

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

TRACY DAVIS,)	
)	
Petitioner,)	
)	
vs.)	DOAH Case No. 17-1816
)	SBA Case No. 2016-3822
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On August 14, 2017, Administrative Law Judge Darren A. Schwartz (hereafter “ALJ”) submitted his Recommended Order to the State Board of Administration (hereafter “SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Tracy Davis, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due August 29, 2017. 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.

STATEMENT OF THE ISSUE

The SBA adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order as if fully set forth herein.

PRELIMINARY STATEMENT

The SBA adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge cannot be rejected or modified by a reviewing agency in its final order "...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence...." See Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd*, 652 So.2d 894 (Fla 2nd DCA 1995); *Dietz v. Florida Unemployment Appeals Comm*, 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). A seminal case defining the "competent substantial evidence" standard is *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

An agency reviewing a Division of Administrative Hearings ("DOAH") recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm*, 609 So.2d 143, 145 (Fla. 4th DCA 19932). Thus, if the record discloses any

competent substantial evidence supporting finding of fact in the ALJ's Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify [an administrative law judge's] conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."

FINDINGS OF FACT

The Findings of Fact set forth in the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in the ALJ's the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. Petitioner has failed to show that she is entitled to the relief requested. The Petitioner's request that she be deemed to have made a valid second election to transfer from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan hereby is denied. At the time Petitioner submitted her second election form, she no longer was earning service credit in an employer-employee relationship as required under Section 121.4501(4)(g), Florida Statutes. Her second election form was submitted on August 25, 2016, but Petitioner did not earn any service credit during the month of August 2016.

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.

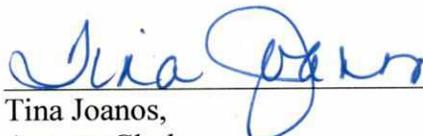
DONE AND ORDERED this 9th day of October, 2017, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan 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 Tracy Davis, pro se, both by email transmission to [REDACTED] and by UPS to [REDACTED] by US Mail to Darren A. Schwartz, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; 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 9th 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
DIVISION OF ADMINISTRATIVE HEARINGS

TRACY DAVIS,

Petitioner,

vs.

Case No. 17-1816

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings for final hearing by video teleconference on May 15, 2017, with sites at West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Tracy Davis, pro se

[REDACTED]
[REDACTED]

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Petitioner, Tracy Davis ("Petitioner"), made a valid "2nd election" to transfer from the Florida Retirement System ("FRS") Pension Plan to the Investment Plan.

PRELIMINARY STATEMENT

By letter dated November 18, 2016, Respondent, State Board of Administration ("Respondent"), denied Petitioner's 2nd election to transfer from the FRS Pension Plan to the Investment Plan. Dissatisfied with Respondent's determination, Petitioner timely filed a request for an administrative hearing. Subsequently, the parties participated in an informal hearing before Respondent. During the informal hearing, it was determined that there were disputed issues of material fact. Accordingly, on March 21, 2017, Respondent referred this matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the formal administrative hearing.

On March 24, 2017, the undersigned issued a Notice of Hearing, setting this matter for final hearing on May 15, 2017. The final hearing was held on May 15, 2017, with both parties present. Petitioner testified on her own behalf. Respondent presented the testimony of Mini Watson. In addition, based on the stipulation of the parties, Respondent offered the depositions of Teri Jensen and Mark Mitchell, in lieu of their in-person testimony. Respondent's Exhibits 1 through 5 and 7 through 16 were received into evidence.

The one-volume final hearing Transcript was filed at DOAH on July 3, 2017. On July 13, 2017, Respondent filed a motion

requesting a one-day extension of the deadline to file proposed recommended orders. On July 14, 2017, the undersigned entered an Order granting the motion, and requiring the parties to file their proposed recommended orders by July 14, 2017. Respondent timely filed its Proposed Recommended Order. Petitioner did not file a proposed recommended order.

Unless otherwise stated, all statutory and rule references are to the statutes and rules in effect in 2016.

FINDINGS OF FACT

1. Petitioner was employed by the Palm Beach County School Board ("School Board") as a special education teacher for 12 and one-half years. The School Board is an FRS-participating employer. By reason of this employment, Petitioner was enrolled in the FRS Pension Plan.

2. As a teacher with the School Board, Petitioner was employed for ten months out of the calendar year. She did not work in the summers. The last day Petitioner performed any work for the School Board was June 3, 2016, the last day of classes for the 2015-2016 school year before the summer break.

