

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MICHAEL ARCURI,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2019-0284
)	
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On January 29, 2020, 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, Michael Arcuri, 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 February 13, 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 his second election form was not received by the Plan Choice Administrator prior to Petitioner's termination date, hereby is denied. Petitioner had given a signed second election form to a staff member of his personal financial planner to send via facsimile to the Plan Choice Administrator.

However, Petitioner could not produce any evidence that his second election form was received prior to 4:00 p.m. on Petitioner's last day of employment. 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 26 day of February 2019, in Tallahassee,

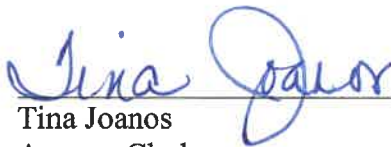
Florida.

**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 Michael Arcuri, pro se, both by email transmission to [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com) and jmevaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 26 day of February, 2020.



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**

MICHAEL ARCURI,

Petitioner,

vs.

CASE NO: 2019-0284

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 December 3, 2019, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Michael Arcuri, pro se (by telephone)

For Respondent: Deborah Minnis
Ausley McMullen, P.A.
123 South Calhoun Street (32301)
PO Box 391
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner has or may now switch from the Florida Retirement System (FRS) Pension Plan into the FRS Investment Plan.

EXHIBIT A

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 R-1 through R-10 were offered at hearing, and having now reviewed the entire record, they are admitted into evidence. Petitioner's objections to Exhibits R-9 and R-10 are denied. A transcript of a call to the MyFRSGuidance Line of March 8, 2019 was filed on December 17, 2019.

A transcript of the hearing was made, filed with the agency, and provided to the parties on December 13, 2019. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner was initially hired by the Citrus County Board of County Commissioners, an FRS participating employer, on January 14, 2008. He had until July 31, 2008 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan. Petitioner made no election by the July 31, 2008 deadline date, and therefore defaulted into the Pension Plan.

2. Petitioner terminated his FRS-eligible position with the Citrus County Board of County Commissioners effective March 8, 2019. Apparently acting on the advice of his personal financial planner, Petitioner waited until the last day he was employed in his FRS-eligible position to submit a second election form, seeking to transfer from the Pension Plan to the Investment Plan.

3. On March 8, 2019, Petitioner called the MyFRS Financial Guidance Line and spoke with an EY financial planner about making this second election. He inquired specifically about sending the election form by fax.

4. The EY financial planner made clear to Petitioner that a faxed election form had to be received by 4:00 p.m. on the last day of his employment in an FRS-eligible position, and advised that Petitioner not wait until the last day of his employment in case there was an issue with the fax. He also recommended that Petitioner follow up with the Plan Choice Administrator to ensure that the fax was received.

5. Petitioner relied on the staff of his personal financial planner to fax the 2nd Election Plan Enrollment Form to the Plan Choice Administrator. Petitioner's 2nd Election Plan Enrollment Form was not received by the Plan Choice Administrator prior to Petitioner terminating his employment in an FRS-eligible position.

6. On July 11, 2019, Petitioner submitted a FRS Investment Plan Request for Intervention. Petitioner attached a fax monitoring report to his request. The fax monitoring report purports to show that the 2nd Election Plan Enrollment Form was transmitted to the Plan Choice Administrator at Fax Number 1-888-310-5559.

7. Upon receipt of Petitioner's request, Respondent conducted a search of its records to ensure that the document had not been inadvertently misfiled or received but not processed.

8. The records did not show receipt of a 2nd Election Enrollment Form from Petitioner on March 8, 2019, his last day of employment in an FRS eligible position. However, Respondent's records do show a faxed 2nd Election Enrollment Form received from Petitioner on April 4, 2019.

9. Petitioner presented no evidence that he received a confirmation statement from the Plan Choice Administrator regarding his second election.

CONCLUSIONS OF LAW

10. Section 121.4501(4)(f), Florida Statutes, provides in relevant part:

...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...

11. Pursuant to the express terms of the above governing statute, Petitioner's Investment Plan election must have been received by Alight Solutions, the Plan Choice Administrator, while Petitioner was still employed in an eligible position.

