

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

JANE DYE,

Petitioner,

CASE NO. 2003-111

vs.

**STATE BOARD OF ADMINISTRATION
OF FLORIDA,**

Respondent.

FINAL ORDER

A Recommended Order was submitted to the State Board of Administration of Florida ("SBA") in this proceeding by the duly designated presiding officer, Inspector General of the SBA, Bruce Meeks. Copies of the Recommended Order were served upon the Petitioner, who appeared pro se, and counsel for the Respondent SBA. Both Petitioner and Respondent waived the statutory time period for the entry of the Final Order. The Petitioner filed lengthy Exceptions to the Recommended Order, and the Respondent filed Responses to the Petitioner's Exceptions. The Petitioner filed Responses to Respondent's Responses. This matter is now before the Senior Investment Officer for the Defined Contribution Programs for final agency action as provided by Section 120.569(2)(1), Florida Statutes.

BACKGROUND

In April, 2003, the Petitioner, then a member of the Florida Retirement System Investment Plan ("Investment Plan"), decided that her previous decision to transfer into the Investment Plan was a mistake, and that she wanted to exercise her second election option, as provided for in Section 121.4501(4)(e), Florida Statutes, to transfer back and rejoin the Florida Retirement System Pension Plan ("Pension Plan"). After several telephone conversations with SBA staff and outside consultants of the SBA on how to accomplish the second election transfer, Petitioner did not effect the transfer until May 1, 2003, not the end of April as she had desired, which she alleged cost her an additional \$ [REDACTED] in buyback costs. Petitioner filed a Complaint Petition with the SBA on April 16, 2003. She was informed of her right to a hearing by letter mailed on April 24, 2003. A joint Pre-hearing Statement of Facts and Issues was filed by the parties on August 8, 2003, and a hearing was held on August 22, 2003.

The Recommended Order was entered on April 15, 2004. The presiding officer concluded in the Recommended Order that Respondent SBA's educational process was not in non-compliance with Florida and federal law, and that Petitioner's request for relief from the \$ [REDACTED] additional expense for transferring back into the Pension Plan with an effective date of

June 1, 2003, and not May 1, as she alleged she could have done but for the acts of the SBA staff and consultants, be denied.

**RULINGS ON THE PETITIONER'S
EXCEPTIONS TO THE RECOMMENDED ORDER**

ISSUE NUMBER ONE:

Petitioner filed 61 Exceptions to the Recommended Order. Exception Numbers 1 through 49 follow what Petitioner designates as Issue Number 1, "Whether the information provided during the Choice Period in connection with the calculation of the buyback (i.e., the amount necessary for a former member of the defined benefit program who transferred into the Investment Plan and then chose to use his or her second election to return to the Pension Plan) was adequate to provide for an informed decision." As a state employee, the Petitioner's Choice Period was June 1 through August 31, 2002.

The argument Petitioner advances in these Exceptions is that the cost of the buyback for participants wishing to exercise the "second election" option provided for by Section 121.4501(4)(e), Florida Statutes, was never fully explained as part of the statutorily required education component of the Investment Plan. She argued that the buyback costs to return to the Pension Plan were so high that they have a greater impact on the plan choices than the annual fees or average performance of investment options in specific cases and that it "...was the State's obligation and Respondent's responsibility to provide such full disclosure during the decision-making process." Paragraph 8 of Petitioner's Exceptions.

Petitioner mischaracterizes the adequacy of information available on the second election during her initial choice period. The second election was described in the choice kit materials mailed to the Petitioner's home (e.g., Choice Book pages 12 and 20) prior to the Petitioner's choice period. The website www.MyFRS.com contained the Choice Service—a personalized interactive online tool for projecting benefits under the FRS plans—and generic information on second election (e.g., FAQ's and the Summary Plan Description for the Investment Plan). The Choice Book indicated that the "Choice Service on MyFRS.com can help you figure out your buy-back amount" (page 12). Ernst & Young financial planners were available for free to run the Choice Service for the Petitioner and explain FRS benefit projections in numerous scenarios. The financial planners' availability was announced in home mailings to the Petitioner (e.g., choice kit and multiple reminder letters) and communications to FRS participating employers.

Petitioner further mischaracterizes the educational responsibilities of the Respondent, as set forth by the Legislature in Section 121.4501(10)(c), Florida Statutes. Respondent did not have an obligation to proactively and comprehensively deliver information to the Petitioner describing all possible factors impacting the cost of a buyback in every possible scenario that Petitioner might find herself in. Rather, the Respondent provided personalized financial planning resources that could be used at the Petitioner's initiative to explore various scenarios and learn about the factors influencing possible FRS benefit outcomes in the designated scenarios. The Petitioner did not avail herself of all of the resources provided by the Respondent prior to electing to join the Investment Plan.

