

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

EMILY KRISTANSEN,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3761
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On July 11, 2017, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. The Recommended Order indicates that copies were served upon the pro se Petitioner, Emily Kristansen, and upon counsel for the Respondent. Both Petitioner and Respondent timely filed Proposed Recommended Orders. No exceptions to the Recommended Order, which were due July 26, 2017, were filed by either party. 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 she be allowed to rescind a second election pursuant to which she transferred from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan, or that she be allowed otherwise to return to the FRS Pension Plan, hereby is denied. On August 6, 2008, Petitioner had used her one-time second election to transfer to the FRS Investment Plan. No additional elections are permitted by law.

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 3rd day of October, 2017, 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 Emily Kristansen, pro se, both by email transmission at [REDACTED] and by U.P.S. 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 3rd day of October, 2017.



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

EMILY KRISTANSEN,

Petitioner,

vs.

Case No.: 2016-3761

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 April 27, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Emily Kristansen, pro se

[REDACTED]

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

STATEMENT OF THE ISSUE

The issue is whether the SBA should grant Petitioner's request to rescind a second election by which she transferred from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan or allow her in some other way to return to the Pension Plan.

PRELIMINARY STATEMENT

This case was initially referred to the Division of Administrative Hearings (DOAH) for a hearing to resolve disputed issues of material fact, based upon Petitioner's denial that she made a second election to join the Investment Plan. At deposition, however, Petitioner admitted that she did not make an initial election before her initial election deadline expired, which resulted in her defaulting to membership in the Pension Plan as a matter of law. Petitioner also admitted that she made an affirmative election to join the Investment Plan after her initial election deadline expired. Based on Petitioner's deposition testimony, Respondent filed a motion in the DOAH proceeding to relinquish jurisdiction back to the SBA, citing the lack of any disputed issue of material fact. This motion was granted by the DOAH Administrative Law Judge on October 25, 2016 which initiated this hearing process pursuant to section 120.57(2), Florida Statutes, and an informal hearing was convened on April 27, 2017.

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 23 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Both parties made a timely filing after the hearing.

MATERIAL UNDISPUTED FACTS

1. Petitioner became a member of the FRS by virtue of her employment with the Duval County School Board in February, 2008.

2. Petitioner had until July 31, 2008 to make an initial election between the defined benefit FRS Pension Plan and the defined contribution FRS Investment Plan. Petitioner defaulted into the FRS Pension Plan effective August 1, 2008 because she made no affirmative election to join either plan.

3. On August 6, 2008, Petitioner spoke with the MyFRS Financial Guidance Line to request that her password be reset for the MyFRS.com website. During the call Petitioner had no questions regarding the second election process.

4. Documentation produced by Respondent indicates that on August 6, 2008, Petitioner submitted electronically, through the MyFRS.com website, a second election to join the Investment Plan. Petitioner maintains that this record lacks the requisite certainty to establish August 6, 2008 as the date she made an election to join the Investment Plan. But Petitioner also has stated that she defaulted to the Pension Plan because she did not make an affirmative election to join the Investment Plan before August 1, 2008. Petitioner has not produced any documentation or audio files to that show she made an election to join the Investment Plan before her initial election deadline.

5. Petitioner submitted a Request for Intervention on August 31, 2016 requesting the ability to return to the Pension Plan because at the time she was hired she “did not elect a retirement plan.” Respondent denied the relief requested by Petitioner.

6. Petitioner filed a Petition for Hearing on October 13, 2016 requesting the same relief and the Petition for Hearing was referred to DOAH and her case was assigned DOAH case number 16-6211.

7. On January 10, 2017, the SBA filed a motion to relinquish jurisdiction in DOAH case number 16-6211, citing Petitioner’s deposition testimony whereby she admitted that she did

not make an affirmative initial election before her initial election deadline expired, which resulted in her default admission to the Pension Plan as her initial election. This motion was granted on January 19, 2017, and the case was referred back to the SBA to conduct a hearing not involving disputed issues of fact pursuant to section 120.57(1), Florida Statutes.