12. Rule 19-11.007(2), F.A.C., reiterates the requirement of current employment:

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. ...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.

(Emphasis added).

13. Again, the test is whether the election is made and processed by the Plan Choice Administrator during the permitted time frame; since Petitioner's second election was not timely received or processed, it was not effective.

14. Although the evidence supports Petitioner's intent to elect the FRS Investment Plan in March of 2019, the crux of the issue pursuant to the applicable statute and rule is whether the Plan Choice Administrator received Petitioner's election. Unfortunately, whatever Petitioner intended is irrelevant, since no valid Investment Plan election form was received by Respondent.

15. Because Petitioner terminated his FRS-qualifying employment in March of 2019 and is no longer “earning service credit in an employee-employer relationship” the law bars him from moving between plans at this point.

16. In Wagner v. State Board of Administration, Case No. 19-4954, a recent case before the State of Florida Division of Administrative Hearings, the Administrative Law Judge considered a strikingly similar issue. The Petitioner in Wagner, attempted to make her second election through the FRS website, MyFRS.com from her home computer. Ms. Wagner believed she had clicked all the required buttons to properly execute her election. The Administrative Law Judge found:

The preponderance of the evidence establishes that Ms. Wagner intended to make her second election on March 4, 2019, and to move her retirement account from the Pension Plan to the Investment Plan. The preponderance of the evidence also establishes that Ms. Wagner failed to complete her second election and that Alright Solutions, the Plan Choice Administrator for the Investment Plan did not receive her election

Page 14, Paragraphs 44 and 45. (Emphasis Added.)

17. The Administrative Law Judge ruled:

The rule reiterates the statute’s admonition that the second election must be received by the Plan Choice Administrator to be effective. It also places a duty on the employee to assure that the Plan Choice Administrator has received the second election before the employee leaves active employment....Even if the server malfunctioned, Ms. Wagner still had a responsibility to follow up once she failed to receive a confirmation statement from the Plan Choice Administrator.

Page 17, Paragraph 52.

Though not binding, this ruling is persuasive.

18. Respondent, as an administrative entity of the State of Florida, has only those powers conferred upon it by the legislature. See, e.g., Pesta v. Dep’t of Corrections, 63 So.3d 788 (Fla. 1st DCA 2011). The Florida Administrative Procedure Act expressly provides that statutory language describing the powers and functions of such an entity are to be construed to

extend “no further than...the specific powers and duties conferred by the enabling statute.” §§ 120.52(8) and 120.536(1), Fla. Stat.

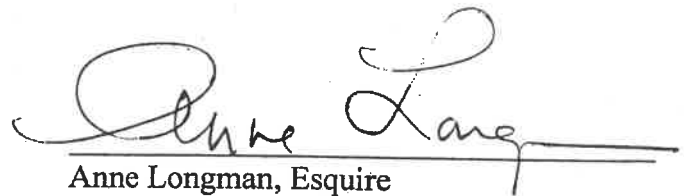
19. Respondent is charged with implementing Chapter 121, Florida Statutes. Respondent is not authorized to depart from the requirements of these statutes when exercising its jurisdiction and has no power to enlarge, modify, or contravene the authority granted to it by the legislature. State, Dept. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco v. Salvation Ltd., Inc., 452 So. 2d 65, 66 (Fla. 1st DCA 1984); Balezentis v. Dep’t of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency “is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction”).

20. Respondent does not have the authority to allow Petitioner to enroll in the FRS Investment Plan absent a timely filed second election, and therefore cannot grant the relief requested.

RECOMMENDATION

Having considered the law and undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 29th day January, 2020.



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

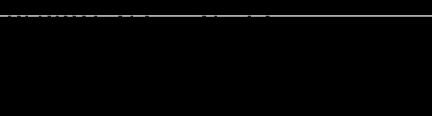
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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 Boulevard, Suite 100
Tallahassee, Florida 32308
Tina.joanos@sbafla.com
Mini.watson@sbafla.com
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Michael Arcuri



Petitioner

and via electronic mail only to:

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Ruth Vafek, Esquire
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Counsel for Respondent