

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MELODY MOORE,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2018-0363
)	
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On April 2, 2019, 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, Melody Moore, 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 April 17, 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 rescind her second election whereby, in 2010, she had transferred from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan, hereby is denied. Petitioner claimed that she was not adequately advised as to the differences between the two plans and that she would not have made the transfer

had she realized that, in her particular situation, the FRS Pension Plan would have provided her with the better retirement benefit. Petitioner did not produce any evidence to rebut the presumption set forth in Section 121.4501(8)(g), Florida Statutes, that any action taken by a member five or more years prior to the submission of a complaint by that member was taken at the request of the member and with the member's full knowledge and consent.

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 23 day of April, 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

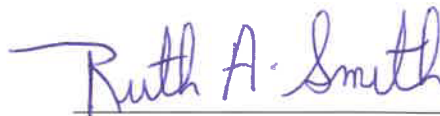
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Melody Moore, pro se, both by email transmission to [REDACTED] and by U.P.S. to [REDACTED] 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 23 day of April, 2019.



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

MELODY MOORE,

Petitioner,

vs.

Case No.: 2018-0363

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 January 29, 2019, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Melody Moore, pro se



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 the SBA should grant Petitioner's request to rescind the second election whereby she transferred from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan or, otherwise return to the Pension Plan.

PRELIMINARY STATEMENT

Petitioner, counsel for the Respondent, and Allison Olson, SBA Director of Policy, Risk Management and Compliance, all attended the hearing in person. Respondent's Exhibits 1 through 6 were admitted into evidence without objection. Petitioner and Ms. Olson testified at the hearing.

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 thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings. This recommendation is based on my consideration of the record in this case and all materials submitted by the parties.

MATERIAL UNDISPUTED FACTS

1. Petitioner began employment with Broward County Sheriff's Office, an FRS-participating employer, in 1990.

2. When the defined contribution Investment Plan was created by the Florida Legislature, Petitioner had until November 30, 2002 to elect membership in the either FRS Investment Plan or the Pension Plan.

3. Petitioner made no affirmative election and so defaulted into the Pension Plan effective December 1, 2002.

4. Petitioner called the MyFRS Financial Guidance Line multiple times between 2006 and 2010 requesting, and receiving, a comparison between the FRS Pension Plan and the FRS Investment Plan. During a 2007 call to the MyFRS Financial Guidance Line, Petitioner was advised that the Pension Plan would yield a greater retirement benefit for her.

5. On December 28, 2010, Petitioner utilized her second election by logging on to the MyFRS website and completing the election process by telephone.

6. On December 30, 2010, Petitioner was sent a Confirmation of 2nd Election advising her that she had utilized her final election and must remain in the Investment Plan until her retirement. She was also advised of her right to rescind that election at that time.

7. Between January 2011 and October 2018, Petitioner received quarterly statements from Respondent showing her account balance.

8. Petitioner filed a Request for Intervention in October 2018 requesting rescission of her second election or to otherwise be allowed to go back to the Pension Plan. That request was denied and Petitioner filed a Petition for Hearing requesting the same relief.

CONCLUSIONS OF LAW

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

(g) 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.

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

10. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans after their initial election period expires. Because Petitioner used her one-time second election on December 28, 2010, she has exhausted her only opportunity to move between plans. There is no “third” election. Unfortunately, Petitioner cannot rescind her second election because she failed to do so before the deadline established by the applicable rule. The grace period provided under Rule 19-11.007, Florida Administrative Code, is as follows:

(4) Grace Period.

(a) If a member files an election with the Plan Choice Administrator and the member realizes that the election was made in error, or if the member has reconsidered his or her plan choice, the SBA will consider, on a case-by-case basis, whether the election will be reversed, subject to the following: The member must notify the SBA by a telephone call to the toll free MyFRS Financial Guidance Line at: 1(866) 446-9377, or by written correspondence directly to the SBA, to the Plan Choice Administrator, to the Financial Guidance Line, or to the Division, no later than 4:00 p.m. Eastern Time on the last business day of the election effective month.

(b) If the request to reverse the election is made timely and the SBA finds the election was made in error, the member will be required to sign a release and return it to the SBA no later than 4:00 p.m., Eastern Time, on the last business day of the election effective month prior to the election's being officially reversed. Upon receipt of the release, the Division and the Plan Choice Administrator will be directed to take the necessary steps to reverse the election and to correct the member's records to reflect the election reversal.

(c) A confirmation that the election was reversed will be sent to the member by the FRS Plan Choice Administrator.

(d) The member retains the right to file a subsequent second election consistent with subsections (2) and (3), above.

(e) Nothing contained in this subsection will interfere with a member's right to file a complaint, as permitted by Section 121.4501(8)(g), F.S. and discussed in Rule 19-11.005, F.A.C.

Rule 19-11.007(4), F.A.C.

11. Under the rule, Petitioner had until the time the present value of her Pension Plan benefit was transferred to her Investment Plan account to rescind her second election. Having failed to make such a request before this deadline, her request is now time-barred.

12. Petitioner maintains that she was not adequately informed as between the FRS Pension Plan and the FRS Investment Plan, and that she would not have used her second election to join the Investment Plan had she known the Pension Plan would have given her the better retirement benefit. Respondent's Exhibit R-2 shows that Petitioner was given a comparison between the FRS Pension Plan and the FRS Investment Plan. During a call with the MyFRS

Financial Guidance Line on January 11, 2007, Petitioner was informed that the Pension Plan would be the better benefit for her.

13. Petitioner has presented no materials that demonstrate the presumption in Section 121.4501(8)(g), Florida Statutes does not apply. That section 121.4501(8)(g), states:

[i]t is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member and with the member's full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.

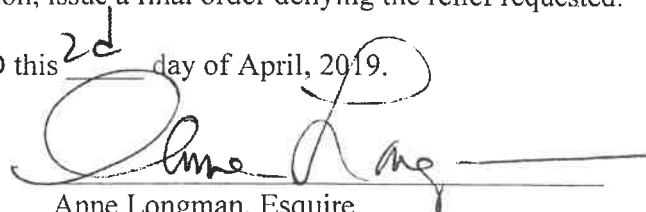
14. Because Petitioner was transferred to the Investment Plan more than five years ago (in 2010) this action is presumed to have been taken at her request as a matter of law. In addition, Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof in this case. See, e.g., Balino v. Dep't of HRS, 348 So. 2d 349(Fla. 1st DCA 1977); see also 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).

15. It is unfortunate that Petitioner is not now in the retirement plan that she would prefer, but she has shown no factual entitlement to the relief she has requested under the applicable law.

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 2^d day of April, 2019.



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
Mini.watson@sbafla.com
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
Liz.stevens@sbafla.com
(850)488-4406

COPIES FURNISHED via mail and electronic mail to:

Melody Moore



Petitioner

and via electronic mail only to:

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
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Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent