

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

LINDA HUNTER,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2017-0010
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On August 2, 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 counsel for Petitioner, Linda Hunter, and upon counsel for the Respondent. Both Petitioner and Respondent timely filed Proposed Recommended Orders. No exceptions to the Recommended Order, which were due August 17, 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

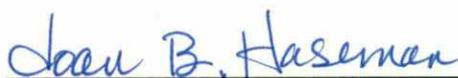
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that she be allowed to rescind a second election pursuant to which she transferred from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan hereby is denied. In January 2004, Petitioner filed a second election form to use her one-time second election to transfer to the FRS Investment Plan from the FRS Pension Plan. No additional elections are permitted by law. An administrative

tribunal is without authority to address any arguments broached by Petitioner alleging that Section 121.4501(4)(b), Florida Statutes, (that provides that a failure to make an initial election is deemed to be a default into the FRS Pension Plan), violates Petitioner's due process rights under both the Federal and state constitutions.

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.

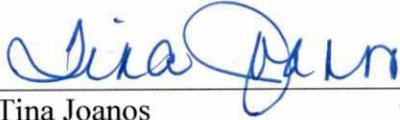
DONE AND ORDERED this 3rd day of October, 2017, in Tallahassee, Florida.

**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 Gail L. Grossman, Esquire, counsel for Petitioner, both by email transmission at [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

LINDA HUNTER,

Petitioner,

vs.

Case No. 2017-0010

STATE BOARD OF ADMINISTRATION,

Respondent.

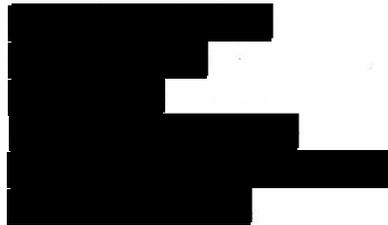
RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on May 24, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Linda Hunter, Petitioner



For Respondent:

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

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether the SBA should grant Petitioner's request to return to the Florida Retirement System (FRS) Pension Plan despite having made a second election switch from the FRS Pension Plan to the FRS Investment Plan. Petitioner asserts that because she did not make an overt election as between the two FRS plans during her initial enrollment period, she retains to this date the right to make another election.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and was represented by counsel. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Petitioner's Motion to Dismiss the Informal Hearing and Motion for Formal Administrative Hearing in Front of DOAH was taken up at the hearing and has been denied by Order of July 17, 2017.

Respondent's Exhibits 1, 4, 5 and 6 were admitted into evidence at the hearing. Respondent's Exhibits 2 and 3 are admitted over the objection of Petitioner upon consideration of the Affidavit of Marc Mancuso filed post-hearing, and are now part of the record herein.

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 on or before July 28, 2017. Both parties filed proposed recommended orders.

MATERIAL UNDISPUTED FACTS

1. Petitioner was a member of the FRS by virtue of her employment with the School District of Palm Beach County, which began in 1997. At that time, the only plan available to her was the FRS defined benefit Pension Plan.

2. In 2002, when the FRS defined contribution Investment Plan was created by the Florida legislature, Petitioner had a deadline of November 30, 2002 to make an initial election between remaining in the Pension Plan or moving to the Investment Plan. Petitioner did not make an election before the November 30, 2002 deadline and thus defaulted into the Pension Plan effective December 1, 2002.

3. On January 7, 2004, Petitioner spoke with the MyFRS Financial Guidance Line, and asked to move her FRS account into a private investment plan in accordance with advice from her investment advisor, because she was going to be leaving the state at the end of the month. Petitioner was notified during the call that she had to work one day into the month of February to be eligible to make the transfer into the Investment Plan. She was also told twice that she could simply remain in the Pension Plan. The discussion ended with Petitioner stating she would have her investment representative call the FRS back to discuss the fact that she would need to work one day into February, 2004 for a January, 2004 election to be valid.

