

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MARCUS ORTHODOXOU,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2018-0228
)	
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On January 2, 2019, the Presiding Officer submitted her Recommended Order to the State Board of Administration (“SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Marcus Orthodoxou, 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 on January 17, 2019. 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 to be allowed to transfer from the Florida Retirement System (FRS)

Pension Plan to the FRS Investment Plan, even though Petitioner could not demonstrate that a valid second election form was filed on his behalf by his employer's human resources office before he terminated his employment, hereby is denied. The SBA, by law, is not responsible for the failure of any FRS employer, its agents, its employees or any other party on their behalf to properly complete any activities required by law to change retirement plans.

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.

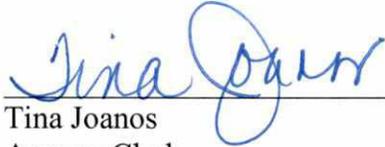
DONE AND ORDERED this 7th day of March 2019, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard
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 Marcus Orthodoxou, pro se, both by email transmission 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 7th day of March, 2019.



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

MARCUS ORTHODOXOU,

Petitioner,

vs.

Case No. 2018-0228

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 September 18, 2018, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Marcus Orthodoxou, pro se

[REDACTED]

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be allowed to transfer from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan without evidence that a second election was made on his behalf before he terminated FRS-covered employment.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 4 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. Although a hard copy of the transcript was delivered to the SBA in October, 2018, an electronic version was not provided to the parties until November 28, 2018. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by Osceola County Fire Rescue, an FRS-participating employer, from 2007 – 2017.
2. Petitioner defaulted into the defined benefit Pension Plan effective April 1, 2007.
3. Petitioner resigned his position with Osceola County Fire Rescue on August 25, 2017.
4. Petitioner testified that before he resigned, he asked the director of his employer's human resources office to enroll him in the defined contribution Investment Plan. Petitioner testified that he was told by the human resources director that she would process a second election for him before he terminated employment.
5. Neither Respondent nor its Plan Choice Administrator has any record of a second election being submitted by, or on behalf of, Petitioner. Petitioner was never asked to sign a second election form. There is no record of a second election having been received by facsimile

or electronically through the MyFRS.com website. Petitioner and his employer are likewise unable to produce any record of a second election being made on Petitioner's behalf.

6. Petitioner submitted a Request for Intervention requesting membership in the Investment Plan. This request was denied by Respondent on July 5, 2018, and a timely Petition for Hearing was filed which initiated this administrative proceeding.

CONCLUSIONS OF LAW

7. Participation and enrollment into the Investment Plan are governed by section 121.4501(4)(f), Florida Statutes. That section states:

(f) 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.

§ 121.4501(4)(f), Fla. Stat. (2017) (emphasis added). Thus, a second election must be made before the FRS member terminates FRS-covered employment.

8. The procedure for making a second election (i.e. to move from the Pension Plan to the Investment Plan) is also governed by Rule 19-11.007(2), Florida Administrative Code, which reiterates this requirement, stating in pertinent part that:

(2) A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator during the month in which 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 or terminated members cannot use their 2nd election until they return to FRS-covered employment. Employees of an educational institution on summer break cannot use their 2nd election during the full calendar months of their summer break. For example, if the last day of the school term is May 21st and the first day of the new school term is August 17th, the employee may not file a 2nd election in the calendar months of June or July. The beginning of the school term is determined by the employer. In general terms, this means that the 2nd election can only be made and processed during the month in which 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 of the month the member is actively employed and earning salary and service credit.

Rule 19-11.007(2), Fla. Admin. Code (emphasis added).

9. This rule reiterates and is consistent with the statutory requirements enumerated above and provides express notice that a valid second election is made only when there is an election submitted and processed by the SBA's Plan Choice Administrator that was made while the employee was earning service credit. Here, there is no evidence that a second election was submitted to the SBA's Plan Choice Administrator before Petitioner resigned on August 25, 2017. As the rule states, it is the responsibility of the employee to ensure that any second election is received by the Plan Choice Administrator.

10. Petitioner stated at hearing that the director of his former employer's human resources office said she would make a second election for him before he terminated employment. I accept this testimony as true, but FRS employers are not agents of the SBA and the SBA is not responsible for any erroneous information provided by an FRS employer. § 121.021, Fla. Stat. (2018) ("Employers are not agents of the department, the state board, or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.").

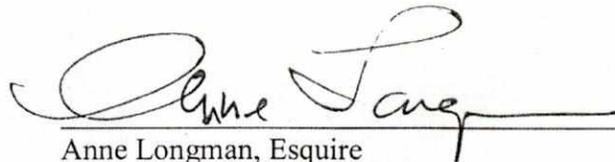
11. Petitioner, as the party seeking affirmative relief, has the burden to demonstrate entitlement to the relief requested. Young v. Department of Community Affairs, 625 So. 2d 837 (Fla. 1993); and Florida Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Petitioner cannot meet this burden here because the record does not show that a second election was made before he terminated FRS-covered employment.

12. Because the Respondent lacks the statutory authority to place Petitioner into the Investment Plan without a timely election having been made with the Plan Choice Administrator, Petitioner's request cannot be granted.

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 2th day of January, 2019.



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
Mini.watson@sbafla.com
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
Liz.stevens@sbafla.com
(850)488-4406

COPIES FURNISHED via mail and electronic mail to:

Marcus Orthodoxou



Petitioner

and via electronic mail only to:

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent