

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

WILLIE B. TAYLOR,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2009-1586
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On December 16, 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, Willie B. Taylor, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner timely filed an exception to the Recommended Order on December 31, 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.

RULING ON PETITIONER’S EXCEPTION TO THE RECOMMENDED ORDER

Petitioner has filed what she deems as a “formal written exception” to the Recommended Order and has asked that the matter be kept open because she wishes to seek legal counsel. Petitioner argues that the governing statutory provisions are not

applicable since she was involuntarily terminated. Petitioner further argues that her former employer, Miami Dade College, should have advised her, at the time she was involuntarily terminated, that she was required to submit her second election form to transfer from the Pension Plan to the Investment Plan prior to her termination date, while still earning service credit.

Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

The Petitioner's exception does identify the disputed portions of the Recommended Order, does not identify any legal basis for the exception, and does not include appropriate and specific citations to the record. Further, Petitioner already had the opportunity to present her case and to obtain legal counsel, if she desired, to represent her at the proceeding.

Accordingly, Petitioner's exception hereby is rejected. As outlined below, Petitioner can appeal this determination if she desires.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be transferred from the Pension Plan to the Investment Plan 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 15th day of January, 2010, 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

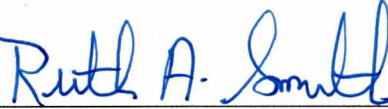
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Willie B. Taylor, pro se, [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 15th day of January, 2010.



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

WILLIE B. TAYLOR,

Petitioner,

vs.

CASE NO. 2009-1586

STATE BOARD OF ADMINISTRATION,


Respondent.

RECOMMENDED ORDER

This cause was heard in an informal hearing before the undersigned presiding officer on October 15, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:


Miami, Florida 33147

For Respondent:

Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether Petitioner's submission of a second election form seeking to switch from the Florida Retirement System (FRS) Pension Plan to the Investment Plan after the date she was involuntarily terminated without notice by her employer is valid to effectuate that change.

PRELIMINARY STATEMENT

Petitioner filed a request for intervention on July 30, 2009 asking to be allowed to transfer into the FRS Investment Plan. This request was investigated by the State Board of Administration (SBA) and denied by letter of August 3, 2009. Petitioner then filed a Petition for Hearing requesting the same relief, which resulted in the instant hearing.

Petitioner and her financial advisor, Christine Moore, attended the hearing by telephone, with Petitioner testifying on her own behalf and offering testimony from Ms. Moore. Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Respondent's Exhibits R-1 through R-7 were admitted into evidence without objection.

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. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner began FRS-covered employment in 1979, and was employed by Miami Dade College, an FRS-participating employer, at the time of the events here at issue.
2. By letter dated May 26, 2009, Petitioner was notified by Miami Dade College that her position had been eliminated and that her last day of employment would be the day she received the letter, which was May 28, 2009.
3. Petitioner did not work any days for Miami Dade College after receipt of the letter.
4. Throughout her employment, Petitioner had been a member of the FRS Pension Plan and had accumulated approximately 29.67 years of service in that plan.

5. On June 4, 2009, the Petitioner executed a 2nd Election Retirement Plan Enrollment Form requesting to transfer from the FRS Pension Plan to the Investment Plan. The second election form states that “you must be actively employed earning salary when your form is received by the FRS Plan Choice Administrator.”

6. Petitioner’s second enrollment form was received by ING, Respondent's third party administrator for the Investment Plan, by facsimile on June 4, 2009.

7. Petitioner's request to switch plans was denied because it was determined her employment had been terminated prior to the request having been received by ING.

8. Petitioner's employer confirmed that the Petitioner's employment terminated on May 31, 2009.

9. In a letter of August 21, 2009 to Respondent, Petitioner stated that she had a first meeting with a financial advisor in April, 2009 to begin planning her retirement. She decided at that time that she should use her second election to switch to the Investment Plan, but was deprived of this opportunity by the actions of her employer in terminating her on May 28, 2009. At the hearing, Petitioner presented testimony from her financial advisor, Ms. Christine Moore, who contended that Petitioner should be allowed to file a second election form after her termination because the termination letter she received from Miami Dade College provided her with three months of transition pay. According to Ms. Moore, this led Petitioner to believe she had three months (or until August 30, 2009) to make the decision to file her second election form. Ms. Moore also contends that the letter from Miami Dade College was deficient because it did not advise Petitioner that she had until 4:00 p.m. on May 28, 2009 to make a valid second election.

CONCLUSIONS OF LAW

10. FRS eligible employees may elect to participate in either the FRS defined benefit program (the Pension Plan) or the Public Employee Optional Retirement Program, (the Investment Plan, which is also formally known as the Public Employee Optional Retirement Program). When the Investment Plan began in 2002, all FRS employees were given a period of time in which to choose the new plan; if they did not make that choice, they remained in the Pension Plan by default. §121.4501, Fla. Stat. After the initial election or default, an FRS participant has one opportunity to switch plans, and “[e]ligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship ... excluding leaves of absence without pay.” *Id.* at (4)(e).

11. In order for the second election to be valid, the participant must be an "eligible employee." Eligibility is defined by Sections 121.4501(3)(a), 121.4501(2)(f)1., and 121.4501(3), Florida Statutes which state:

(3) Eligibility; retirement service credit.—

(a) Participation in the Public Employee Optional Retirement Program is limited to eligible employees. Participation in the optional retirement program is in lieu of participation in the defined benefit program of the Florida Retirement System.

§ 121.4501(3)(a), Fla.Stat. (2008)

Section 121.4501(2)(f)1., Florida Statutes, defines an "eligible employee" as:

(2) Definitions.--As used in this part, the term:

...
(f) "Eligible employee" means an officer or employee, as defined in s. 121.021(11), who:

1. Is a member of, or is eligible for membership in, the Florida Retirement System, including any renewed member of the Florida Retirement System;

§ 121.4501(2)(f)1., Fla.Stat. (2008)

Section 121.021(11), Florida Statutes, states:

121.021. Definitions

The following words and phrases as used in this chapter have the respective meanings set forth unless a different meaning is plainly required by the context:

(11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a city, a metropolitan planning organization, or a special district, employed in a covered group.

§ 121.021(11), Fla.Stat. (2008)

12. Additionally, Rule 19-11.007, Florida Administrative Code states, in pertinent part:

(d) The member may elect to move between the Florida Retirement System retirement programs only if the member is earning service credit in an employer-employee relationship consistent with the requirements under Section 121.021(17)(b), F.S. **FRS members must be actively employed earning salary and service credit to be eligible to make a valid 2nd election.** 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. **The election must be received and processed by the FRS Plan Choice Administrator before the member terminates covered FRS employment.** It is the responsibility of the member to ensure the 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 earning service credit.

Rule 19-11.007, F.A.C. (emphasis added).

13. Respondent SBA cannot deviate from Florida Statutes creating and governing the Florida Retirement System, including the requirements for movement between the Pension Plan and the Investment Plan. Balezentis v. Department of Management Services, Division of

Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Respondent'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).

14. It is undisputed that at the time Petitioner submitted her second election, she had already been terminated by her employer and was no longer actively employed or earning service credit in an employer-employee relationship.

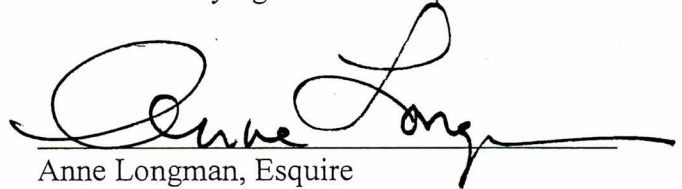
15. Petitioner asserts that: (1) the termination of her employment was not voluntary, so the governing statutes and rules are inapplicable to her situation; and (2) she did not have ample time to submit her second election form to ING for processing prior to her last day of employment. Petitioner also contends that the termination letter she received from her employer led her to believe that she had three months to make the decision to submit a second election and did not advise her of the deadline to make that election.

16. The applicable statutes and rule do not differentiate between voluntary and involuntary termination of employment with regard to filing a second election; they require that a participant be actively working at the time the election is made and that the form be received and processed by the FRS Plan Choice Administrator before termination. Respondent SBA must administer the Investment Plan in accordance with the statutes that created it, and there appears to be no legal requirement that participants be given any prescribed period in which to switch retirement plans after they are terminated.

17. Petitioner asserts that her employer, Miami Dade College, failed to provide ample notice of termination and of her deadline to make a second election. This tribunal has no jurisdiction over claims directed to Petitioner's employer. I note that Petitioner was given both transition pay and an additional transition payment of \$15,000, and that she is fully vested in the Pension Plan. It is unfortunate that her termination was so sudden after her many years of employment, but whether her termination was in compliance with all requirements of her employment contract with her employer cannot be decided here.

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.



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 16th day of December, 2009.

Copies furnished to:



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

December 28, 2009

To Whom It May Concern:

Re: Case No. 2009-1586

Willie B. Taylor vs. State Board of Administration

Please consider this letter as my formal written exception of the State Board of Administration's Recommended Order, which is to be filed with the Agency Clerk. Please keep this file open.

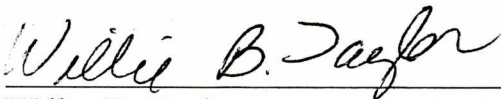
I have decided to seek legal counsel regarding this matter, as it seems I am not the only one that has been affected by such a ruling.

There is no ruling anywhere in the FRS system which addresses employees who are terminated in the manner in which I was terminated. **The statute should be clear in the differentiation of voluntary or involuntary termination.** The letter I received from my employer SHOULD have notified me of ALL deadlines – including my second election option. Everything else was covered in the letter, which is on file with the Board of Administration.

My intention was to create a 5-year plan to retire at age 62. I am now 57 and may not be able to find another position comparable to my last one. I cannot receive social security benefits for 5 years.

This order has left me with NO choices regarding my retirement.

Respectfully,



Willie B. Taylor

Rec'd
12/31/09

Joanos_Tina

From: UPS Quantum View [auto-notify@ups.com]
Sent: Monday, January 18, 2010 7:39 PM
To: Joanos_Tina
Subject: UPS Delivery Notification, Tracking Number [REDACTED]



***Do not reply to this e-mail. UPS and STATE BOARD OF ADMINISTRATION will not receive your reply.

At the request of STATE BOARD OF ADMINISTRATION, this notice is to confirm that the following shipment has been delivered.

Important Delivery Information

Delivery Date / Time: 18-January-2010 / 7:07 PM
Driver Release Location: FRONT DOOR

Shipment Detail

Ship To:
Willie B. Taylor



UPS Service: NEXT DAY AIR SAVER
Shipment Type: Letter

Tracking Number: [REDACTED]
Reference Number 1: General Counsel

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