STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

JOSEPH E. BURNS, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 2009-1432

FINAL ORDER

On July 20, 2009, 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, Joseph E. Burns, and upon counsel for the Respondent. Both Petitioner and Respondent filed Proposed Recommended Orders. Petitioner filed exceptions on July 29, 2009. Exceptions were due on August 4, 2009. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

ISSUE NUMBER ONE:

Petitioner filed several pages of unnumbered exceptions to the Recommended Order. The Exceptions set forth under what Petitioner designates as "Issue Number 1,"

challenge the Presiding Officer's Preliminary Statement which concludes that the Pre-Hearing Statement was timely filed by the Respondent, and that even if it had been late-filed, no prejudice resulted to Petitioner. Petitioner argues that Respondent failed to comply with the Notice of Proceeding and Initial Order of Instructions, because the Pre-Hearing Statement was filed by the Respondent 16 days, rather than 15 days from that Order, and that the Petitioner is therefore entitled to prevail on the substance of his petition.

The Notice of Proceeding and Initial Order of Instructions was dated February 10, 2009. Chapter 28-106, Florida Administrative Code applies to all proceedings under Chapter 120, Florida Statutes, which includes informal agency hearings. Rule 28-106.103, Florida Administrative Code provides, in pertinent part, as follows:

> In computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the day of the act from which the period begins to run shall not be included.... (emphasis added)

Rule 28-1.06.102 defines "presiding officer" as follows:

> "Presiding officer" means an agency head, or member thereof, who conducts a hearing or proceeding on behalf of the agency, an administrative law judge assigned by the Division of Administrative Hearings, or any other person authorized by law to conduct administrative hearings or proceedings who is qualified to resolve the legal issues and procedural questions which may arise.

As provided by rule, the day the Notice of Proceeding and Initial Order of Instructions is issued is not counted in calculating the 15 day requirement. As such, 15 days from the date of the Order would be February 16, 2009, the date the Pre-Hearing

Statement was filed by the Respondent. Thus, Respondent's Pre-hearing Statement was filed timely, and was not filed late as alleged by the Petitioner.

Even had the Pre-Hearing Statement been filed a day late, the Petitioner has not alleged or demonstrated that the Petitioner has suffered any prejudice. Petitioner had the opportunity fully to present his arguments at the hearing. Additionally, Petitioner was granted the opportunity by the Presiding Officer to present any additional arguments in support of his position even after the transcript was filed. Tr. Page 49, lines 11-21. In instances in which an agency fails to meet procedural benchmarks, a party may obtain relief, such as reversal, only where the party suffers prejudice from the delay. *See Littleford v. Department of Highway Safety and Motor Vehicles,* 814 So.2d 1258 (Fla. 5th DCA 2002).

Petitioner's Exceptions under Issue 1 are rejected.

ISSUE NUMBER TWO:

The next few pages of unnumbered exceptions to the Hearing Officer's Conclusions of Law pertain to what Petitioner designates as Issue Number 2, "Whether the Respondent is liable for Petitioner's losses because Petitioner was unable to exercise control over Petitioner's Investment Plan account assets during the three month waiting period."

Petitioner claims that, during the statutorily imposed three-month waiting period between his termination date and the date he was able to take a distribution from the plan, the State exercised control over his Investment Plan. Petitioner then claims because such control existed, the State must be liable for any losses sustained during his waiting period.

The Investment Plan is designed to provide benefits through "...employee-directed investments...". Section 121.4501(1), Fla. Stat. [emphasis supplied] . Thus, the hallmark of the Investment Plan is that the participant, rather than the state, assumes responsibility for any losses suffered by the account, because it is the employee, not the State that makes the investment decisions. Here, Petitioner has not alleged or demonstrated that the State could re-allocate any of Petitioner's investment selections during the waiting period. And, in fact, the evidence produced during the hearing shows that the Petitioner always retained the authority to re-allocate his investment selections, both before and after he terminated FRS employment on July 1, 2008. Petitioner never lost the ability to exercise control over the actual investments in his account. The Second Election Form signed by the Petitioner specifically stated that the Petitioner could change the selected funds "at any time." Exhibit R-2, p. 3.