Additionally, at the time of her initial election, the Petitioner's decision-making process in considering whether to become a member of the Investment Plan was unrelated to the buyback cost in exercising the second election to leave the Investment Plan and return to the Pension Plan. She stated in a telephone conversation, received into evidence as Exhibit 13, that she was planning to leave state government and that was the reason she then chose to join the Investment Plan. For reasons that are not disclosed in the transcript of the hearing, or the record, the Petitioner later changed her mind and decided to stay in her job. When she later concluded that it had been a mistake to leave the Pension Plan, she then inquired and learned that the cost to her to exercise the "second election" to return to the Pension Plan would be approximately \$ [REDACTED], over the value of the funds invested in her Investment Plan Account. TR 69

To now argue that she should have been provided "such full disclosure" of the factors on which the cost of the buyback of the second election are calculated, as part of her decision-making process in her initial election decision (on whether to leave the Pension Plan to join the Investment Plan), fails in the light of logic. Contrary to the Petitioner's argument, the cost factors associated with reversing a decision to join the Investment Plan would not reasonably form a material basis for an FRS plan election, when an employee has already decided to leave state government employment. The option to return to the Pension Plan would not even be available to an ex-government employee, unless she returned to FRS-covered employment at some time in the future. As indicated above, the information was available, at the request of Petitioner, but Petitioner never made such request during her initial choice period.

Finally, the out-of-pocket expense for the Petitioner, to exercise the second election option is simply a cost as required by the Legislature, of re-joining the Pension Plan. Had Petitioner's investments while a member of the Investment Plan earned a greater return, there would have been no out-of-pocket costs to the Petitioner for her second election. In fact, of the 79 individuals who have returned to the Pension Plan, 51 had a surplus in their Investment Plan account, so they had money remaining in their Investment Plan account after rejoining the Pension Plan. TR 49

At the time of her first election decision, it would have been impossible for the Petitioner to predict the size of any out-of-pocket buyback cost for the second election, even had she availed herself of the educational resources that could have helped her understand the cost of the buyback. The final cost, including any out-of-pocket expenses to the Petitioner, depends on the value of her Investment Plan account at some point in the future.

Petitioner's Exceptions Numbers 1 through 49 are denied.

ISSUE NUMBER 2:

Petitioner's Exception Numbers 50 through 55 address Issue Number 2: Whether Respondent's failure to timely provide notification of the decision on the Complaint Petition directly resulted in increasing the buyback amount.

Petitioner's Exception Number 50:

Petitioner's Exception Number 50 challenges the Recommended Order's Finding of Fact Number 23 that the Respondent's mailing of the agency action letter on April 24, 2003, to Respondent's home address complied with the promise to Petitioner that a response would be sent to her no later than April 25, 2003. The Respondent's promise that a response would be sent no later than April 25, 2003, was met by mailing the response on April 24th. Mr. Kelleher testified at the hearing that normal procedure is to tell a complainant the date a response would go out (TR 77-78). Accordingly, Exception Number 50 is denied.

Petitioner's Exception Number 51:

Petitioner's Exception Number 51 challenges Finding of Fact Number 26 as being misleading. Petitioner contends that Respondent witness Walter Kelleher neglected to do his job by not returning her telephone call April 25, 2003 until May 1, 2003.

While Mr. Kelleher did not call the Petitioner until May 1, 2003, he had already contacted the Division of Retirement to provide the Petitioner with a calculation of the buyback amount, and that letter had been sent to her on April 10, 2003. That letter, as Mr. Kelleher knew, instructed the Petitioner to contact the FRS Investment Plan Administrator, at a toll free telephone number.

Mr. Kelleher discharged his job responsibilities in a timely manner with respect to the Petitioner.

Petitioner's own inactivity delayed her second election option, and the transcript of hearing contains substantive evidence that Mr. Kelleher was timely in his dealings with the Petitioner. TR77-94 Petitioner's Exception Number 51 is denied.

Petitioner's Exception Number 52:

Petitioner's Exception Number 52 challenges the Finding of Fact Number 28 as being unsupported by substantial evidence. Respondent's mailing of a response to Petitioner's home by April 25, 2003, was accomplished by midnight on April 24, 2003. TR 78. Petitioner's contention that Mr. Kelleher's failure to call her back until May 1, 2003, caused the increase in her buyback amount has been addressed in Petitioner's Exception Number 51. Accordingly, Exception Number 52 is denied.

Petitioner's Exception Numbers 53 and 54:

Petitioner's Exception Number 53 challenges case law Conclusion Number 78 of the Recommended Order as prejudicial and irrelevant. For the reasons set forth in denying Petitioner's Exception 52, Exceptions 53 and 54 are denied.

Petitioner's Exception Number 55:

Petitioner's Exception Number 55 challenges case law Conclusion Number 83 of the Recommended Order as misleading. Petitioner again challenges Mr. Kelleher's failure to return her telephone call until May 1, 2003, as the reason her second election choice was not effective until June 1, 2003, which resulted in an increase of \$[REDACTED] in the buyback amount. Unfortunately, Petitioner did not attempt to contact anyone else at the Respondent, or any of the education providers who were readily able to answer Petitioner's questions. For the reasons set forth in Petitioner's Exception Number 51, Petitioner's Exception Number 55 is denied.

ISSUE NUMBER 3:

Petitioner's Exceptions Numbers 56 through 61 address her Issue Number 3: Whether Respondent provided sufficient ongoing information to Petitioner to make an informed decision in connection with the effective date of the second election.

Petitioner's Exception Number 56:

Petitioner's Exception Number 56 challenges the Finding of Fact Number 19 as being misleading and unsupported by substantial evidence. Petitioner directs this exception to a typographical error in the letter sent by the State Division of Retirement to the Petitioner on April 10, 2003. While the telephone number was wrong, Petitioner did eventually contact CitiStreet at the correct telephone number. TR 88-89. Further, she had called the correct telephone number several times in the past. Petitioner's Exception Number 56 is denied.

