

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

KATHLEEN BRANEN,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2009-1582
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
)	

FINAL ORDER

On February 9, 2010, 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, Kathleen Branen, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order, but Petitioner did not. Neither party filed Exceptions, which were due on February 24, 2010. 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

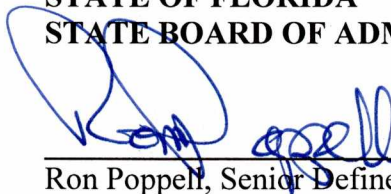
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to rescind her second election and be returned to the Pension Plan hereby is denied.

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 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 5th day of April, 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

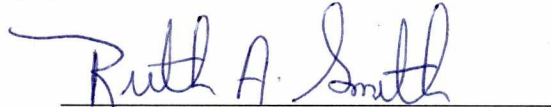
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Kathleen Branen, 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 5th day of April, 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

KATHLEEN BRANEN,

CASE NO.: 2009-1582

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer on November 19, 2009. The appearances were as follows:

APPEARANCES

For Petitioner:



For Respondent:

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

STATEMENT OF THE ISSUE

The issue is whether Respondent State Board of Administration (SBA) should grant Petitioner's request to rescind her second election into the Investment Plan.

PRELIMINARY STATEMENT

Petitioner filed a Request for Intervention dated July 16, 2009 asking to be allowed to return to the Florida Retirement System (FRS) Pension Plan. After investigation, this request was denied by Respondent by letter of September 2, 2009. Petitioner then filed a Petition for Hearing seeking the same relief, and this hearing ensued.

Petitioner attended the informal hearing by telephone and testified on her own behalf. Respondent presented the testimony of Dan Beard, SBA Director of Policy, Risk Management and Compliance. Respondent's Exhibits R-1 through R-5 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 is a member of the FRS. She remained in the Pension Plan by default on September 1, 2002, during the initial roll-out of the Investment Plan.
2. Respondent received a 2nd Election Retirement Plan Enrollment Form bearing Petitioner's signature with a date of October 3, 2006, indicating Petitioner's desire to transfer her retirement assets from the Pension Plan to the Investment Plan.
3. Petitioner's second election to transfer to the Investment Plan was effective on November 2, 2006.

4. Petitioner first gave notice to Respondent of her wish to rescind her second election and return to the Pension Plan on March 18, 2009, long after her Pension Plan assets were transferred to her Investment Plan account.

5. At hearing, Petitioner recounted how she came to file a second election form in 2006, after signing up to take courses from the Primerica investment firm to obtain a license to sell insurance. Primerica representatives sold her a mortgage and also persuaded her that she would be better off with her retirement assets in the Investment Plan. Petitioner testified that an election form to transfer to the Investment Plan was given to her by representatives of Primerica. These representatives, Frank May and John Evers, told her that she could still switch back to the Pension Plan and participate in the DROP program, even after her FRS account was transferred to the Investment Plan and even though this was her second election -- these statements are not accurate.

6. Petitioner testified that all the writing on page three of the second election form received by Respondent, including the signature, is hers, but that the writing on the first page is not. She does not recall signing the second election form that Respondent received, but rather recalls signing a 5x7 card with three investment options, provided by Primerica. She recalls selecting the least aggressive investment option before signing this card and returning it to the Primerica representative to effectuate her transfer to the Investment Plan. She does not dispute that she intended, at the time of signing, to switch to the Investment Plan, although she misunderstood the implications of her action.

7. The three page second election form bearing Petitioner's signature was mailed in an envelope showing a Primerica return address.

8. After Petitioner was transferred to the Investment Plan, she received quarterly statements advising her of the performance of her Investment Plan assets, which she did not usually open or read. At some point in 2009, Petitioner became aware of fluctuations in her Investment Plan account, and after speaking with an SBA authorized counselor, became aware that she could not now enter the Deferred Retirement Option Program (DROP) or move back to the Pension Plan.

9. Petitioner does not contend that she was misled by any information she received from Respondent or any of its authorized representatives, rather that she was misled by representations made by Primerica personnel as to the operation and effect of switching to the Investment Plan.

CONCLUSIONS OF LAW

10. Movement between the FRS Pension Plan and Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes. That section states, in pertinent part:

(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.

§ 121.4501(4)(e), Fla.Stat.

11. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans after their initial election period runs. Petitioner has used this one-

time second election to move to the Investment Plan.

12. The SBA has only those powers granted by statute, Valdez v. Department of Management Services, Division of Retirement, 2005 WL 2429479 at *4 (Fla.Div.Admin.Hrgs.), and there is no provision in the statutes governing the Florida Retirement System that would authorize Respondent to allow Petitioner to return to the Pension Plan. Because Petitioner has used her one-time second election, she has exhausted the opportunity to move between plans.

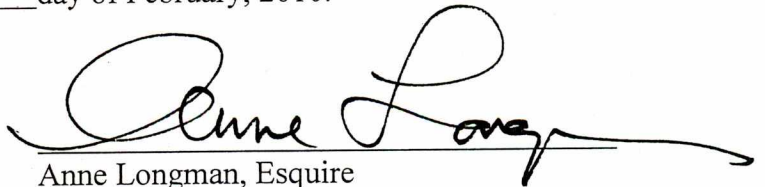
13. It is unfortunate that Petitioner may very well have been misled by representatives of Primerica, but misconduct by third parties does not authorize Respondent to nullify a second election. If Primerica misled Petitioner as she contends, that wrong can be addressed only by a tribunal with power to effectuate a remedy, in a forum that has jurisdiction over the third parties who caused the harm.

14. The SBA lacks the statutory authority to allow Petitioner to rescind her second election and has no jurisdiction over her claim that she was misled by Primerica representatives.

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 9th day of February, 2010.



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

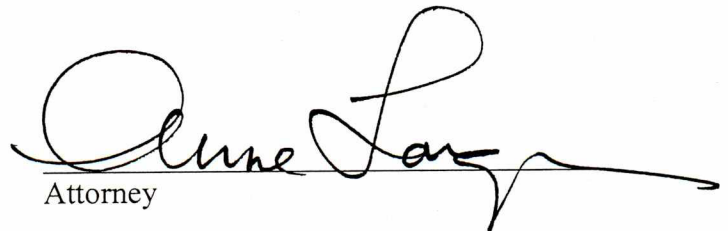
This 9th day of February, 2010.

Copies furnished to:

[REDACTED]

Orlando, Florida 32826

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


Attorney