Petitioner did not demonstrate that Petitioner was misled into believing that his assets could not be moved to other funds during the waiting period. Petitioner specifically stated during the hearing that:

> My point being is that 90 to 120 days was a requirement. Did I have access to move that money around. Sure. I could shuffle it from side to side, up and down. Tr. Page 44, lines 9-12.

Later, in response to a direct question from the Hearing Officer as to whether Petitioner was under the impression that Petitioner could not move funds during the waiting period, Petitioner replied:

> You know, I can't answer the question because it was one of those things that I wasn't ever actually thinking about moving it from one fund to another at that point in time. Tr. Page 45, lines 1-9.

Neither of the foregoing statements made by Petitioner demonstrates that the Petitioner somehow believed he was unable to re-allocate his investment selections during the waiting period. In fact, the first statement seems to indicate Petitioner did believe he could move his asset allocations.

A restriction on when a participant can receive a distribution from a plan is not equivalent to a restriction on the ability to make investment selections during the waiting period. Because Petitioner was free during the waiting period to select any mix of investment alternatives to alter the investment risk, Petitioner never lost control over his account assets. Instead of selecting a different asset mix during the mandatory waiting period, Petitioner chose to continue the allocation of 60% stocks and 40% bonds, which unfortunately proved to be a risky mix in view of the then-existing market conditions. Thus, the losses suffered by Petitioner during the waiting period were not due to any restrictions on distribution but instead were due to Petitioner's own selection of investment funds.

Petitioner claims that there was a duty on the State to disclose that he would retain the liability for losses incurred during the waiting period. Petitioner states in his exceptions that, in the materials provided to him regarding the Investment Plan, it "...was made abundantly clear that the investment plan member was responsible for gains or losses to their account while they were employed and until they retire." [Exceptions, Page 4, lines 12-14]. Petitioner has never given any reason as to why he believed the risk of loss would shift during the waiting period, other than he made such an assumption. If the entire basis of the Investment Plan is that the participant reaps the gains and suffers the losses resulting from his or her own investment decisions, and the State makes that

abundantly clear to all individuals prior to joining the Investment Plan, there would be no duty for the State to remind participants that the risk of loss continues to remain on the participant during a particular occurrence such as a waiting period. The only time the State would need to advise a participant regarding risk of loss would be if the risk of loss somehow shifted during that particular occurrence. Here, Petitioner is not claiming that the risk of loss actually did shift during the waiting period- he is claiming the risk of loss should shift because he made an erroneous assumption and he should not be held accountable for his error. If Petitioner had any question as to whether the risk of loss shifted during the waiting period, that issue could have been broached during his conversations with the MyFRS Financial Guidance Line, during which Petitioner was clearly advised of the waiting period, as well as his ability to take a 10% distribution after one month if he so elected.

Petitioner claims that the Regulations under the Employee Retirement Income Security Act of 1974 ("ERISA"), applicable to participant control, and which are made applicable to the Investment Plan under Section 121.4501(15), Fla. Stat., show that he lost control over his account assets solely because the State "...concealed material non-public facts regarding the investment from the participant...". 29 C.F.R § 2550.404c-1(c)(2)(ii). But, as noted above, the Petitioner stated it was abundantly clear from materials supplied by the State that Investment Plan participants bear the risk of loss from their own investment decisions. There clearly was no concealment by the State as to an Investment Plan participant's liability for losses.

Petitioner's Exceptions under Issue 2 are rejected.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that the State Board of Administration reimburse Petitioner for losses suffered in his Investment Plan account is denied.

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 200, 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 11 day of September, 2009, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Ron Poppell, Senior Defined Contribution
Programs Officer
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
Clerk TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Joseph E. Burns, [redacted] and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 11th day of September, 2009.

Ruth A. Smith

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

JOSEPH E. BURNS,

Petitioner,

v.