Petitioner's Exception Number 57:

Petitioner's Exception Number 57 challenges the Finding of Fact Number 20 as being misleading. Petitioner claimed that she could, not would, as the Hearing Officer's Recommended Order states, contact Mr. Kelleher at the e-mail address on the complaint form. While Respondent's e-mail system malfunctioned and an e-mail Petitioner sent on April 17, 2003, was not received (see Pre-hearing Statement of Facts and Issues), Finding of Fact Number 20, nevertheless, is supported by substantial evidence in the record. Accordingly, Petitioner's Exception Number 57 is denied.

Petitioner's Exception Number 58:

Petitioner's Exception Number 58 challenges Finding of Fact Number 21 and case law Conclusion Number 84 as being prejudicial and misleading. Finding of Fact Number 21 sets forth, verbatim, the entire transcript of a telephone conversation between the Petitioner and a representative of CitiStreet. TR 89-92 Petitioner alleges she received incorrect information concerning the effective date of the second election option. Petitioner was told the buyback would be effective, once CitiStreet was informed of the buyback amount, the same day. Petitioner knew her buyback amount while on that telephone call and could have told the CitiStreet representative of the buyback amount at that time. She was not provided with incorrect information. Exception Number 58 is denied.

Petitioner's Exception Number 59:

Petitioner's Exception Number 59 challenges the last sentence of the Finding of Fact Number 22 as being unsupported by substantial evidence. The last sentence of Finding of Fact Number 22 is valid speculation by the Hearing Officer, that the CitiStreet representative could have assisted the Petitioner better on the telephone, had he been informed of the buyback amount which was already known by the Petitioner. The Hearing Officer listened to a tape of the telephone conversation, and could assess the tenor of the conversation and level of communication between the participants. TR 89-92 Exception Number 59 is denied.

Petitioner's Exception Number 60:

Petitioner's Exception Number 60 challenges Finding of Fact Number 30 as being unsupported by substantial evidence. Finding of Fact Number 30 is supported by the transcript and record in this case. Accordingly, Exception Number 60 is denied.

Petitioner's Exception Number 61:

Petitioner's Exception Number 61 challenges case law Conclusion Numbers 84 and 85 as being unsupported by substantial evidence. Despite her refusal to see the totality of the facts in this case, Petitioner had access to all relevant information needed to effect her second election option, and make it effective earlier than May 1, 2003, thereby saving herself \$[REDACTED]—a cost increase that resulted because the State Division of Retirement had to recalculate her buyback amount for an effective date of June 1, 2003. The transcript and record are replete with all of the different methods of obtaining information available to the Petitioner. That she failed to avail herself of those answers is not the fault, nor the responsibility, of the Respondent. Exception Number 61 is denied.

RULING ON PETITIONER'S RESPONSES TO RESPONDENT'S RESPONSES

Petitioner's Responses To Respondent's Responses were not considered because neither Chapter 120, Florida Statutes, nor Rule Chapter 28-106, Florida Administrative Code, permits such filings.

CONCLUSION

Petitioner Dye's failure to accomplish her second election option to leave the FRS Investment Plan and return to membership in the FRS Pension Plan prior to the May 1, 2003, effective date is unfortunate. The additional buyback expense of \$[REDACTED], could have been saved by the Petitioner, had she availed herself of the information readily available to her. Her protestations that the factors making up the calculation of the buy back amount were not available to her at the time she elected to become a member of the FRS Investment Plan are unpersuasive. She freely elected to exercise her option to join the FRS Investment Plan because as she admitted, she was leaving her job with the state. Circumstances changed between August,

2002, and April, 2003, and she did not leave her state position. The buyback amount for her second election option could not be determined until she had made up her mind on a transfer date. Delivering comprehensive personalized information, in the absence of a request from the Respondent, on buyback calculations prior to when she entered the FRS Investment Plan was not the responsibility of the education program put in place by the Respondent to assist employees statewide on their decision whether or not to join the FRS Investment Plan. Petitioner's claims to the contrary are rejected.

IT IS THEREFORE, ORDERED:

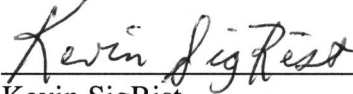
A. The attached Findings of Fact of the Recommended Order are hereby adopted and incorporated by reference herein.

B. The Conclusions of Law of the attached Recommended Order are hereby adopted and incorporated by reference herein.

C. Jane Dye's transfer date for exercising her second election option to transfer back into the FRS Pension Plan is June 1, 2003, and her buyback amount is affirmed as calculated by the Division of Retirement as of that date.

DONE AND ORDERED this 27th day of January, 2005, in Tallahassee, Leon County, Florida.

**STATE BOARD OF ADMINISTRATION OF
FLORIDA**




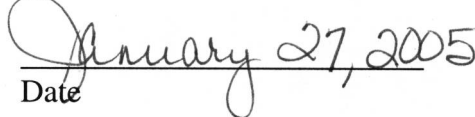
Kevin SigRist
Senior Investment Officer, Office of Defined Contribution
Programs
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308

REST OF PAGE INTENTIONALLY LEFT BLANK

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by filing 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, 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 this Final Order is filed with the Clerk of the State Board of Administration.

