

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

DEBORAH WESTBERRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2017-0313
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On March 8, 2018, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. The Recommended Order indicates that copies were served upon the pro se Petitioner, Deborah Westberry, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. No exceptions to the Recommended Order, which were due by March 23, 2018, were filed by either party. 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 that she be allowed to use her second election to transfer from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to pay the statutorily-required “buy-in” amount hereby is denied. Petitioner had originally claimed that she had no recollection of having elected the FRS Investment Plan in 2005. However, a transcript of a recorded call made by Petitioner to the MyFRS

Financial Guidance Line prior to her initial election indicated that Petitioner clearly wanted to join the FRS Investment Plan because she was unsure as to whether or not she would remain in her position long enough to meet the FRS Pension Plan's longer vesting requirement. Petitioner received quarterly statements since her 2005 election showing that she was a member of the FRS Investment Plan. At the hearing, Petitioner was provided with what she deemed to be satisfactory evidence that her initial election in 2005 was the FRS Investment Plan.

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 2nd day of April, 2018, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



**Joan B. Haseman**  
Chief of Defined Contribution Programs  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

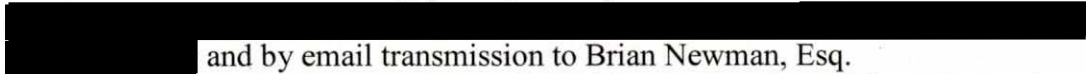
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Deborah Westberry, pro se, both by email transmission at

 and by email transmission to Brian Newman, Esq. ([brian@penningtonlaw.com](mailto:brian@penningtonlaw.com)) and Brandice Dickson, Esq., ([brandi@penningtonlaw.com](mailto:brandi@penningtonlaw.com)) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 2nd day of April, 2018.



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

DEBORAH WESTBERRY,

Petitioner,

vs.

CASE NO. 2017-0313

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 January 24, 2018, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Deborah Westberry, pro se

  
Petitioner

For Respondent: Brian A. Newman, Esquire  
Pennington, P.A.  
215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301



## **STATEMENT OF THE ISSUE**

The issue is whether Petitioner can use her second election to switch from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan without having to pay the "buy-in" amount calculated as a result of the requested transaction.

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing in person, testified on her own behalf, and presented no other witnesses. She was accompanied by a colleague, who did not testify. Respondent presented the testimony of Mini Watson, 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 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. Respondent filed a proposed recommended order; Petitioner made no further filings.

## **UNDISPUTED MATERIAL FACTS**

1. Petitioner began employment with the Duval County School Board, an FRS-participating employer, on November 23, 2004.
2. Petitioner had a deadline of May 31, 2005 to select between membership in the FRS Pension Plan or the FRS Investment Plan.
3. On May 16, 2005, Petitioner called the MyFRS Financial Guidance Line. The Ernst & Young ("EY") financial planner discussed the different features of the Pension Plan and the Investment Plan with Petitioner. In particular, Petitioner was told she would be ineligible for DROP as an Investment Plan member. Petitioner made it clear that she wanted the Investment

Plan because, as a new employee, she was unsure whether she would remain in her FRS-covered job long enough to meet the Pension Plan's longer vesting requirement.

4. The financial planner told Petitioner she had a second election she could use later to change plans, but warned her that the cost to "buy-in" to the Pension Plan could exceed the value of her Investment Plan account.

5. Petitioner made her initial election through the MyFRS.com website, selecting enrollment in the Investment Plan, with a June 1, 2005 effective date. She made this election during the MyFRS Financial Guidance Line telephone call on May 16, 2005.

6. Petitioner filed a Request for Intervention on September 25, 2017 requesting that she be able to use her second election to move to the Pension Plan without having to pay the buy-in amount over the value of her Investment Plan account. Petitioner stated that she had no recollection of having switched from the Pension Plan to the Investment Plan and requested to be shown evidence of having made this election.