CONCLUSIONS OF LAW

8. Petitioner's deadline to make an initial election was July 31, 2008, the last business day of the fifth month following her official month of hire. Having made no affirmative plan election before this deadline expired, Petitioner defaulted to Pension Plan membership. § 121.4501(4)(b)2.a., Fla. Stat. (2008). This was her first election.

9. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(g), Florida Statutes. That section states, in pertinent part:

(g) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay.

§ 121.4501(4)(g), Fla. Stat. (emphasis added).

10. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans after their initial election period expires. Because Petitioner used her one-time second election on August 6, 2008, she has exhausted her only opportunity to move between plans. No additional elections are permitted. Petitioner cannot now rescind her second election because she failed to do so before the deadline established by the applicable rule. The grace period provided under Rule 19-11.007, Florida Administrative Code, is as follows:

(4) Grace Period.

(a) If a member files an election with the Plan Choice Administrator and the member realizes that the election was made in error, or if the member has reconsidered his or her plan choice, the SBA will consider, on a case-by-case basis, whether the election will be reversed, subject to the following: The member must notify the SBA by a telephone call to the toll free MyFRS Financial Guidance Line at: 1(866) 446-9377, or by written correspondence directly to the SBA, to the Plan Choice Administrator, to the Financial Guidance Line, or to the Division, no later than 4:00 p.m. Eastern Time on the last business day of the election effective month.

(b) If the request to reverse the election is made timely and the SBA finds the election was made in error, the member will be required to sign a release and return it to the SBA no later than 4:00 p.m., Eastern Time, on the last business day of the election effective month prior to the election's being officially reversed. Upon receipt of the release, the Division and the Plan Choice Administrator will be directed to take the necessary steps to reverse the election and to correct the member's records to reflect the election reversal.

(c) A confirmation that the election was reversed will be sent to the member by the FRS Plan Choice Administrator.

(d) The member retains the right to file a subsequent second election consistent with subsections (2) and (3), above.

(e) Nothing contained in this subsection will interfere with a member's right to file a complaint, as permitted by Section 121.4501(8)(g), F.S. and discussed in Rule 19-11.005, F.A.C.

Rule 19-11.007(4), F.A.C.

11. Under the rule, Petitioner had until the time the present value of her Pension Plan benefit was transferred to her Investment Plan account to rescind her second election. Having failed to make such a request before this now long-passed deadline, her request is time barred.

12. Petitioner maintains that the record of her online second election to join the Investment Plan lacks the requisite certainty to establish the exact date and means by which she made an election to join the Investment Plan. But it is undisputed that Petitioner did not make this election to join the Investment Plan before her initial election period elapsed, therefore this

election was a second election, and therefore the specific date and method of this election is not relevant.

In her post-hearing submission, Petitioner states that she is “still without any validation or proof that she utilized a second election or made any online election.” While Petitioner’s frustration in this regard is understandable, she has been in the Investment Plan for many years, and the Respondent does not have the burden of proving her exact date of election. The SBA is not required to maintain records for more than five years to resolve member conflicts. § 121.4501(8)(g), Fla. Stat. (2016). In addition,

[i]t is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member and with the member’s full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.

Id. Because Petitioner was transferred to the Investment Plan more than five years ago (in 2008) this action is presumed to have been taken at her request as a matter of law. Petitioner has not produced any documentation or audio files to overcome the statutory presumption that she made a second election to join the Investment Plan after her initial election expired.

As the party asserting the affirmative in this proceeding, Petitioner has the burden of proving that she is entitled to the relief she has requested. See, e.g., Balino v. Dep’t of HRS, 348 So. 2d 349(Fla. 1st DCA 1977); see also Wilson v. Dep’t of Admin., Div. of Ret., 538 So. 2d 139, 142 (Fla. 4th 6 DCA 1989)(burden is on beneficiary to establish entitlement to retirement benefits). It is unfortunate that Petitioner cannot now join the FRS plan that she would prefer, but she has not demonstrated entitlement to the relief she has requested under the applicable statutes and rules.

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 11th day of July, 2017.



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
nell.bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Emily Kristansen



Petitioner

and via electronic mail only to:

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