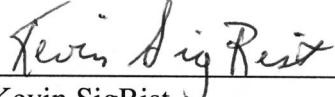
**FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.**


Clerk JANICE S. (TINA) JANOS


Date

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by U.S. Mail to: Jane R. Dye, pro se, [REDACTED] this 27th day of January, 2005.

**STATE BOARD OF ADMINISTRATION OF
FLORIDA**


Kevin SigRist
Senior Investment Officer, Office of Defined
Contribution Programs
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION
OFFICE OF INSPECTOR GENERAL

JANE DYE)
)
 Petitioner,)
)
 vs.) CASE NO.: 2003-111
)
)
 STATE BOARD OF ADMINISTRATION)
)
 Respondent.)
)
)
 _____)

RECOMMENDED ORDER

Upon due notice, the State Board of Administration, by its duly designated presiding officer, Bruce R. Meeks, convened a substantial interest hearing in the above-styled cause on August 22, 2003, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Jane R. Dye, pro se



For Respondent: Ruth L. Gokel, Esq.
Office of the General Counsel
State Board of Administration
1801 Hermitage Boulevard
Tallahassee, FL 32308

STATEMENT OF THE ISSUES

1. Whether the information provided to employees during the Choice Period was inadequate and did not allow for informed decision-making; especially information related to the calculation of the buy-back amount that would be necessary for a former member of the defined benefit plan (Florida Retirement System [FRS] Pension Plan) who transferred into the defined contribution plan (FRS Investment Plan) during the Choice Period and then subsequently chose to use her second election to return to the defined benefit plan (FRS Pension Plan).

2. Whether Respondent failed to provide or make available sufficient ongoing information, beyond the Choice Period, to allow Petitioner to make an informed decision regarding the effective date of the second election.

3. Whether the timeliness of Respondent's notification of the decision on Petitioner's complaint improperly resulted in increasing Petitioner's buy-back amount at no fault attributable to Petitioner.

PRELIMINARY STATEMENT

Petitioner filed a Complaint Petition with the State Board of Administration (SBA) on April 6, 2003. The SBA investigated the issues raised by the Petitioner and determined that Petitioner's contentions were not supported

by the facts and the remedy requested could not be granted. The SBA's decision was communicated to Petitioner by letter mailed on April 24, 2003, advising her of her right to a hearing. Petitioner filed a request for hearing on May 22, 2003. In a Notice of Proceeding letter, dated June 5, 2003, the SBA clarified its position in response to Petitioner's Hearing Request and advised Petitioner of her opportunity to present either written or oral evidence. Petitioner chose to present oral evidence.

On July 9, 2003, the SBA presiding officer assigned to this cause provided initial pre-hearing instructions. A Notice of Hearing was issued on July 31, 2003, setting August 22, 2003, as the hearing date. The parties filed a joint Pre-hearing Statement of Facts and Issues on August 8, 2003, stipulating to certain facts.

Respondent filed a Motion to Preclude Consideration of the Calculation of the Buy Back Amount on August 11, 2003. Petitioner responded in opposition on August 18, 2003. The presiding officer ruled on the motion on August 21, 2003, and hand delivered a hard copy of his ruling to the parties prior to the beginning of the hearing. He ordered that Respondent's Motion to Preclude Consideration of the Calculation of the Buy Back Amount be granted for lack of subject matter jurisdiction, as the SBA lacked the

authority to make a final decision on the matter. As a result, he also ruled that there would be no testimony or consideration of the issue regarding Petitioner's (proposed) Issue 4.¹

The matter was heard as scheduled on August 22, 2003. At the hearing, Petitioner testified on her own behalf and presented no other testimony. However, Petitioner reiterated her request that the presiding officer listen to her recorded conversations with CitiStreet (the FRS Investment Plan Administrator) and with Ernst & Young (the financial planners hired to provide educational services to FRS members on the MyFRS Financial Guidance Line) in their entirety. Respondent offered the testimony of two employees of the SBA's Office of Defined Contribution Programs: Ron Poppell, Director of Educational Services, and Walter Kelleher, Director of Policy, Risk Management and Compliance. Further, Respondent proffered thirteen² exhibits which were previously identified in the parties' joint statement. The parties' exhibits, as follows, were admitted into evidence.

LIST OF EXHIBITS

Exhibit 1. Retirement Choice Kit sent to the home addresses of all potential participants, consisting of a number of documents.

Exhibit 2. Retirement Choice Workshop notebook, slides shown at workshops.

Exhibit 3. Petitioner's Enrollment Form, executed August 30, 2002.

Exhibit 4. Confirmation letter from FRS Investment Plan Administrator to Petitioner, showing transaction date of September 23, 2002, and stating that the amount would be allocated to the investment option chosen by Petitioner on September 27, 2002, and could be accessed on September 30, 2002, and accompanied by the confirmation brochure and the advisor brochure.

Exhibit 5. Petitioner's Complaint Petition, dated April 6, 2003.

Exhibit 6. Letter from Division of Retirement to Petitioner, dated April 10, 2003.

Exhibit 7. Respondent's response to Complaint Petition, dated April 22, 2003.

Exhibit 8. Respondent's letter to Petitioner, dated May 12, 2003.