7. Respondent conducted an investigation of its records, found and produced a transcript of Petitioner's telephone call with the MyFRS Guidance Line which occurred on May 16, 2005 and copies of quarterly reports mailed to her through the intervening years showing her membership in the Investment Plan.

8. Respondent informed Petitioner that it had no statutory authority to waive the "buy-in" provision and therefore could not grant her request.

9. On November 3, 2017 Petitioner filed a Petition for Hearing requesting that Respondent allow her to use her second election to join the Pension Plan without paying the Pension Plan "buy-in" amount. This administrative proceeding followed.

## CONCLUSIONS OF LAW

10. Movement between the two FRS plans is governed by section 121.4501(4)(f),

Florida Statutes. That section states, in pertinent part:

(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.

1. If the employee chooses to move to the investment plan, the provisions of subsection (3) govern the transfer.
2. If the employee chooses to move to the pension plan, the employee must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan. Benefit commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension plan liabilities in the most recent actuarial valuation...

§ 121.4501(4)(f), Fla. Stat. (2017) (emphasis added).

11. The different features of the Pension Plan and Investment Plan were explained to Petitioner in great detail immediately before she made her initial election to join the Investment Plan in 2005. The accuracy of the information provided has not been challenged. Petitioner made



it clear that she preferred the Investment Plan because of the shorter vesting period. As such, there is no question of fact here that Petitioner made a well-informed decision to join the Investment Plan as her initial plan election. See Dixon v. State Board of Administration, DOAH Case No. 16-600, Order Granting Motion and Closing File (Dec. 15, 2016) stating:

Mr. Dixon does not dispute the accuracy of the transcript of the recorded telephone call. It reflects clearly that the Ernst & Young financial advisor did not advise or encourage Mr. Dixon to choose one option over the other. Rather, he explained the difference between the two, and their respective advantages and disadvantages. At the end of the call, Mr. Dixon voluntarily chose the Investment Plan. He has not identified any misstatement of fact by the advisor that led him to choose the Investment Plan as his initial plan election.

In view of this, no genuine issue as to any material fact exists. Therefore, the Motion is granted, jurisdiction in the case is relinquished to the agency for final disposition of the matter, and the file of the Division of Administrative Hearings is hereby closed. Because an evidentiary hearing to resolve disputed facts is no longer necessary, the final hearing on January 10, 2017, is canceled.

12. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. § 120.57(1)(j), Fla. Stat.; Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349(Fla. 1st DCA 1977); Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 142 (Fla. 4th 6 DCA 1989)(burden is on beneficiary to establish entitlement to retirement benefits). Here, the SBA does not have the authority to waive the statutorily-mandated Pension Plan "buy-in", and therefore cannot grant the relief Petitioner has requested.

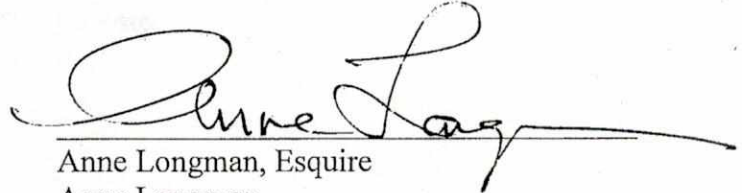
13. Due to an unintentional delay in Petitioner receiving the SBA's exhibits prior to hearing, she did not have an opportunity to review same before the hearing. She stated at hearing that her purpose in requesting the intervention that became this hearing was to be shown that she had indeed made the Investment Plan election in 2005. This has now been accomplished.



**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 8<sup>th</sup> day of March, 2018.



Anne Longman, Esquire  
Anne Longman  
Presiding Officer  
For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
315 South Calhoun Street, Suite 830  
Tallahassee, FL 32301-1872

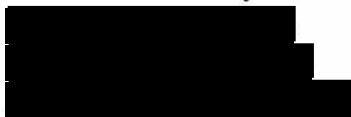
**NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER**

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)  
[nell.bowers@sbafla.com](mailto:nell.bowers@sbafla.com)  
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Deborah Westberry



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](mailto:slindsey@penningtonlaw.com)

Counsel for Respondent