

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SHARON FLEITA,)
)
 Petitioner,)
)
vs.)
)
STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
_____)

DOAH Case No. 17-5505
SBA Case No. 2017-0266

FINAL ORDER

On February 23, 2018, Administrative Law Judge Suzanne Van Wyk (hereafter “ALJ”) submitted her Recommended Order to the State Board of Administration (hereafter “SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Sharon Fleita, 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 March 12, 2018. On March 12th, Petitioner did submit a letter to the ALJ that reiterated a few points that Petitioner made during the hearing. The letter stated that Petitioner accepted the ALJ’s decision. Petitioner’s letter was not submitted to the SBA, as would have been required under Rule 28-106.217(1), F.A.C., if the Petitioner had intended the letter to serve as exceptions. Further, the letter did not clearly identify any disputed portions of the ALJ’s recommended order by page number or paragraph, did not identify any legal basis for arguments Petitioner made, and further did not include any specific

citations to the record, as would have been required for valid exceptions under Section 120.57(1)(k), Florida Statutes. As such, Petitioner's letter is not addressed herein.

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.

STATEMENT OF THE ISSUE

The SBA adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order as if fully set forth herein.

PRELIMINARY STATEMENT

The SBA adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge ("ALJ") cannot be rejected or modified by a reviewing agency in its final order "...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence...." See Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd*, 652 So.2d 894 (Fla 2nd DCA 1995); *Dietz v. Florida Unemployment Appeals Comm*, 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). A seminal case defining the "competent substantial evidence" standard is *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as "such evidence as will establish a substantial basis of fact from which the fact at issue can be

reasonably inferred” or such evidence as is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.”

An agency reviewing a Division of Administrative Hearings (“DOAH”) recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 19932). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the ALJ’s Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to “reject or modify [an administrative law judge’s] conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.”

FINDINGS OF FACT

The Findings of Fact set forth in the ALJ’s Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in the ALJ’s the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. Petitioner has failed to show that she is entitled to the relief requested. The Petitioner's request that she be deemed to have made a valid second election to transfer from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan hereby is denied. At the time Petitioner submitted her second election form in May 2017, Petitioner was on FMLA (Family Medical Leave Act) leave and was not earning either salary or service credits. Petitioner did not return to work after her leave of absence. As such, Petitioner no longer was earning service credits in an employer-employee relationship as is required under Section 121.4501(4)(f), Florida Statutes in order to make a valid second election.

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
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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 Sharon Fleita, pro se, by email to [REDACTED] and by U.S. mail to [REDACTED] by US Mail to Suzanne Van Wyk, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (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
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHARON FLEITA,

Petitioner,

vs.

Case No. 17-5505

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 9, 2018, in Tallahassee, Florida, before Suzanne Van Wyk, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sharon Fleita, pro se

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Suite 200
Post Office Box 10095
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

Whether Petitioner, Sharon Fleita, made a valid "second election" to transfer from the Florida Retirement System ("FRS") Pension Plan to the Investment Plan, pursuant to section 121.4501, Florida Statutes (2016).^{1/}

PRELIMINARY STATEMENT

This case arose from Petitioner's attempt to transfer from the FRS Pension Plan to the Investment Plan while she was on an unpaid leave of absence. Petitioner submitted a "second election form" requesting this transfer, which was received by the FRS Plan Choice Administrator on March 11, 2017. After a series of phone calls to the MyFRS Financial Guidance Line (MyFRS hotline) and the Division of Retirement, Petitioner realized that her election may not have been valid. In order to clear up this uncertainty, she submitted a request for intervention with Respondent, State Board of Administration (SBA). In a letter dated August 29, 2017, SBA informed Petitioner that her request to elect into the FRS Investment Plan had been denied. On September 7, 2017, Petitioner requested a hearing before the SBA.

The petition was referred to the Division of Administrative Hearings by the SBA on October 3, 2017, and assigned to the undersigned. The final hearing was originally scheduled for December 11, 2017, but was rescheduled on a Motion for Continuance filed by Respondent. The final hearing was rescheduled to, and commenced on, January 9, 2018.

At the final hearing, Petitioner testified on her own behalf, but did not offer any witnesses. Petitioner introduced Exhibit P1, which was admitted into evidence without objection.

