

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

DENISE WHITEHURST,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2021-0014
	)	
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
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**FINAL ORDER**

On May 13, 2021, 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, Denise Whitehurst, and upon counsel for the Respondent. Neither party filed exceptions to the Recommended Order which were due on May 28, 2021. 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 granted a “third election,” so that she can transfer from the Florida Retirement System (FRS) Investment Plan to the FRS Hybrid Option, after already having filed a second election in 2007 to transfer from the FRS Pension Plan to

the FRS Investment Plan, hereby is denied. By law, an FRS member has only one opportunity to switch retirement plans after the member's initial plan election period expires.

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 17<sup>th</sup> day of June 2021, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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**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 Denise Whitehurst, *pro se*, both by email transmission to [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. ([dminnis@ausley.com](mailto:dminnis@ausley.com)) and Ruth Vafek ([rvafek@ausley.com](mailto:rvafek@ausley.com)) and [jmcvaney@ausley.com](mailto:jmcvaney@ausley.com), Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 17<sup>th</sup> day of June, 2021.



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**

DENISE WHITEHURST,

Petitioner,

vs.

Case No.: 2021-0014

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, on March 23, 2021, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

**APPEARANCES**

For Petitioner: Denise Whitehurst, *pro se*



For Respondent: Deborah S. Minnis  
Ausley & McMullen, P.A.  
Post Office Box 391  
Tallahassee, Florida 32302

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner may be switched from the Florida Retirement System (FRS) Investment Plan to the FRS Hybrid Option despite having already utilized her one-time second election as provided by statute.

## **PRELIMINARY STATEMENT**

Petitioner testified on her own behalf and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance.

A transcript of the hearing was made, filed with the agency, and provided to the parties on April 5, 2021. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based on my consideration of the complete record in this case and all materials submitted by the parties.

## **UNDISPUTED MATERIAL FACTS**

1. Petitioner began employment with the Department of Children and Families, an FRS-participating employer, on January 28, 2005. She had until July 29, 2005 to make an initial election between the defined benefit Pension Plan and defined contribution Investment Plan.

2. On April 5, 2005, prior to the expiration of her choice period, Petitioner contacted the My FRS Financial Guidance Line and spoke with a representative from Ernst & Young (EY). She was aware that her choice period would expire on July 29, as confirmed by the EY representative.

3. During the call, the EY representative also advised Petitioner that she would have a one-time opportunity to switch plans, and explained the different plans available to her.

4. There is no record of the SBA Plan Choice Administrator receiving an election from Petitioner by the established deadline date, as Petitioner did not submit an election form within the required period. Pursuant to Section 121.4501 (4)(a)1, Florida Statutes, Petitioner was deemed to have elected to default into the Pension Plan effective August 1, 2005.

5. Almost two years later, on July 13, 2007, Petitioner called the MyFRS Financial Guidance Line again and spoke with an EY representative. During this conversation, the EY Representative guided Petitioner through completing a second election form.

6. On this same date, Petitioner executed a 2<sup>nd</sup> Election Retirement Plan Enrollment Form choosing to change from the Pension Plan to the Investment Plan. Petitioner was on notice that she was exercising her second election. In Section 1, above the box she checked indicating her selection, the form reads **“I am exercising my one-time 2<sup>nd</sup> Election to: ....”** Under section 4 of the form, Petitioner was cautioned to read the bolded information which stated, **“I understand that my one-time 2<sup>nd</sup> Election is irrevocable and that I must remain in the plan I chose in Section I until my FRS-covered employment ends and I retire.”** On July 18, 2007, the Plan Choice Administrator received and processed Petitioner’s 2nd Election Retirement Plan Enrollment Form, Form ELE-2, electing to change from the Pension Plan to the Investment Plan. A Second Election Plan Choice Confirmation Statement was sent to Petitioner confirming an effective date in the Investment Plan of August 1, 2007. This statement again advised that she would have to remain in the FRS Investment Plan until her retirement from covered employment.

7. Petitioner’s second election became final and irrevocable at 4:00 PM (Eastern) on July 18, 2007. Pursuant to Chapter 19-11.007, Florida Administrative Code, Petitioner could have rescinded her election by notifying FRS by August 31, 2007. Respondent has no record of Petitioner notifying the FRS of any request to rescind her second election, nor does Petitioner assert that she tried to use the grace period to rescind her second election.

8. On August 31, 2007, the present value of Petitioner’s Pension Plan benefit was transferred to her Investment Plan account.

## CONCLUSIONS OF LAW

9. Section 121.4501(4)(a)1, Florida Statutes, provides that if an employee fails to make an election to participate in the Investment Plan within the five-month period following the month of hire, he or she is deemed to have elected to remain in the Pension Plan. Once an employee has defaulted into the Pension Plan, the only option available to participate in the Investment Plan is to exercise the Second Election under section 121.4501(4)(f), Florida Statutes.

10. Paragraph (f) of that section, in pertinent portion, provides as follows:

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. ...

(Emphasis added).

11. All record evidence and testimony demonstrate that Petitioner knew and had adequate notice of her choice period deadline, did not exercise an initial election, and therefore was defaulted into the Pension Plan.

12. As provided in the above statute, members of the FRS have one opportunity to switch plans after their initial election period expires. Petitioner used her one-time second election in 2007 to move to the Investment Plan and has exhausted her only opportunity to move between plans.

13. Petitioner cannot rescind her second election as she did not 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 considered 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. (emphasis added).

14. Under the rule, Petitioner had until the time the present value of her Pension Plan benefit was transferred to her Investment Plan account, August 31, 2007, to rescind her second election.



15. Pursuant to Section 121.4501(8)(g), Florida Statutes, Respondent's actions are presumed to have been taken at Petitioner's request and with her full knowledge and consent.

This 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 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. (emphasis added).

16. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency "is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction").

17. Petitioner has stated that all facts recited by Respondent SBA are correct, but believes that her employer's human resources personnel never gave her adequate information about her first election. It also appears that she was not clear about the difference between a deferred compensation plan and the available FRS retirement plans, but there is no record indication that she was given erroneous information by the SBA or its third party contractors. It

is unfortunate that she is not now in the plan that she would prefer, but Respondent has no statutory authority to permit another election at this point.

### **RECOMMENDATION**

Having considered the law and undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying Petitioner's request for relief.

DATED this 13th day of May 2021.

s/ Anne Longman  
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  
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