CASE NO.: 2009-1432

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on March 9, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Joseph Burns
[redacted]
Petitioner

For Respondent: Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Respondent is liable to Petitioner for losses in his Florida Retirement System (FRS) Investment Plan account during the three month period following termination of his employment.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner filed a Request for Intervention raising the above issue, which was investigated and denied by Respondent by letter of January 21, 2009. This informal hearing ensued.

Petitioner attended the hearing in person and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management and Compliance, State Board of Administration. Petitioner's Exhibit P-1 and Respondent's Exhibits R-1 through R-7 were admitted into evidence.

A transcript of the hearing was filed with the agency and made available to the parties, who were invited to submit proposed recommended orders within 30 days after the transcript was filed. Both Petitioner and Respondent filed proposed recommended orders.

As an initial matter, both at hearing and in his proposed recommended order, Petitioner asserted that Respondent failed to comply with the Notice of Proceeding and Initial Order, because its Pre-Hearing Statement was filed 16 rather than 15 days from that Order, and that he is therefore entitled to prevail on the substance of his petition. By my count, the pleading in question was in fact timely filed, and in any event, even had it been filed a day late, no prejudice would have accrued to Petitioner.

UNDISPUTED MATERIAL FACTS

1. Petitioner was employed by the Pinellas County School Board for 34 ½ years, and for most of that time, was a member of the FRS Pension Plan.

2. Petitioner used his second election to switch to the FRS Investment Plan in July 2007. The second election form states, above the signature line:

> I understand that Sections121.4501(8)(b)4 and 121.4501(15)(b) of Florida law incorporate the federal law concept of participant control, established by regulations of the U.S. Department of Labor under section 404(c) of the Employee Retirement Income Security Act of 1974. If I exercise control over the assets in my FRS Investment Plan account, pursuant to section 404(c) regulations and all applicable laws governing the operation of the FRS Investment Plan, no program fiduciary shall be liable for any loss to my account which results from my exercise of control.

3. When Petitioner moved to the Investment Plan from the Pension Plan, he put 60% of his assets in stocks and 40% in bonds. He maintained that asset mix until he took a total distribution of his account. Petitioner had a range of investment choices available to him and could have allocated all of his Investment Plan account funds to a money market account at any time, and could have moved all of his plan funds into and out of the money market fund up to the point his account was fully distributed to him.

4. Approximately a year after moving into the Investment Plan, on June 17, 2008, Petitioner called the MyFRS Financial Guidance Line and informed the counselor during the call that he was planning on retiring very soon, most likely on July 1st. Petitioner was aware that he couldn't "touch the money for at least three months," but was not sure what investments he currently held: "I don't know – I guess it's in mutuals or something. I don't know. I'm not sure what I have it set in right now."

5. Petitioner was advised that although he would have to wait three calendar months after his termination month before he could take a total distribution of his account, he could take a ten percent distribution after only one month because he met the requirements for normal retirement.

6. Petitioner also was advised during that call that he could accelerate receipt of a

distribution if he terminated on June 30th instead of July 1st, but he stated that was "not an issue," as he was hoping not to have to use the money for a year.

7. Petitioner terminated FRS-covered employment on July 1, 2008, at which time he was 58 years old, had attained 34.99 years of creditable service and had accumulated approximately [redacted] in his Investment Plan account.

8. Petitioner sought distribution from his Investment Plan account on November 25 and 28, 2008.

9. Between the time Petitioner terminated and the time he requested a distribution, his FRS Investment Plan account lost value. Petitioner estimated he lost in excess of $[redacted] during this period.

10. Petitioner acknowledges that he and all participants are restricted from taking a full distribution of an Investment Plan account until three calendar months after the month of termination. He asserts that neither the applicable Florida Statute or rule states which party is liable for account losses that may occur during the mandated waiting period, and that if he is liable for these losses, this is a material fact which, if undisclosed, would contravene the regulations that govern whether a participant is exercising independent control over his assets. He asserts that the SBA therefore was in liable for his account losses during this period.