Respondent presented the testimony of Mini Watson, SBA's Director of Compliance, Office of Defined Contributions. Respondent introduced Exhibits R1 through R41, which were admitted in evidence.

A one-volume Transcript of the proceedings was filed on February 2, 2018. Respondent requested a one-day extension to file a proposed recommended order, which was granted. Respondent timely filed a Proposed Recommended Order on February 13, 2018. Petitioner neither filed a proposed recommended order nor requested an extension of the filing deadline.

FINDINGS OF FACT

1. Petitioner, Sharon Fleita, was, at all times relevant hereto, an employee of the Jefferson County School Board ("School Board") and enrolled as a member of the FRS Pension Plan.

2. Respondent, SBA, is the state agency tasked with administering the FRS Investment Plan. § 121.4501(8), Fla. Stat.

Petitioner's Employment History

3. Petitioner was employed by the School Board as a full-time teaching assistant from early 2011 through May 31, 2017.

4. The last day Petitioner performed work for the School Board was on April 19, 2017. As of that date, Petitioner had exhausted her allotted paid sick leave.

5. On April 21, 2017, Petitioner underwent ankle surgery. The recovery period was about three months, during which time Petitioner was required to use a wheelchair.

6. From April 20 through May 31, 2017, Petitioner was on unpaid "Family Medical Leave Without Pay" as designated by the School Board on a form titled "Application for Leave of Absence," which was signed by Petitioner.

7. Realizing that her medical condition would prevent her from returning to work, Petitioner officially resigned on May 31, 2017.^{2/}

8. At the time of her resignation, Petitioner had earned 7.27 years of FRS service credits and was a "vested" member of the FRS.^{3/} See § 121.021(45), Fla. Stat.

9. Petitioner did not return to work after her leave of absence, nor did she retire on disability through FRS.

10. Petitioner was found to be disabled by the Social Security Administration with a date of disability of April 21, 2017, but she never applied for disability with FRS.^{4/}

11. On May 31, 2017, Petitioner received a paycheck from the School Board in the amount of \$82.13, after deductions and taxes, indicating a pay period of May 1, 2017 through May 26,

2017. The paycheck was compensation for work performed prior to May 2017.

Petitioner's Second Election

12. Ms. Fleita's employer, the School Board, did not have a human resources director to help her through the second election process.

13. Seeking guidance, Petitioner placed a number of calls to the Division of Retirement and the MyFRS hotline over the course of about five months, beginning in March 2017.

14. Before she made her second election, several representatives informed Petitioner during these phone calls that she needed to be actively employed, earning a salary, and earning FRS service credits at the time the second election was made.

15. On March 20, 2017, a representative with the MyFRS hotline informed Petitioner that she could not make a valid second election while on "unpaid leave of absence or summer break or anything like that." The representative also recommended that Petitioner make her second election a month or so before her last day of work, in order to make sure the election was valid.

16. On May 10, 2017, a representative with the MyFRS hotline explained to Petitioner that a salary and FRS service credits are distinct, and that it is possible to receive a

paycheck but no FRS service credit for a given month. The representative also informed Petitioner that if she were to submit a second election while not earning service credit, the election might be processed but ultimately would not be considered valid.

17. On May 10, 2017, while on FMLA (Family Medical Leave Act) leave, Petitioner completed a "2nd Election Retirement Plan Enrollment Form" to switch from the FRS Pension Plan to the Investment Plan. The Plan Choice Administrator processed the election on May 11, 2017.

18. On July 28, 2017, a representative with the Division of Retirement informed Petitioner that she had earned service credit for May 2017, the month in which she made her second election.

19. Later that same day, a different representative informed Petitioner that her election into the Investment Plan had been approved. However, soon thereafter, the representative called Petitioner back and informed her that her election was invalid because, according to the SBA, Petitioner was not earning service credits in May 2017.

Service Credit During FMLA Leave

20. Monthly service credit is awarded for "each month salary is paid for service performed." § 121.021(17)(b)4., Fla. Stat.

21. Section 121.021(58) defines "leave of absence" as "a leave of absence from employment under the Florida Retirement System, subsequent to November 30, 1970, for which retirement credit [i.e., FRS service credit] may be received in accordance with s. 121.121."

