP or must he do something else, such as first exercise his option to transfer into the Pension Plan? Second, if he had to buy into the Pension Plan, what would become of Alvarez's $41,000 estimated payment if he bought into the Pension Plan? SBA maintained the position held by it, the Division, and DMS: that if he wanted to join SUSORP, the governing law would require Alvarez to first transfer into the Pension Plan by paying $41,000, and that transfer payment would not be added as a starting balance to his SUSORP account.

The hearing officer stated that she was "as baffled as Mr. Alvarez" that he would have to forfeit his vested Investment Plan benefit in order to partake in SUSORP "where the statute says you're just in the program automatically." Ultimately, the hearing officer issued a recommended order that SBA should issue its final order granting the relief requested by Alvarez. The hearing

officer could not conclude that as a matter of law Alvarez was not permitted to either transfer the value of his Investment Plan as his opening SUSORP account balance or to simply maintain his current Investment Plan account with no further contributions and commence participation in SUSORP with a zero balance beginning the date his employment began at UCF. Neither party filed exceptions to the recommended order.

SBA then issued its final order, adopting all of the hearing officer's findings of fact, but rejecting all but one of the conclusions of law set forth in the recommended order. In its final order, SBA engaged in a convoluted analysis of the governing statute. It concluded that because section 121.35(3)(h) provides that a participant in SUSORP cannot participate in more than one state-administered plan, Alvarez could not simply keep his Investment Plan with no further additions while joining SUSORP. SBA noted that a participant in the Pension Plan was authorized to directly transfer into SUSORP, meaning that if Alvarez wished to join SUSORP, it would cost him $41,000, which SBA acknowledged, in a gross understatement, could be deemed an "unfair result." Alvarez timely appealed.

## Analysis

### Exhaustion of Administrative Remedies

At the outset, we reject SBA's argument that Alvarez failed to exhaust his administrative remedies through the Division and DMS. Alvarez first corresponded with DMS which in turn was advised by SBA on how to respond. Indeed, it was SBA, apparently acting on behalf of the Division and DMS, that rendered the state's official position outlined above, described the decision as final, and notified Alvarez that he had a right to a hearing. By its action or inaction, DMS adopted the position of SBA. Alvarez thus had what SBA, the Division, and DMS declared to be a final decision, which Alvarez then contested in a hearing in which SBA participated. Given that SBA undertook to advise the Division and DMS informally, corresponded directly with Alvarez conveying the final decision, and then undertook the formal litigation of the issue with the apparent consent of DMS, SBA's position is entirely disingenuous.[3]

Standard of Review and Agency Deference

[3] Furthermore, the Board has a reported history of addressing similar cases on the merits. *See, e.g.*, *Byron v. State Bd. of Admin.,* SBA Case No. 2019-0019 (Fla. State Bd. of Admin. Sept. 17, 2019); *Ross v. State Bd. of Admin.,* SBA Case No. 2017-0211 (Fla. State Bd. of Admin. Jan. 17, 2018); *Jackson v. State Bd. of Admin.*, SBA Case No. 2014-2998 (Fla. State Bd. of Admin. Oct. 13, 2014); *Herman v. State Bd. of Admin.*, SBA Case No. 2010-1951 (Fla. State Bd. of Admin. Aug. 17, 2011), *available at* https://www.myfrs.com/RSIntervention.htm (last visited July 2, 2021).