CONCLUSIONS OF LAW

11. The Florida Legislature has by statute set the terms and conditions of the FRS benefit programs. Section 121.591(1), Florida Statutes, prescribes when normal benefits under

the Investment Plan (formally known as the Public Employee Optional Retirement Program) are payable and states, in pertinent part:

> (1) Normal benefits.--Under the Public Employee Optional Retirement Program:
>
> (a) Benefits in the form of vested accumulations as described in s. 121.4501(6) shall be payable under this subsection in accordance with the following terms and conditions:
>
> 1. To the extent vested, benefits shall be payable only to a participant.
>
> 2. Benefits shall be paid by the third-party administrator or designated approved providers in accordance with the law, the contracts, and any applicable board rule or policy.
>
> 3. To receive benefits under this subsection, the participant must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).
>
> 4. Benefit payments may not be made until the participant has been terminated for 3 calendar months, except that the board may authorize by rule for the distribution of up to 10 percent of the participant's account after being terminated for 1 calendar month if a participant has reached the normal retirement requirements of the defined benefit plan, as provided in s. 121.021(29).

§ 121.591(1), Fla.Stat. (2008).

Petitioner was aware of this three month waiting period when he made his June 17, 2008 call to the MyFRS Guidance Line.

12. Petitioner asserted in his prehearing documents that the Florida Statutes, Florida Administrative Code and FRS Summary Plan description do not state who is responsible for investment losses during the three month waiting period. But it is clear that Respondent SBA is not liable for any loss to a participant's account which results from the participant exercising control over that account. In this regard, the three month waiting period is no different from any

other time during the course of a participant's management of an Investment Plan account, and the hallmark of such an account is that it is invested as directed by the participant. Sections 121.4501(15)(a) - (c), Florida Statutes, state, in pertinent part:

> (15) Statement of fiduciary standards and responsibilities.--
>
> (a) Investment of optional defined contribution retirement plan assets shall be made for the sole interest and exclusive purpose of providing benefits to plan participants and beneficiaries and defraying reasonable expenses of administering the plan. The program's assets are to be invested, on behalf of the program participants, with the care, skill, and diligence that a prudent person acting in a like manner would undertake. The performance of the investment duties set forth in this paragraph shall comply with the fiduciary standards set forth in the Employee Retirement Income Security Act of 1974 at 29 U.S.C. s. 1104(a)(1)(A)-(C). In case of conflict with other provisions of law authorizing investments, the investment and fiduciary standards set forth in this subsection shall prevail.
>
> **(b) If a participant or beneficiary of the Public Employee Optional Retirement Program exercises control over the assets in his or her account, as determined by reference to regulations of the United States Department of Labor under s. 404(c) of the Employee Retirement Income Security Act of 1974 and all applicable laws governing the operation of the program, no program fiduciary shall be liable for any loss to a participant's or beneficiary's account which results from such participant's or beneficiary's exercise of control.**
>
> (c) Subparagraph (8)(b)4. and paragraph (15)(b) incorporate the federal law concept of participant control, established by regulations of the United States Department of Labor under s. 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA). ***

§§ 121.4501(a) – (c), Florida Statutes (2008)(emphasis added).

13. Petitioner has, at least by implication, alleged that the FRS Investment Plan fails to meet conditions determined by reference to regulations of the United States Department of Labor under section 404 (c) of the Employee Retirement Income Security Act of 1974 and all

applicable laws governing the operation of the program to show that the participant is exercising control over his or her account.

14. The regulations cited within Sections 121.4501(15)(b) and (c) include 29 C.F.R. § 2550.404c-1. That regulation states, in pertinent part:

> **(a) In general.**
>
> **(1) Section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) provides that if a pension plan that provides for individual accounts permits a participant or beneficiary to exercise control over assets in his account and that participant or beneficiary in fact exercises control over assets in his account, then the participant or beneficiary shall not be deemed to be a fiduciary by reason of his exercise of control and no person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such exercise of control.** This section describes the kinds of plans that are "ERISA section 404(c) plans," the circumstances in which a participant or beneficiary is considered to have exercised independent control over the assets in his account as contemplated by section 404(c), and the consequences of a participant's or beneficiary's exercise of control.
>
> ...
>
> (b) ERISA section 404(c) plans--
>
> (1) In general. An "ERISA section 404(c) Plan" is an individual account plan described in section 3(34) of the Act that:
>
> (i) Provides an opportunity for a participant or beneficiary to exercise control over assets in his individual account (see paragraph (b)(2) of this section); and
>
> (ii) Provides a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which some or all of the assets in his account are invested (see paragraph (b)(3) of this section).
>
> **(2) Opportunity to exercise control.**
>
> **(i) a plan provides a participant or beneficiary an opportunity to exercise control over assets in his account only if:**

(A) Under the terms of the plan, the participant or beneficiary has a reasonable opportunity to give investment instructions (in writing or otherwise, with opportunity to obtain written confirmation of such instructions) to an identified plan fiduciary who is obligated to comply with such instructions except as otherwise provided in paragraph (b)(2)(ii)(B) and (d)(2)(ii) of this section; and

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless--

(1) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

...

(2) The participants or beneficiary is provided by the identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf), either directly or upon request, the following information, which shall be based on the latest information available to the plan:

...

(ii) A plan does not fail to provide an opportunity for a participant or beneficiary to exercise control over his individual account merely because it--

(A) **Imposes charges for reasonable expenses.** A plan may charge participants' and beneficiaries' accounts for the reasonable expenses of carrying out investment instructions, provided that procedures are established under the plan to periodically inform such participants and beneficiaries of actual expenses incurred with respect to their respective individual accounts;

(B) **Permits a fiduciary to decline to implement investment instructions by participants and beneficiaries.** A fiduciary may decline to implement participant and beneficiary instructions which are described at paragraph (d)(2)(ii) of this section, as well as instructions specified in the plan, including instructions--

(1) Which would result in a prohibited transaction described in ERISA section 406 or section 4975 of the Internal Revenue Code, and

(2) Which would generate income that would be taxable to the plan;

(C) Imposes reasonable restrictions on frequency of investment instructions. A plan may impose reasonable restrictions on the frequency with which participants and beneficiaries may give investment instructions. In no event, however, is such a restriction reasonable unless, with respect to each investment alternative made available by the plan, it permits participants and beneficiaries to give investment instructions with a frequency which is appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject, provided that--

(1) At least three of the investment alternatives made available pursuant to the requirements of paragraph (b)(3)(i)(B) of this section, which constitute a broad range of investment alternatives, permit participants and beneficiaries to give investment instructions no less frequently than once within any three month period; and

(2)(i) At least one of the investment alternatives meeting the requirements of paragraph (b)(2)(ii)(C)(1) of this section permits participants and beneficiaries to give investment instructions with regard to transfers into the investment alternative as frequently as participants and beneficiaries are permitted to give investment instructions with respect to any investment alternative made available by the plan which permits participants and beneficiaries to give investment instructions more frequently than once within any three month period; or

(ii) With respect to each investment alternative which permits participants and beneficiaries to give investment instructions more frequently than once within any three month period, participants and beneficiaries are permitted to direct their investments from such alternative into an income producing, low risk, liquid fund, subfund, or account as frequently as they are permitted to give investment instructions with respect to each such alternative and, with respect to such fund, subfund or account, participants and beneficiaries are permitted to direct investments from the fund, subfund or account to an investment alternative meeting the requirements of paragraph (b)(2)(ii)(C)(1) as frequently as they are permitted to give investment instructions with respect to that investment alternative; and

...

(3) Broad range of investment alternatives.