22. This definition is reiterated in Florida Administrative Code Rule 60S-6.001, which provides:

LEAVE OF ABSENCE (Authorized Leave of Absence) - Means a leave of absence from employment under the Florida Retirement System, subsequent to November 30, 1970, for which retirement credit may be received in accordance with Rule 60S-2.006, F.A.C.

23. By default, FRS members do not earn service credits while on an unpaid leave of absence. Service credits may be earned, however, if the member meets the following requirements of rule 60S-2.006:

(1) A member may receive retirement credit for a total of two work years of creditable service for authorized leaves of absence under the Florida Retirement System, subject to the following:

(a) A leave of absence must be authorized in writing by a member's employer prior to or during the leave of absence.

(b) The member must satisfy the service requirements for vesting, excluding any periods of leave of absence, except for military leaves of absence as provided in subsection 60S-2.005(1), F.A.C., prior to receiving retirement credit for leaves of absence.

(c) The member must return to active employment performing service with a Florida Retirement System employer in a regularly established position immediately upon termination of the leave of absence and remain on the employer's payroll for one calendar month. The exceptions to this requirement are:

1. A member placed on a leave of absence for medical reasons who retires on disability while on the leave of absence shall not be required to return to employment in order to be eligible to receive credit for the leave of absence; and

2. A member whose work year is less than 12 months and whose leave of absence terminates between school years shall be eligible to receive credit for the leave of absence as long as he or she returns to covered employment at the beginning of the next school year and remains on the employer's payroll for one calendar month.

24. Petitioner did not return to work after her leave of absence (or at the beginning of the following school year), or retire on disability during her leave of absence. Petitioner did not earn service credit during her leave of absence in May 2017. Id.

25. It appears Petitioner misunderstood the distinction between salary and FRS service credit, believing that the paycheck she received in May 2017 meant that she also earned FRS service credits for that month. The delay between the date on which her second election form was processed and the date on

which it was invalidated exacerbated this problem, and perhaps gave Petitioner false hope that her second election was valid.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

27. Petitioner bears the burden of proving the validity of her election into the FRS Investment Plan by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

28. FRS offers two retirement plans: the Pension Plan, a defined benefit plan; and the Investment Plan, a defined contribution plan. §§ 121.051 and 121.451, Fla. Stat.

29. Members of the FRS have two opportunities to move, or "elect," between plans.

30. The first election must be made within the first five months of employment. See Fla. Admin. Code R. 19-11.006(2) (2017).

31. The second election process is controlled by section 121.4501(4)(f), which provides:

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.

(emphasis added).

32. Second elections are further controlled by Florida Administrative Code Rule 19-11.007(2), which provides:

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 In general terms, this means that the 2nd election can only be made and processed during the month in which 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 of the month the member is actively employed and earning salary and service credit.

(emphasis added).

33. These provisions establish three requirements for an FRS member to make a valid second election: the election must be made while the member is (1) employed, (2) earning a salary, and (3) earning FRS service credits. If a member is on a leave

of absence, the member must return to work before making a valid second election.

34. While Petitioner was employed by the School Board when she was on FMLA leave, based on the Findings of Fact herein, Petitioner was neither earning a salary nor earning service credit when she made her second election on May 11, 2017.

35. Petitioner failed to meet her burden to demonstrate that she made a valid election to join the FRS Investment Plan.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, State Board of Administration, issue a final order denying Petitioner's request to transfer from the FRS Pension Plan to the Investment Plan.

DONE AND ENTERED this 23rd day of February, 2018, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of February, 2018.

ENDNOTES

1/ Unless otherwise noted, all statutory references are to the 2016 version of the Florida Statutes.

2/ Petitioner did not reapply for her job after her surgery because she did not think her application would be seriously considered. This belief stemmed, in part, from past interactions she had with the School Board, including Petitioner's allegations that she was retaliated against after reporting a former teacher of abusing a student, which led to that teacher's resignation. In addition, the public school at which she was employed at the end of the 2017 school year was reorganized as a charter school for the 2017-2018 school year.

3/ Petitioner had acquired some service credit from employment with other employers participating in FRS prior to her employment with the School Board.

4/ In order to be eligible for disability retirement through FRS, the employee must have at least eight years of service credit. § 121.091(4)(a), Fla. Stat.

COPIES FURNISHED:

Sharon Fleita
[REDACTED]
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.