The standard of review is de novo as this matter involves the interpretation of a statute. *See* Art. V, § 21, Fla. Const. This Court is free to disagree with an agency on a point of law. § 120.68(7)(d), Fla. Stat. (2020). Section 120.68(7)(d) provides that a district court "shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that . . . [t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 120.68(7)(d), Fla. Stat.; *see also Metro. Dade Cnty. v. Dep't of Env't Prot.,* 714 So. 2d 512, 516 (Fla. 3d DCA 1998); *Schrimsher v. Sch. Bd. of Palm Beach Cnty.*, 694 So. 2d 856, 861 (Fla. 4th DCA 1997). With the passage of Article V, section 21 of the Florida Constitution effective November 6, 2018, the previously afforded deference to agency interpretation of statutes or rules has been abolished. *See La Galere Markets, Inc. v. Dep't of Bus. & Prof'l Regul.*, 289 So. 3d 553, 556 (Fla. 1st DCA 2020) ("Before the passage of Article V, section 21 of the Florida Constitution, reviewing courts had to defer to 'an agency's interpretation of statutes it implemented unless such interpretation was clearly erroneous.' After the amendment passed, judicial deference to an agency's interpretation was no longer required. Instead, the de novo standard applies. Though the order appealed here was rendered before the

effective date of the amendment, we need not decide whether the amendment applies. When the agency's view conflicts with the plain meaning of the statute, judicial deference is not required. Our review is de novo." (quoting *S. Baptist Hosp. of Fla. v. Ag. for Health Care Admin.*, 270 So. 3d 488, 502 (Fla. 1st DCA 2019))).

Statutory Language is Unambiguous

This case presents two questions. First, is there any basis to claim that Alvarez was not eligible to become a participant in SUSORP on the date he commenced employment with UCF? Second, if he is allowed to participate in SUSORP, what becomes of the assets in his Investment Plan account? Both sides argue, and we agree, that these questions are answered by reference to the controlling statutory provisions.

"When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey,* 137 So. 157, 159 (Fla. 1931)). Courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative

power." *Id.* (emphasis omitted) (quoting *Am. Bankers Life Assurance Co. of Fla. v. Williams,* 212 So. 2d 777, 778 (Fla. 1st DCA 1968)).

"[W]e begin our analysis . . . as we do in any case of statutory interpretation, with the actual language used by the Legislature." *Quarantello v. Leroy*, 977 So. 2d 648, 651 (Fla. 5th DCA 2008) (internal marks and citations omitted).

Alvarez's Eligibility to Participate in SUSORP

Section 121.35(3)(c) provides in pertinent part:

> **(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.
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> 1. Any employee whose optional retirement program eligibility results from initial employment shall be enrolled in the program at the commencement of employment. If, within 90 days after commencement of employment, the employee elects membership in the Florida Retirement System, such membership shall be effective retroactive to the date of commencement of employment.
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> 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.

The parties agree that Alvarez became "eligible" upon commencing employment in his new position with UCF. According to the just-quoted statutory provisions, Alvarez was compelled to participate in the optional program, SUSORP, *unless* he made a written election within ninety days to instead participate in FRS. Using a belt and suspenders approach, that section goes on to say that in the absence of making such an "opt out" election, the employee "shall be deemed to have elected to participate in the optional retirement program." § 121.35(3)(c), Fla. Stat.

Here, Alvarez made no such election to opt out of SUSORP. As far as the default compulsory nature of SUSORP participation, the statute does not differentiate between whether the eligible employee is or was a participant in any FRS retirement plan. Section 121.35(3)(c)(2) deals precisely with Alvarez's circumstances where his eligibility for the optional retirement program (SUSORP) resulted from a change in status via appointment or transfer, and again, the default—absent affirmative employee election to opt

out of SUSORP—is for the now-eligible employee to become a participant in the optional retirement program, i.e., SUSORP.

Thus, according to the plain and repetitious language of the statute, Alvarez is a compulsory participant in SUSORP with commencement of his participation being retroactive to the date he became employed by UCF. There is nothing in the statute that requires him to convert his Investment Plan account into a Pension Plan account and thereby forfeit $41,000 in order to participate in SUSORP. *See State v. Geiss*, 70 So. 3d 642, 647–48 (Fla. 5th DCA 2011) ("[B]ecause the statute has no such language, it is not our place to read into the statute a concept or words that the legislature itself did not include." (citation omitted)). To answer the first question, we find there is absolutely no basis to claim that Alvarez was not eligible to become a participant in SUSORP on the date he commenced employment with UCF.