3. The first day of school for the 2016-2017 school year was Monday, August 8, 2016. Petitioner did not return to work on August 8, 2016, nor did she work at all during the month of August 2016.

4. On August 25, 2016, Petitioner submitted a 2nd election to Respondent requesting to transfer from the FRS Pension Plan to the Investment Plan.

5. On August 29, 2016, Petitioner resigned her employment from the School Board.

6. Even though Petitioner did not work in August 2016, she received gross pay from the School Board of \$ [REDACTED], for the payroll period of August 6, 2016, through August 19, 2016.

7. This pay was for 30 hours of "up-fronted" sick leave (7.5 hours per day x 4 days), which Petitioner was credited for the first week of the pay period at the beginning of the 2016-2017 school year.

8. Sick leave for the School Board's teachers is governed by a collective bargaining agreement. "Section B-Specific Paid Leaves," on page 93 of the agreement, provides in pertinent part:

1. Sick Leave—sick leave claims shall be honored as submitted by the employee for his/her own personal illness Sick leave days are accumulated as follows:

a. Permanent Full-Time Employees—An employee employed on a full-time basis shall be entitled to four (4) days of sick leave as of the first day of permanent employment of each appointive year, and shall thereafter earn one (1) day of sick leave at the end of each calendar month; provided the employee has been on duty or compensable leave a minimum of eleven (11) days within the month; and provided further, that the employee shall be entitled to earn a maximum of one (1) day of sick leave times the number of months of

13. Petitioner bears the burden of proving the validity of the 2nd election. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989).

14. Transfers from the FRS Pension Plan to the Investment Plan are governed by section 121.4501(4)(g), Florida Statutes, which provides as follows:

(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. Effective July 1, 2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator. This paragraph is contingent upon approval by the Internal Revenue Service.

15. Pursuant to section 121.021(17)(b)4., monthly service credit is awarded "for each month salary is paid for service performed."

16. Florida Administrative Code Rule 19-11.007(2), applicable at the time of Petitioner's request, further provides:

employment during the year of employment. Sick leave shall not be used prior to the time it is earned and credited to the employee.

9. Petitioner was mistakenly paid in August 2016 for sick leave she had not earned. Petitioner did not earn any sick leave or creditable service for the month of August 2016, or any month thereafter. Petitioner could not have earned 30 hours of paid sick leave in August 2016, because she was not on duty or compensable leave a minimum of 11 days within the month.

10. The School Board demanded repayment of the wages Petitioner was mistakenly paid for August 6 through 19, 2016, after it was determined that she had not earned the sick leave she was paid. These wages were recouped from a bonus Petitioner was to receive for work performed during the 2015-2016 school year.

11. In sum, Petitioner's 2nd election is invalid because she did not work and earn any sick leave or creditable service for the month of August 2016.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction of the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

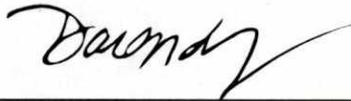
(2) A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator while the member is actively employed and earning salary and service credit in an employer-employee relationship consistent with the requirements of Section 121.021(17)(b), F.S. Members on an unpaid leave of absence, terminated members, or employees of an educational institution on summer break cannot use their 2nd election until they return to covered FRS employment. In general terms, this means that the 2nd election must be made and processed while the member is actively working and being paid for that work. It is the responsibility of the member to assure that the 2nd election is received by the Plan Choice Administrator no later than 4:00 p.m. (Eastern Time) on the last business day the member is earning salary and service credit.

17. As detailed above, Petitioner did not return to work after June 3, 2016. Accordingly, Petitioner was not entitled to earn sick leave during the month of August 2016, and she did not receive creditable service in August 2016. Petitioner failed to meet her burden to establish that her 2nd election is valid, and she is not entitled to transfer from the FRS Pension Plan to the Investment Plan.^{1/}

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, State Board of Administration, enter a final order denying Petitioner's request to transfer from the FRS Pension Plan to the Investment Plan.

DONE AND ENTERED this 14th day of August, 2017, in
Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of August, 2017.

ENDNOTE

^{1/} Rule 19-11.007 was amended effective April 12, 2017. The prior version of the rule applies to this proceeding. Nevertheless, under either version, Petitioner's 2nd election is invalid.

COPIES FURNISHED:

Tracy Davis



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(eServed)

Ash Williams, Executive Director and
Chief Investment Officer
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.