Exhibit 9. Petitioner's Hearing Request, received May 22, 2003.

Exhibit 10. Respondent's Notice of Proceeding letter, dated June 5, 2003.

Exhibit 11. Petitioner's response, faxed to Kevin SigRist on June 20, 2003.

Exhibit 12. Petitioner's modified response, faxed to Kevin SigRist, on June 26, 2003.

Exhibit 13. Audiotape and compact disc recordings of Petitioner's conversations with CitiStreet and Ernst & Young, respectively.

Respondent's Exhibits 1 and 2 were not received into evidence, being inconsistent with the best evidence rule codified at Section 90.952, Florida Statutes.

Upon Respondent's request, official recognition was taken of: 1) Chapter 121, Florida Statutes, especially Parts II and III; 2) Rule 19-10, Florida Administrative Code; and 3) Federal ERISA provisions at 29 U.S.C. § 1104(a)(1)(A)-(C), incorporated by reference in Section 121.4501(15), Florida Statutes.

The presiding officer offered an opportunity for the parties to file proposed recommended orders and stated such must be filed by September 12, 2003. Petitioner deferred a decision on whether or not she would submit a proposed recommended order. Respondent stated that a proposed recommended order would be submitted. The presiding officer then set September 26, 2003, as the date for rendition of his Recommended Order, and October 13, 2003, for the submission of exceptions. As required by Section 120.569(2)(1), the final order would be rendered no later than November 21, 2003, 90 days after the conclusion of the hearing. A transcript of the proceeding was ordered.

On August 25, 2003, Petitioner filed a notice with the presiding officer, stating her wish to file a proposed recommended order and requesting an extension of the filing deadline until the latter of 30 days after her return to the United States or 30 days after her receipt of the hearing transcript and recordings. On September 3, 2003,

the presiding officer extended the due date for the proposed recommended orders until October 21, 2003, and ruled that the 90-day final order requirement was thereby waived.

The hearing was transcribed and the transcript was received and filed on September 16, 2003. An electronic version of the transcript was purportedly sent via e-mail to Petitioner on the same day.

On October 5, 2003, Petitioner filed another request for extension with the presiding officer, noting time constraints imposed by her job between October 1, 2003 and January 31, 2003 (sic), and also stating that she had not received a copy of the transcript of the hearing nor did she have a copy of the recorded conversations with the Ernst & Young, or the CitiStreet representatives. The presiding officer directed that SBA staff send Petitioner another copy of the transcript and the recordings, and granted an extension for submission of proposed recommended orders until December 5, 2003.

Respondent and Petitioner filed proposed recommended orders with the presiding officer on December 5, 2003. Said proposals have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the oral, documentary and recorded evidence adduced at the hearing and the entire record compiled herein, including the Parties' Pre-hearing Statement of Facts and Issues filed on August 8, 2003, the following relevant findings of fact are made:

1. Petitioner is a state employee with over 21 years of creditable service, who was an existing employee at the beginning of the retirement choice election period for state employees that began on June 1, 2002, pursuant to Section 121.4501(4)(a)1., Florida Statutes.

2. Respondent is the state entity charged by the Legislature, pursuant to Section 121.4501(1), Florida Statutes, via delegation of authority from its Trustees, to establish and administer the FRS Investment Plan, officially known as the Public Employee Optional Retirement Program.

3. Petitioner is presently employed by the Office of the Auditor General in the Tampa office as a Lead Senior Auditor.

4. Petitioner received the Retirement Choice Kit, sometime before August 15, 2002.

5. Petitioner attended an SBA-sponsored workshop, conducted by a representative of Ernst & Young, on August

13, 2002, at the Hernando County School Board in Brooksville, Florida. Notebooks were available to all participants and slides were shown throughout the presentation. However, Petitioner maintains that she was in attendance for only a portion of the workshop, did not receive a workshop participant's notebook, did not know the notebook was available, and saw no slides shown at the workshop.

6. Records from Financial Engines, an educational services provider of on-line information and guidance for the FRS employees, indicated that Petitioner accessed the web-based Choice Service on August 28, 2002, and ran various scenarios to show projections of future retirement benefits under the FRS Pension Plan and the FRS Investment Plan. In each simulation run by Petitioner, the FRS Pension Plan showed more benefits available to her than the FRS Investment Plan.

7. Petitioner called the toll-free MyFRS Financial Guidance Line and spoke with an Ernst & Young financial planner (EY) on August 29, 2002, which was two days before her deadline to make a retirement plan election. The conversation in its entirety follows:

EY - MyFRS Financial Guidance Line, this is Novarre of Ernst & Young, may I please have your Social Security Number to locate your records?

Dye - XXX-XX-XXXX (SSN omitted here)

EY - OK, can you hold on while I locate your records?

Dye - Sure.

EY - Thank you.

EY - OK and whom am I speaking with?

Dye - Jane Dye.

EY - Ms. Dye, do you have a phone number where you can be reached just in case we get disconnected?

Dye - XXX-XXX-XXXX, and if we get disconnected it's because my battery is low - so if you call back I won't be able to answer it. (Telephone number omitted here)

EY - OK, not a problem. How may I help you today, Ms. Dye?

Dye - OK, uh, I'm pretty sure I'm leaving the FRS system and I won't be returning come November.

