

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

AMANDA FERREIRA,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1404
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On July 10, 2009, the presiding officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Amanda Ferreira, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on July 27, 2009. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

ORDERED

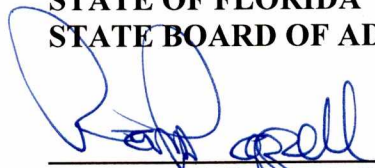
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that the State Board of Administration honor Petitioner's second election request to enroll in the Investment Plan is denied.

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 200, 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 5th day of August, 2009, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



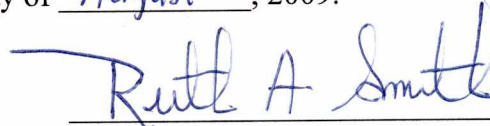
Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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.


Clerk TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to [REDACTED] and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 5th day of August, 2009.



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

AMANDA FERREIRA,

Petitioner,

vs.

CASE NO. 2008-1404

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on March 9, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

[REDACTED]

For Respondent:

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether Respondent State Board of Administration (SBA) should honor Petitioner's second election request to enroll in the Investment Plan.

PRELIMINARY STATEMENT

Petitioner filed a Request for Intervention dated December 12, 2008 asking that her attempt to transfer into the Investment Plan be honored. Petitioner's request was investigated and denied by Respondent by letter of December 24, 2008. She then filed the Petition which resulted in this informal hearing.

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management and Compliance for the State Board of Administration. Respondent's Exhibits R-1 through R-9 were admitted into evidence without objection. Respondent's Exhibit R-10 was offered in evidence and is hereby admitted over Petitioner's objection, but is not relied on as a basis for this recommendation. Petitioner's Composite Exhibits P-1 and P-2 were received post-hearing without objection.

A transcript of the informal hearing was filed with the agency and made available to the parties, who were invited to submit proposed recommended orders. Respondent submitted a proposed recommended order; Petitioner made no further submittals.

UNDISPUTED MATERIAL FACTS

1. Petitioner was employed by the Florida Department of Corrections (FDOC).
2. Petitioner defaulted into the FRS Pension Plan in 2002.
3. Petitioner was terminated from employment with the Florida Department of Corrections by letter dated October 9, 2008 effective beginning on October 10, 2008.
4. Petitioner Ferreira testified that the last day she actively performed work for the

FDOC was October 10, 2008.

5. Petitioner also testified, however, that she believed she was earning service credit past October 10, 2008, because she was “employed but not at work.” She stopped going to work after October 10, 2008 and, in her understanding, was taking sick leave in the following days. During this period, she was not at work to receive notice of her termination, and she stated she first heard of her termination from a fellow employee six or seven days later. Petitioner asserts that she was still actively employed during that time because she received paychecks for periods of time after October 10, 2008.

6. At hearing, Petitioner advised that she had documents which would show that she was employed by the FDOC until at least October 24, 2008. She was invited to submit these after the hearing.

7. Post-hearing, Petitioner submitted to counsel for Respondent her termination letter, which was filed with Respondent's Agency Clerk and denominated Petitioner's Exhibit 1. That document is dated October 9, 2008. It bears a stamp showing hand delivery and signature by Petitioner at 3:58pm on October 10, 2008, with two witness signatures.

8. Petitioner also submitted to counsel for Respondent three of her FDOC Employee Earnings Statements and one document titled Employee YTD Balances. Those documents were filed with Respondent's Agency Clerk and denominated Petitioner's Composite Exhibit 2. They reflect pay dates of October 24, 2008 for the pay period October 3, 2008 – October 16, 2008, for regular wages, annual leave and uniform allowances, but do not show that work was performed by Petitioner on any specific date, or that the payments correlate to any specific days during that two week period. The year to date balances statement reflects that her last warrant date was

December 2, 2008, but does not show the amount of that warrant or what it was for.

9. Petitioner called the MyFRS Financial Guidance Line on October 15, 2008 requesting information about moving from the FRS Pension Plan to the FRS Investment Plan.

10. Petitioner submitted a 2nd Election Retirement Enrollment Form to the Respondent's third party administrator on October 15, 2008.

11. Petitioner testified that she had previously submitted second elections to the Respondent's third party administrator by facsimile on September 2, 2008 and again on October 6, 2008, but she was unable to provide a fax confirmation sheet for either of those fax transmissions, and Respondent and its third party administrators have no record of these faxes.

12. Petitioner also testified that the second election form that was faxed to the Respondent's third party administrator on October 15, 2008 bears an October 6, 2008 date because she back-dated it.

13. In addition to having no record of any pre-October 15, 2008 attempts by Petitioner to file a second election, Respondent has no record of any telephone call between the Petitioner and the MyFRS Financial Guidance Line before the October 15, 2008.

14. In her October 15, 2008 call to the MyFRS Financial Guidance line, Petitioner makes no mention of having previously attempted to file second election forms; she states she wants to roll her retirement into the Investment Plan and receives help over the phone with locating the proper form on the internet and obtaining the number to fax it to. In a call the next day, October 16, 2008, she does state that she had previously faxed the form, and had to re-fax it on October 15, 2008, and that her last day of employment would be the next day, October 17, 2008.

CONCLUSIONS OF LAW

15. Section 121.4501(4)(e), Florida Statutes states:

(e) After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, 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 defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. Eligible **employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship** consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be 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 that the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator.** This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

§ 121.4501(4)(e), Fla.Stat. (2008)(emphasis added).

16. Pursuant to Rule 19-11.007(3)(d), Florida Administrative Code, Respondent also requires that the second election form “must be received and processed by the FRS Plan Choice Administrator before employment is terminated.”

17. Petitioner's second election form was filed with the Respondent's third party administrator on October 15, 2008. Her employer has reported that she was terminated from employment effective October 10, 2008, she confirms that that was her last day of active work with FDOC and she has submitted nothing, either before or after hearing, which contradicts that termination date.

18. The above statute requires Petitioner to have been earning service credit at the time she filed her second election form and when it was received, and the cited rule implements that statute by specifying that an employee cannot earn service credit after employment is terminated.

19. Petitioner may have sincerely believed that she was still eligible to file her second election after her termination date because she thought she was still taking sick leave on the day she filed her form, or because she received pay checks after her termination date. But once she was terminated, she could no longer be earning service credit, consistent with Respondent's interpretation and implementation of Section 212.4501(4)(e), Florida Statutes.

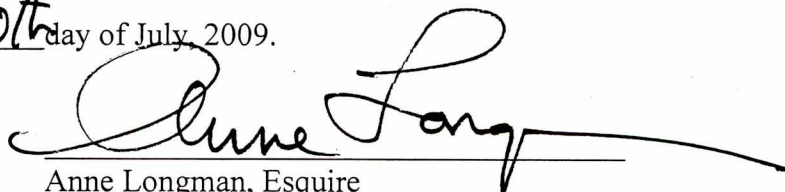
20. Respondent is not authorized to depart from the requirements of the statutes governing the Investment Plan when exercising its jurisdiction. See, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), Final Order No.: DMS-05-009 (Dept.Mgmt.Svs. April 4, 2005).

21. There is no dispute that FDOC terminated Petitioner effective October 10, 2008 and that her second election form was received on October 15, 2008, after she was no longer actively working. Her October 15, 2008 second election is therefore invalid.

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 10th day of July, 2009.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

NOTICE: 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, which 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 with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 10th day of July, 2009.

Copies furnished to:



Petitioner

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent



Attorney