

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

CLIFF GOLDSTEIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2012-2599
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

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**FINAL ORDER**

On February 11, 2013, the Administrative Law Judge 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, Cliff Goldstein, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions, which were due on February 26, 2013. 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.

**ORDERED**

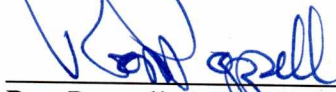
The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that he be deemed to have made a valid second election to transfer from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan, when

Petitioner submitted his form after he had terminated employment and no longer was earning service credit, hereby 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 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 22nd day of March, 2013, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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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.

  
\_\_\_\_\_  
Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Cliff Goldstein, 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 22nd day of March, 2013.

  
\_\_\_\_\_  
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

CLIFF GOLDSTEIN,

Petitioner,

v.

Case No. 2012-2599

STATE BOARD OF ADMINISTRATION,

Respondent.


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**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 12, 2012 at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Cliff Goldstein

  
Petitioner

For Respondent: Brandice D. Dickson, Esquire  
Pennington, P.A.  
215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner made a valid second election to switch from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan.

**EXHIBIT A**

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. On December 10, 2012, two days before hearing, Respondent filed supplemental exhibits consisting of transcripts of calls between Petitioner and the My FRS Financial Guidance Line made on July 6, 2012. At hearing on December 12, 2012, Petitioner stated that he had not received either the Prehearing Statement or Respondent's exhibits. Also at hearing, he provided an address so that these materials could be sent to him again. At the end of the hearing, I asked that he notify me by December 17, 2012, after receiving and reviewing those materials, if he saw a need for further proceedings. I have received no further communication from Petitioner. All exhibits proffered by Respondent were admitted by Order of January 3, 2013.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Respondent filed a proposed recommended order; Petitioner has made no further filing.

## **UNDISPUTED MATERIAL FACTS**

1. Petitioner was a guidance counselor for Collier County Schools, a FRS participating employer, beginning in 1987.
2. Petitioner's last day of work for the Collier County School Board was June 14, 2012. He planned to relocate and start a business.
3. On July 9, 2012, Petitioner executed a 2<sup>nd</sup> Election Retirement Plan Enrollment Form expressing his intent to switch from the defined benefit FRS Pension Plan to the defined contribution FRS Investment Plan.



4. Petitioner's election form was faxed to Respondent's third party administrator on July 9, 2012.

5. The election form stated:

You must be actively employed earning salary when your form is received by the Plan Choice Administrator. If you are leaving FRS-covered employment, **this form must be received by the FRS Plan Choice Administrator no later than 4:00 p.m. ET on the last business day you are earning salary and service and prior to your termination date.** If you are on an unpaid leave of absence or you are an employee of an educational institution on summer break, you cannot use your 2<sup>nd</sup> Election until you return to work.

[Emphasis added].

6. Petitioner gave notice of his resignation to his employer on July 14, 2012. Petitioner's employer, Collier County Schools, reported that Petitioner's termination date as June 14, 2012, the last date Petitioner actually worked.

7. Petitioner's second election was reversed because Respondent determined he was not actively employed and earning service credit when Respondent's third party administrator received his election form, and therefore his second election was not valid.

#### CONCLUSIONS OF LAW

8. Movement between FRS plans is governed by Section 121.4501(4)(e), Florida Statutes. That statute states:

(e) After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, 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 defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. Eligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be 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 that the employee must meet the conditions of the previous sentence **when the election is received by the third-party administrator**. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

§ 121.4501(4)(e), Fla.Stat. (emphasis added).

9. Rule 19-11.007, Florida Administrative Code, governs the timing of the receipt of the second election form and states, in pertinent part:

19-11.007. Second Election Enrollment Procedures for the FRS Retirement Programs.

(1) Purpose. The purpose of this rule is to establish procedures for making the second election permitted by Section 121.4501(4)(e), F.S. This rule includes procedures for members who initially chose the FRS Investment Plan or the FRS Investment Plan Hybrid Option to use their 2nd. election to transfer to the FRS Pension Plan; or for members who chose or defaulted into the FRS Pension Plan to use their 2nd election to transfer to the FRS Investment Plan or the FRS Investment Plan Hybrid Option. 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 earning service credit in an employer-employee relationship consistent with the requirements of 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. 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 earning service credit.**

...

(3) General Procedures.

...

(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).

10. Petitioner's last day actively working was June 14, 2012. He therefore earned no service credit in July 2012. Petitioner submitted his second election form on July 9, 2012, *after* the last business day he earned service credit, irrespective of the date of his resignation. The second election was invalid because it was not received and processed prior to 4:00 p.m. Eastern Time on the last day of his employment in accordance with Rule 19-11.007, Florida Administrative Code.

11. The second election form expressly informed Petitioner by what time it had to be received to be considered valid and explained that employees of educational institutions, such as he was, may not make a second election during summer break and must wait until they return to active work (and earn service credit) to make the election.

12. Petitioner's assertion that the counselors on the MyFRS Financial Guidance Line failed to inform him that he had to submit his second election while he was still earning service credit is not borne out by the record. The transcripts from the July 6, 2012 calls demonstrate that Petitioner was told he had to be actively working and earning service credit to switch plans. Petitioner advised he was a 10 month employee, and was told that the second election form could be submitted during the summer months, but would not be effective until he returned to actual employment after the summer and once again earned service credit.



13. Petitioner did not return to employment and earn service credit after he submitted his second election form in July 2012. Therefore, his second election never became effective and the Respondent correctly determined the election to be invalid.

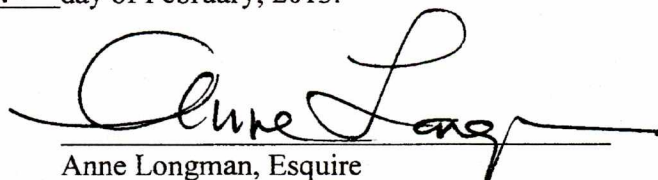
14. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Its construction and application of those statutes 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 DCA1998). Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements to make a valid election into the Investment Plan. Young v. Department of Community Affairs, 625 So.2d 837 (Fla. 1993); Department of Transportation v. J.W.C., 396 So.2d 778 (Fla. 1st DCA 1981), and has not been able to meet this standard.

15. I note that Petitioner may be entitled to a Pension Plan benefit and also may still elect to switch plans if he returns to FRS-covered employment and submits a valid second election.

#### 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 11<sup>th</sup> day of February, 2013.

  
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](mailto:Tina.joanos@sbafla.com)  
[Daniel.beard@sbalfa.com](mailto:Daniel.beard@sbalfa.com)  
(850) 488-4406

This 11th day of February, 2013.

Copies furnished to:

Via U.S. Mail:

Cliff Goldstein



Petitioner

Via electronic delivery:

Brian A. Newman, Esquire

Brandice D. Dickson

Pennington, Moore, Wilkinson Bell & Dunbar

Post Office Box 10095

Tallahassee, FL 32302-2095

[slindsev@penningtonlaw.com](mailto:slindsev@penningtonlaw.com)

Attorneys for Respondent

A handwritten signature in black ink, appearing to read "Dune Long".