EY - OK

Dye - So, I'm pretty sure what I need to do is go into the Investment Plan.

EY - OK

Dye - And, uh, OK my question is once I'm in that and I'm terminated, how often can I switch my investments? Uh, I picked out what I want to start with.

EY - Uh huh.

Dye - And it says all through the literature that you can change your percentages and your mix.

EY - Uh huh.

Dye - And that's daily, if I wish?

EY - Daily if you want, unless it says like on your choice forms, except on particular funds that have an R next to it.

Dye - Yes, I saw that.

EY - Yes, those are the particular funds that might have some slight difficulty transferring out of.

Dye - OK.

EY - Right, but, within a few days you would be able to transfer out of - it's not as liquid as others.

Dye - OK.

EY - Alright.

Dye - OK, and then I just wanted to tell you what I decided on my mix because I want to be conservative.

EY - OK.

Dye - OK - oh gosh - oh yeah - OK - here it is, I wanted to do the FRS balanced fund, the moderate.

EY - OK.

Dye - 25% in that and 25% in the balanced aggressive and then 50% in the TIPS.

EY - OK, now why are you splitting it between the two balanced funds?

Dye - Just because I couldn't choose which one and I wanted to do 50/50, so I thought, well

EY - OK, no, I just wanted to ask because typically it's kind of doubling over on your investments because they basically use similar funds.

Dye - Uh huh.

EY - And it's just covering kind of the same bases, all right, and that's why I wanted to make sure that

Dye - Yeah, I wanted to do 50/50 in balanced funds and TIPS.

EY - OK, that's fine, well the U.S. TIPS is actually a very conservative play, which is a good thing, and the reason why I asked about the allocations in the moderate balanced fund and the aggressive was because typically since they kind of cover a lot of the same bases, you may consider actually going with a heavier weighting in the moderate balanced fund and then choosing an actual specific fund to give you a more aggressive push if you wanted to, because also you mentioned that you wanted more of a conservative portfolio, you may want to consider more towards the moderate and then take a small percentage towards an actual specialized fund.

Dye - OK - special - where is that?

EY - What are the specialty funds?

Dye - Oh, the US Stock Funds.

EY - Stock funds or any of the particular funds like that.

Dye - Yeah - OK, maybe I'll think about that.

EY - OK, so just letting you know off hand.

Dye - OK, and then, huh, let's see, I had to call FRS on my other question - Oh - and like what resources are available for advice after I've terminated?

EY - Actually, you can call the line that you just called.

Dye - You mean for years, this line?

EY - I mean we are hired indefinitely.

Dye - OK.

EY - So?

Dye - As long as the state has this Investment Plan you're going to - I mean, it's going to be covered?

EY - You will have financial planners on the line.

Dye - OK.

EY - OK, so that's pretty much indefinite.

Dye - OK - great.

EY - All right, so you can always give us a call back and we can try to help you with your allocations.

Dye - OK - great.

EY - All right, is there anything else we can do for you Ms. Dye?

Dye - No, No.

EY - All right, yeah, you may just want to give that a bit of thought before you make your actual election.

Dye - I will, OK, I just like the balanced part of it.

EY - No, No, it's a good thing, it's a good thing, I just wanted to show you that there are other strategies out there, that's all.

Dye - OK.

EY - I mean if you still want to go with the same allocations, that's perfectly fine.

Dye - Uh huh.

EY - OK, I just wanted to show you.

Dye - OK, thanks so much.

EY - Your very welcome.

Dye - Bye bye.

EY - Bye bye. (End of call)

8. It can be inferred from the conversation above that Ms. Dye's election to participate in the FRS Investment Plan was predicated on her intention of leaving state employment at some point prior to November 2002. Having already made her plan choice decision when she placed the call, the focus of her questions to the financial planner pertained to the frequency of which she could change her investment choices after she terminated employment and whether financial guidance resources would be available after she terminated employment. While the financial planner did not offer concrete advice, nor was he asked for any, he did ask questions that required Ms. Dye to think about her decision and ultimately advised her to "give that a bit of thought before you make your actual election."

9. Again, on August 30, 2002, Petitioner called the MyFRS Financial Guidance Line and spoke with an Ernst & Young financial planner (EY). Specifically, her questions related to: 1) the annual fees (i.e., expenses) associated with the plan choices (especially whether switching back and forth between funds would result in higher fees), and 2) rates of returns for TIPS (i.e., FRS Select U.S. Treasury Inflation-Protected Securities Index Fund). The

following excerpt is from the conclusion of that telephone call:

Dye - OK, thanks for your help.

EY - You're welcome. Can I ask you for 30 seconds of your time to provide feedback on our services, please?

Dye - Yeah, I've been real happy with it. I've gotten definitive answers. I've called several times; I've been happy with your answers.

* * *

10. Petitioner executed her enrollment form on August 30, 2002, with an effective date of enrollment of September 1, 2002.

11. The FRS Investment Plan Administrator sent Petitioner a statement dated September 23, 2002, confirming the opening of her FRS Investment Plan account and the scheduled transfer of \$ [REDACTED] (which represented the present value of her FRS Pension Plan benefit) to be allocated in TIPS as she directed. The statement reported that the new account would be funded on September 27, 2002, and could be accessed via the Internet or by calling the MyFRS Financial Guidance Line on September 30, 2002.

