

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MARIN CROWE,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2017-0282
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On March 14, 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, Marin Crowe, 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 29, 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 claimed that she was placed in the FRS Investment Plan in 2009 without her consent. She admitted to having received quarterly statements for eight years setting forth her

Investment Plan holdings, but claimed that she never opened the statements. Petitioner could not produce any evidence that the 2009 FRS Investment Plan election was made without her knowledge or 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 4th day of April, 2018, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

Joan B. Haseman

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.

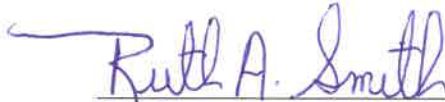


Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

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

 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 4th 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

MARIN CROWE,

Petitioner,

vs.

CASE NO. 2017-0282

STATE BOARD OF ADMINISTRATION,

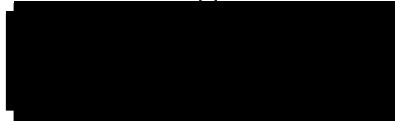
Respondent.

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 18, 2018, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Marin Crowe, pro se



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 is properly in the Florida Retirement System (FRS) Investment Plan and if so, can use her second election to switch to the FRS Pension Plan without having to pay the "buy in" amount as required by statute.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-8 were admitted into evidence, noting Petitioner's objection that online plan elections should not have been permitted.

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 Broward County School Board, an FRS-covered agency, on July 1, 2008.
2. Petitioner had a deadline of January 30, 2009 to make an initial election of membership in either the defined contribution Investment Plan or the defined benefit Pension Plan. Petitioner made her election through the MyFRS.com website, selecting enrollment in the Investment Plan, on January 20, 2009, establishing a February 1, 2009 effective date.
3. Petitioner filed a Request for Intervention on August 25, 2017 requesting that she be put back into the Pension Plan, as she "did not authorize moving from the Pension Plan to the Investment Plan." Petitioner stated she was switched into the Investment Plan in 2009 without her consent.

4. Petitioner admits having received quarterly statements showing her Investment Plan holdings and balance for the eight years spanning 2009-2017, but asserts she never opened them.

5. On June 16, 2014, Petitioner called the MyFRS Financial Guidance Line and asked for a copy of the quarterly statement that would show her balance in order to secure a mortgage she sought. Investment Plan members' quarterly statements show a balance as opposed to Pension Plan members who do not have a "balance."

6. At some point in 2017, Petitioner realized that she was in fact a member of the FRS Investment Plan, and that while she may still use her second election to switch to the Pension Plan, she will have to pay the buy-in amount calculated pursuant to section 121.4501(4)(g) in order to do so. Petitioner asserts that she was placed in the Investment Plan in 2009 without her consent. During hearing she stated that the plan choice decision was too important to have been allowable by an online election, and that Respondent's information produced during its investigation was insufficient to show that she had made the 2009 Investment Plan election.

7. Respondent informed Petitioner that it had confirmed that she did choose the Investment Plan and had no statutory authority to waive the buy-in provision and therefore could not grant her request.

8. On October 9, 2017 Petitioner filed a Petition for Hearing requesting that she be placed back into the Pension Plan without any cost to her as she "did not elect for the Investment Plan." This administrative proceeding followed.

CONCLUSIONS OF LAW

9. Movement between the two FRS plans 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. 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. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. The division must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

...

§ 121.4501(4)(g), Fla.Stat. (2014)(emphasis added).

10. At the time Petitioner made her election to join the Investment Plan, she had access to several educational resources including the Plan Choice Kit, toll-free MyFRS Financial Guidance Line and the MyFRS.com website, and the FRS Investment Plan Summary Plan Description.

11. These educational resources inform members that they have a one-time opportunity to switch from the Investment Plan to the Pension Plan, but that they must buy-in to the Pension Plan with the money in their Investment Plan account, and that if the buy-in cost exceeds the value of their Investment Plan account, they must make up the difference with other financial resources in order to complete the transaction.

12. The records of Respondent demonstrate that the action complained of, Petitioner being placed in the Investment Plan, occurred more than five years prior to when Petitioner's complaint here was submitted. Pursuant to Section 121.4501 (8)(g), Florida Statutes, the Respondent's action is presumed to have been taken at Petitioner's request and with her full knowledge and consent. That section states:

(g) The state board shall receive and resolve member complaints against the program, the third-party administrator, or any program vendor or provider; shall resolve any conflict between the third-party administrator and an approved provider if such conflict threatens the implementation or administration of the program or the quality of services to employees; and may resolve any other conflicts. The third-party administrator shall retain all member records for at least 5 years for use in resolving any member conflicts. **The state board, the third-party administrator, or a provider is not required to produce documentation or an audio recording to justify action taken with regard to a member if the action occurred 5 or more years before the complaint is submitted to the state board. It 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.**

§ 121.4501(8)(g), Fla.Stat.

13. Petitioner has not come forward with any documentary evidence or audio recording demonstrating that the action taken by Respondent in 2009 was taken without her knowledge and consent. Rather, all of the documentary evidence, including eight years' worth of quarterly statements from the Investment Plan, demonstrates that Petitioner elected the Investment Plan, knew she was in the Investment Plan, and never took timely action to switch or undo her election. As such, Petitioner was and still is correctly placed in the Investment Plan.

14. There is no statutory provision authorizing a switch from the Investment Plan to the Pension Plan without using a second election and paying the buy in amount. If Petitioner chooses to utilize her second election to switch to the FRS Pension Plan, she must do so in accordance with the statutory requirement that she pay the buy in amount associated with that switch, as it is Petitioner who carries the burden to demonstrate compliance with all applicable statutory requirements before being granted the relief requested. 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).

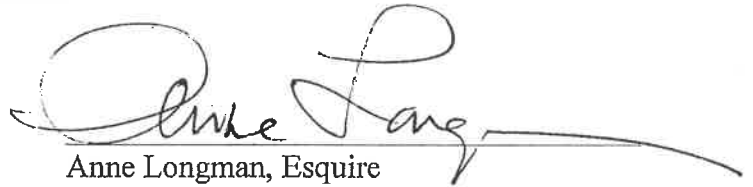
15. Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla. Div. Admin. Hrgs.). Respondent's construction and application of Chapter 121 are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See 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 DCA 1998).

16. Accordingly, Respondent does not have the authority to waive the statutorily-mandated Pension Plan buy in, and therefore cannot grant the relief requested in the Petition for Hearing.

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 14th 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
nell.bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Marin Crowe



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

Counsel for Respondent