What Happens to Alvarez's Assets in His FRS Retirement Fund?

The second question posed above, what happens to Alvarez's Investment Plan account once he became a participant in SUSORP, is also answered by section 121.35. Subsection (3)(g) of that statute provides in pertinent part that:

> (g) An eligible employee who is a member of the Florida Retirement System at the time of election to participate in the optional retirement program shall retain all retirement service credit earned under the Florida Retirement System at the rate

> earned. Additional service credit in the Florida Retirement System may not be earned while the employee participates in the optional program, and the employee is not eligible for disability retirement under the Florida Retirement System.

Thus, the statute contains no forfeiture provision of previously earned, vested retirement benefits.

Section 121.35(3)(h) provides that "[a] participant in the optional retirement program [like SUSORP] may not participate in more than one state-administered retirement system, plan or class simultaneously." Thus, Alvarez is not entitled to have the state make contributions to both his Investment Plan account and his SUSORP account; however, he has never requested any such thing. He has always been agreeable, as one alternative, to passive ownership of his Investment Plan account, meaning that all employee and employer contributions to his Investment Plan cease as of his date of employment with UCF and he will leave that account alone until he retires. Thus, he proposes that he will be an active participant in only one state-administered retirement program, SUSORP.

SBA's position, that Alvarez had to convert his Investment Plan account into a Pension Plan account, is apparently based on various provisions within section 121.35 which discuss the right of a participant in the Pension Plan to directly transfer his/her account credits directly into an

optional program, such as SUSORP.[4] The statute repeatedly refers to what somebody in the "pension plan" can do and what happens with his/her account and retirement credits upon electing to transfer that pension plan account to an optional program; however, it does not specifically mention an "investment plan" although it repeatedly refers to the "Florida Retirement System" which by definition, includes both.[5] Given the statutory language, we agree with SBA and DMS that Alvarez cannot directly transfer the assets from his FRS Investment Plan account into SUSORP. Thus, his SUSORP account balance as of his first day of employment at UCF would be zero.

Alvarez questions why he should not be permitted to participate in a trustee-to-trustee rollover of his Investment Account funds directly over to his

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[4] It is unclear to this Court whether the failure to provide for direct transfer of FRS Investment Plan account assets in that statute was intentional or an oversight that may deserve future consideration by the legislature.

[5] As explicitly defined by the Legislature, the "'Florida Retirement System' or 'system' means the general retirement system established by this chapter, including, but not limited to, the defined benefit program administered under this part, referred to as the 'Florida Retirement System Pension Plan' or 'pension plan,' and the defined contribution program administered under part II of this chapter, referred to as the 'Florida Retirement System Investment Plan' or 'investment plan.'" § 121.021(3), Fla. Stat. The title of Part II of chapter 121 is the "Florida Retirement System Investment Plan," meaning that the FRS includes the Investment Plan. The reference to "service credit," contrary to the final order's reasoning, is not limited to the Pension Plan. *See, e.g.*, § 121.591, Fla. Stat. (2018).

SUSORP account, much as an employee in the private sector can rollover the employee's vested 401(k) plan assets into an IRA. In support of that position, Alvarez notes that there is nothing in the controlling statute that would prohibit it, while also admitting there is nothing in the statute specifically permitting it either. Because Alvarez is willing to accept the alternative remedy mentioned earlier and because we are remanding this matter to SBA and DMS for further proceedings, we need not answer this now.[6]

## Conclusion

We reverse SBA's final order and remand for further proceedings consistent with this opinion which will confirm Alvarez to be a participant in SUSORP retroactive to his date of employment with UCF without having to convert his Investment Plan into a Pension Plan and which will not result in a loss of benefits under SUSORP to Alvarez as a result of SBA's initial denial of such participation.[7]

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[6] We note that section 121.35(4)(c) created an Optional Retirement Program Trust Fund that is authorized under section (4)(f) and in accordance with the Internal Revenue Code to accept rollovers or direct trustee-to-trustee transfers for deposit into participants' accounts or contracts.

[7] Because the Division and DMS elected to have SBA resolve this matter on their behalf, they are required to promptly take any such action necessary to effectuate compliance with this opinion.

REVERSED and REMANDED, with instructions.

LAMBERT, C.J., concurs
SASSO, J., dissents, with opinion.

SASSO, J., dissenting.

Alvarez appeals a final order entered by the State Board of Administration ("SBA") after he filed a Petition for Hearing on the issue of whether he should be permitted to enroll in the State University System Optional Retirement Plan ("SUSORP"). Alvarez argued he should be permitted to enroll, either by transferring directly from the Florida Retirement System Investment Plan or by maintaining passive ownership in his current investment plan and enrolling in the SUSORP with a zero balance. The SBA concluded that it lacked authority to grant the relief Alvarez requested. Nonetheless, it went on to provide its opinion that Alvarez's requested relief was also precluded by statute.

In this appeal, to which only Alvarez and the SBA are a party, Alvarez challenges the SBA's final order. I agree with the SBA on this issue of its jurisdiction and would therefore affirm the order on review.

The SBA has only the powers, duties, and functions as prescribed by law. *See* § 20.28, Fla. Stat. (2019). As a result, it has no power to act in a manner that enlarges, modifies, or contravenes the authority that the legislature has prescribed to it. *See State, Dep't of Bus. Regul. v. Salvation Ltd.*, 452 So. 2d 65, 66 (Fla. 1st DCA 1984). Moreover, the limits of the SBA's

authority cannot be altered by agreement or consent of the parties; nor can it be based upon waiver or estoppel. *Accord Procacci v. State, Dep't of HRS*, 603 So. 2d 1299, 1300–01 (Fla. 1st DCA 1992).

Relevant to the dispute here, section 121.35, Florida Statutes, explains that the Department of Management Services ("DMS"), rather than the SBA, is charged with administering the SUSORP. *See* § 121.35(1), (6)(a), Fla. Stat. (2012) (providing DMS "shall" establish and administer the SUSORP). Consistent with that charge, DMS is responsible for adopting all required rules, including those related to program enrollment. *See* § 121.35(6)(a), Fla. Stat.; Fla. Admin. Code R. 60U-1.012 (2016).

By contrast, section 121.35 references the SBA, but only to authorize the SBA to "review and make recommendations to [DMS] on the acceptability of all investment products" subject to DMS's final determination as to whether the investment product will be approved for the program. *See* § 121.35(6)(c), Fla. Stat. No other powers are granted to the SBA under section 121.35 with respect to SUSORP, not even the power to require DMS to offer certain investment products under SUSORP.

Thus, while section 121.35 does vest the SBA with certain advisory duties regarding the types of products to be offered in SUSORP, those

powers cannot be extended to cover the administration of SUSORP, which the statute specifically places within the sole purview of DMS.

As the SBA correctly determined, the relief Alvarez requests—chiefly, the ability to enroll in the SUSORP—is simply not within the SBA's power or authority to determine. Regardless of whether the SBA's decision was "disingenuous" or inconsistent, its prior action is of no legal consequence in the context of this proceeding. *See Swebilius v. Fla. Constr. Indus. Lic. Bd.*, 365 So. 2d 1069, 1070 (Fla. 1st DCA 1979).

Finally, it bears emphasis that DMS and the SBA are separate entities. SBA, not DMS, is a party to this appeal. Just as the SBA lacked authority to compel DMS to grant Alvarez's requested relief, so does this Court. *See Alger v. Peters*, 88 So. 2d 903, 906 (Fla. 1956) ("It is so fundamental to our concept of justice that a citation of supporting authorities is unnecessary to hold that the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party and from which he has literally been excluded by the failure of the moving party to bring him properly into court."). I therefore respectfully dissent.