12. The Division of Retirement (DOR) transferred the present value of Petitioner's accumulated benefit obligation on September 27, 2002, to Petitioner's account in the FRS Investment Plan.

13. Petitioner called the MyFRS Financial Guidance Line on several occasions between August 30, 2002, and April 2, 2003. Generally, the purpose of the calls was to request information and voice complaints. Ms. Dye was frustrated that she could not use "stop losses" with a TIPS index fund; she was disturbed that the specific holdings of funds were not available; she wanted access to monthly and quarterly (i.e., historical) fund performance data that did not exist; and she had concerns about the monthly posting of her employer contributions to her account. Much of Ms. Dye's frustration appeared to be due to her own naiveté and lack of understanding. These calls are only tangentially relevant to the issues in this case.

14. Petitioner called the MyFRS Financial Guidance Line on April 2, 2003, and spoke with an Ernst & Young financial planner. At beginning of the conversation Ms. Dye indicated that her decision to go into the Investment Plan "was evidently the biggest mistake because there's a lot of things I didn't know when I went into it." When asked why she decided to go into the Investment Plan, she responded, "Well, because I, no, I don't know, I don't know why I did. But, if I had known then what I know now, I wouldn't have done it." The crux of the conversation centered on the buy-back amount required to return to the

Pension Plan, and the second election. At that time, Ms. Dye was aware of a buy-back estimate of \$ [REDACTED]. However, Ms. Dye indicated that the buy-back dollar amount was not her major concern; rather, wanting to reserve her second election in the event she needed it later was of primary import. The Ernst & Young financial planner agreed to run some numbers and then call Ms. Dye back. During the return call, on the same day, the financial planner reiterated the significant benefits available with the Pension Plan compared to the Investment Plan - regardless of whether Ms. Dye worked until age 62 or retired immediately. Ms. Dye stated, "The smart thing would have been to stay in the Pension Plan until a month before I was leaving. And now I've lost that option." The financial planner conceded that if Ms. Dye's objective was to terminate with a lump sum payment, then she was correct in her assessment that it "probably would have been the best decision if you wanted to leave with a lump sum." Ms. Dye inquired about being able to rescind or void her election to go into the Investment Plan and be returned to the Pension Plan without using her second election. Not receiving a favorable response, she then asked about procedures for filing a complaint to resolve her dilemma. Just prior to ending the call, she conceded "I did what I wanted to do with the

information I had at the time. And then, you know, I've just learned so much after I made the decision."

15. At hearing, Petitioner testified that she did not recall being given a buy-back estimate during her April 2, 2003, conversations with the Ernst & Young financial planner. In fact, the April 2, 2003, recordings revealed not only that Ms. Dye was provided the buy-back estimate by the financial planner, but she stated that she had accessed the on-line 2nd Election Choice Service prior to calling the MyFRS Financial Guidance Line to determine the cost of returning to the Pension Plan.

16. Petitioner filed an FRS Investment Plan Complaint Petition, dated April 6, 2003, stating the following:

I am an inexperienced investor & needed more information on the funds (e.g., historical charts showing daily prices, company names comprising the funds, fund manager track records). More importantly, I thought the buy back would be the amount of any investment losses because I assumed the employer contribution was similar under both plans.

The remedy sought by Ms. Dye and the steps indicated as taken by her to reach a resolution were stated as, respectively:

Rescind my option for the Investment Plan, buy back the amount of investment losses, retain the one time option to change plans.

* * *

Got research advice from a financial advisor, invested conservatively to minimize any buy back, immediately sought your [Office of Defined Contribution Programs] assistance when I discovered (4/2/03) that contributions were not the same under both plans.

The complaint was assigned #2003-111, which is also the case number assigned to this current cause.

17. Respondent sent a letter dated April 7, 2002 (sic), acknowledging receipt of Petitioner's complaint and indicated that "[a] response will be sent to you no later than April 25, 2003."

18. Petitioner and Witness Walter Kelleher had several telephone conversations between April 7-10, 2003. The issues discussed included: her contention that there was not enough information on the MyFRS.com website; her inquiry regarding a stop-loss feature for funds in the Investment Plan; her statement that she thought the value of her investments in the FRS Investment Plan would always equal the amount to buy back into the FRS Pension Plan if there were no investment losses; her concern that her cost to buy back in the Pension Plan as of May 1, 2003, would be \$ [REDACTED], which was in excess of her account balance in the Investment Plan; and her statement that she had made a huge mistake and didn't understand what she was doing.

19. On April 10, 2003, at the request of Witness Kelleher, the DOR sent a letter to Petitioner, indicating

the estimated cost to transfer back to the FRS Pension Plan based on a transfer date of May 1, 2003. The letter also indicated that the amount was only for that date, noting that the actual amount would be calculated "after the election to transfer to the PP [Pension Plan] is made," that a "different calculation would have to be completed for a different transfer date," and noting further that "[I]f your IP [Investment Plan] account balance is less tha[n] the required cost, you will be responsible for payment of the difference." While the letter also stated that further information could be obtained by calling the toll-free number for the MyFRS Financial Guidance Line, the telephone number provided by the DOR was incorrect by one digit.