(i) A plan offers a broad range of investment alternatives only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to:

(A) Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject;

(B) Choose from at least three investment alternatives:

(1) Each of which is diversified;

(2) Each of which has materially different risk and return characteristics;

(3) Which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary; and

(4) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant's or beneficiary's portfolio;

(C) Diversify the investment of that portion of his individual account with respect to which he is permitted to exercise control so as to minimize the risk of large losses, taking into account the nature of the plan and the size of participants' or beneficiaries' accounts. In determining whether a plan provides the participant or beneficiary with a reasonable opportunity to diversify his investments, the nature of the investment alternatives offered by the plan and the size of the portion of the individual's account over which he is permitted to exercise control must be considered. Where such portion of the account of any participant or beneficiary is so limited in size that the opportunity to invest in look-through investment vehicles is the only prudent means to assure an opportunity to achieve appropriate diversification, a plan may satisfy the requirements of this paragraph only by offering look-through investment vehicles.

...

(c) Exercise of control--

(1) In general.

(i) Sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section apply only with respect to a transaction where a participant or beneficiary has exercised independent control in fact with respect to the investment of assets in his individual account under an ERISA section 404(c) plan.

...

(2) Independent control. Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if:

> (i) The participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction;
>
> (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act; or
>
> (iii) The participant or beneficiary is legally incompetent and the responsible plan fiduciary accepts the instructions of the participant or beneficiary knowing him to be legally incompetent.

...

(d) Effect of independent exercise of control--

(1) Participant or beneficiary not a fiduciary. If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (c), then such participant or beneficiary is not a fiduciary of the plan by reason of such exercise of control.

(2) Limitation on liability of plan fiduciaries.

(i) If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (c), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of part 4 of title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control.

(f) Examples. The provisions of this section are illustrated by the following examples. Examples (5) through (11) assume that the participant has exercised independent control with respect to his individual account under an ERISA section 404(c) plan described in paragraph (b) and has not directed a transaction described in paragraph (d)(2)(ii).

...

> **(5) A participant, P, independently exercises control over assets in his individual account plan by directing a plan fiduciary, F, to invest 100% of his account balance in a single stock. P is not a fiduciary with respect to the plan by reason of his exercise of**

control and F will not be liable for any losses that necessarily result from P's investment instruction.

29 C.F.R. § 2550.404c-1 (2008)(emphasis added).

15. I see no credible allegation that Respondent has not met the requirements of the above-cited regulations. With regard specifically to the allegation that Respondent concealed material non-public facts by not expressly stating that Petitioner would be responsible for any declines in investment values during the three month waiting period, thereby voiding Petitioner's independent control over his account, the undisputed facts do not support this assertion.

16. Petitioner equates the three month waiting period imposed by Section 121.591(1)4, Florida Statutes, during which he was statutorily prohibited from taking a full distribution of his FRS Investment Plan account, with a proscription on making changes to his account investments during that time.

17. Petitioner was never restricted as to which investments he could choose within the Investment Plan and could have moved his assets to a money market fund at any time before or while he was in the waiting period.

18. It is unfortunate that Petitioner apparently assumed that once he requested a distribution, the value of his account was frozen, but Respondent SBA did not state or imply that this was the case, and is not responsible for Petitioner's investment losses.

19. Respondent is not authorized to depart from the requirements of the statutes governing the Investment Plan when exercising its jurisdiction. See, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), Final Order No.: DMS-05-009 (Dept.Mgmt.Svs. April 4, 2005).

20. Individuals who control their own accounts cannot hold the State Board of Administration liable for any losses incurred as a result. Petitioner did in fact exercise control over the assets in his individual account and was explicitly advised via the second election form that he could change his selected funds at any time.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 20th day of July, 2009.

Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

NOTICE: 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, which 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.

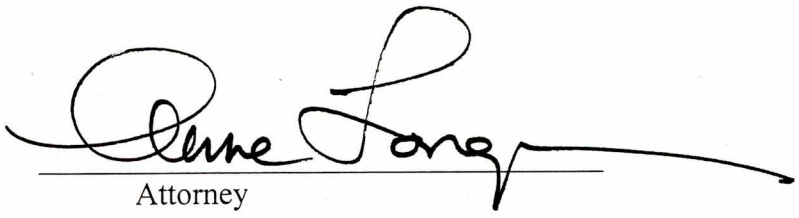
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 20th day of July, 2009.

Copies furnished to:

Joseph E. Burns
[redacted]
Petitioner

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent



Attorney