4. On January 12, 2004, Petitioner again spoke with the MyFRS Financial Guidance Line to discuss switching to the Investment Plan. She had changed her departure date to be able to work into February, 2004. The FRS representative walked petitioner through the MyFRS.com website to get to the Second Election Retirement Choice Form. During this call, the representative explained to Petitioner that this was her one-time second election and he explicitly stated that once she made this switch, she would be in the Investment Plan for the remainder of her employment with the FRS. Petitioner again stated that she wished to move her funds into a private investment fund,

and the representative explained to her the only way to accomplish this was to first move them into the Investment Plan.

5. On January 13, 2004, Petitioner submitted a Second Election Retirement Plan Enrollment Form to the Investment Plan's Plan Choice Administrator indicating her desire to transfer from the Pension Plan to the Investment Plan. The FRS received the form on January 15, 2004. The form executed by Petitioner stated:

I understand that this election will constitute my one-time second election as provided under the FRS and that I must remain in this retirement plan until my retirement.

...

I understand that my one-time second election is irrevocable and I understand that I must remain in this plan until my retirement.

6. Petitioner submitted a Request for Intervention on January 11, 2017 asking to return to the Pension Plan because she was "ill advised" to put her money in the Investment Plan. Respondent denied the relief requested by Petitioner.

7. Petitioner filed a Petition for Hearing on February 6, 2017 requesting the same relief and this administrative proceeding followed.

CONCLUSIONS OF LAW

8. 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. (2015) (emphasis added).

9. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans after their initial election period expires. Petitioner's initial election period expired in November 2002. Because Petitioner used her one-time second election in 2004, she has exhausted her only opportunity to move between plans. There is no "third" election. 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.

10. Under the rule, Petitioner had until the last business day of the month following her election month (i.e. January 31, 2004) to rescind her second election. She did not attempt to do so, and this time period has long since elapsed.

11. Petitioner contends she never made a first election and that, "A default placement is not an election." Section 121.4501(4)(b), Florida Statutes clearly provides that a failure to make an initial election is deemed to be an election and is a default into the Pension Plan:

(4) Participation; enrollment.--

...
(b) 1. With respect to an eligible employee who is employed in a regularly established position on September 1, 2002, by a district school board employer:

a. Any such employee may elect to participate in the investment plan in lieu of retaining his or her membership in the pension plan. The election must be made in writing or by electronic means and must be filed with the third-party administrator by November 30, or, in the case of an active employee who is on a leave of absence on July 1, 2002, by the last business day of the 5th month following the month the leave of absence concludes. This election is irrevocable, except as provided in paragraph (g). Upon making such election, the employee shall be enrolled as a member of the investment plan, the employee's membership in the Florida Retirement System is governed by the provisions of this part, and the employee's membership in the pension plan terminates. The employee's enrollment in the investment plan is effective the first day of the month for which a full month's employer contribution is made to the investment program.

b. Any such employee who fails to elect to participate in the investment plan within the prescribed time period is deemed to have elected to retain membership in the pension plan, and the employee's option to elect to participate in the investment plan is forfeited.

§ 121.4501(4)(b), Fla.Stat. (Emphasis added.)

12. Thus, after November 2002, Petitioner had one election remaining pursuant to Section 121.4501(4)(g). It is undisputed that she used that election in January 2004. Petitioner was expressly advised that she was using her last remaining election during the January 12, 2004 call with the myFRS Financial Guidance Line representative, and the Second Election Retirement Plan Enrollment Form she signed bears the same admonition.

13. None of the disputes of fact alleged by Petitioner's counsel have any bearing on the only relevant facts here: that Petitioner used her one-time second election long ago, and that she was clearly informed that she was moving from the Pension Plan to the Investment Plan and would now be in the Investment Plan for the remainder of her FRS-covered employment. The constitutional issues asserted with regard to the Section 121.4501(4)(b) creation of a default election to a particular plan are beyond the purview of this tribunal.

14. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Further, the SBA's construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA 1998). It is unfortunate that Petitioner may have received bad advice from parties other than the SBA, and that she cannot now be placed in the retirement plan that she would prefer, but

there is no legal basis for the relief she now seeks.

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 2^d ^{August} day of ~~July~~, 2017.



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

COPIES FURNISHED via mail and electronic mail to:

Gail L. Grossman, Esquire



Attorney for Petitioner

and via electronic mail only to:

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Counsel for Respondent