20. On April 17, 2003, Petitioner sent an e-mail to Respondent's DefinedContributionPrograms@fsba.state.fl.us address (as listed on the Complaint Petition form) which was not delivered because of a malfunction in Respondent's e-mail system. Petitioner contends that she confirmed with Witness Kelleher that she would maintain contact with him at the specified e-mail address in her attempts to obtain information regarding the buy-back calculation. Respondent did not learn of the system problem and did not repair it until April 21, 2003.

21. On or about April 23, 2003, Petitioner called CitiStreet for information on transferring from the Investment Plan back to the Pension Plan. In pointed and direct fashion, Ms. Dye asked the CitiStreet representative three or four questions. The CitiStreet (CS) representative attempted to describe the transferal process, but was unable to do so as Ms. Dye was adamant about having only her questions answered. The less than two-minute conversation follows in its entirety:

DYE - Yes. All I want is information on transferring to the Pension Plan from the Investment Plan.

CS - Transferring from the -- from investment to pension?

DYE - Uh-huh. Yeah. Just -- just -- is there a form, or what do you do?

CS - Okay. I'll have to get you over to Division of Retirement. That's how the transaction takes place.

DYE - Okay. They just told me that the --

CS - Did they give you the --

DYE - They said for information on the process for transferring your membership to the Pension Plan, you should contact CitiStreet, prompt 4.

CS - Okay. Now, what's going to happen is: first of all, before you even go through the process of transferring, you would need to get a buyback amount.

DYE - Uh-huh.

CS - Have you received that amount from DOR?

DYE - Well, just tell me what the process is.

CS - Once you get the buyback amount from DOR, you call here, and you put in your request to go back into the Pension Plan.

DYE - Okay.

CS - And we'll --

DYE - Is this over the phone?

CS - Yes. We'll send that request up to plan administration, they'll -- they'll -- they'll verify the buyback amount with DOR, and they'll give you a call and tell you what steps to take.

DYE - Okay. Okay. So -- so it's done the same day?

CS - No, it's not done the same day. It'll probably be done over, like, a 72-hour span.

DYE - Okay. I mean, from the -- the -- from the time you get the call -- when you get the call, that there -- you know, that -- that the individual wants to transfer, at that point?

CS - I mean, once we get the -- the buyback amount and we verify it, and then -- we contact you, yes, it'll be done in that day.

DYE - Okay. Okay. Because the -- the -- Okay. Okay. Great. Thanks.

CS - Thanks. You have a good day.

DYE - Uh-huh, bye. (End of call)

Ms. Dye contends that CitiStreet's representative gave her incorrect information when he represented the length of time it takes to process a transfer from the Investment Plan back to the Pension Plan as one day. In actuality, the information was not incorrect, but it was only a part

of the story. A second election is, in fact, final at 4:00 p.m. the day the requisite form is received by CitiStreet. However, enrollment in the new plan does not effectuate until the first day of the month following the month in which the election was made. The same holds true for the point of reference for the buy-back calculation.

22. The conversation between Ms. Dye and the CitiStreet representative was unclear and confusing. It is difficult to determine if either party totally understood what the other was attempting to convey or ascertain. The confusion was likely exacerbated by Ms. Dye's refusal to tell the representative that she, indeed, already knew the buy-back amount. Such information, being a critical step in the transferal process, dispensed with, may have allowed the representative to focus on providing Ms. Dye important information she did not know and was seeking.

23. On April 24, 2003, Respondent mailed the agency action letter, dated April 22, 2003, in response to her Complaint Petition, to Petitioner's home address as indicated on the Petition. This complied with Respondent's earlier promise that "[a] response will be sent to you no later than April 25, 2003."

24. Petitioner called the SBA during working hours and reached Witness Kelleher's voicemail on April 25, 2003.

Petitioner left a voicemail message explaining that she was going out-of-town for the week, and was calling in reference to the status of the pending items and whether any other information was needed. Petitioner left a phone number where she could be reached out-of-town in connection with the pending matter.

25. Kelleher called Petitioner back on May 1, 2003, at her out-of-town location and faxed the 22-page response (consisting of a three-page letter and 19 pages of instructions, forms and statutes regarding the dispute resolution process) to her out-of-town location. This was the same information mailed to her home address on April 24, 2003. The unfavorable response informed Ms. Dye that the SBA could not honor her request to "return to the Pension Plan with no additional cost to [her]," nor would she be able to "retain [her] one time option to switch plans."

26. At hearing, Witness Kelleher testified that he was out of the office on Friday afternoon, April 25, 2003, attending to a personal matter and, therefore, was unable to receive Petitioner's call. He further testified that he was back in the office on Monday, April 28, and listened to Petitioner's voicemail message. Petitioner's message requested that Kelleher return her call and indicated that

she was out-of-town. However, over the next several days he was engaged in a priority assignment coordinating document production and responses to inquiries from the Office of the Auditor General, in relation to a program audit that was underway, and was unable to return Ms. Dye's call until May 1, 2003.

27. Petitioner contends that Respondent's four-business-day delay in returning her phone call directly resulted in increasing her buy-back amount by \$ [REDACTED]. Had Witness Kelleher returned Petitioner call prior to May 1, 2003, she maintains that she would have acted on the information earlier and, thus, would have learned through inquiry of the effective date of the second election in time to effect a change and limit the buy-back amount to that of May 1, 2003, as opposed to June 1, 2003.

28. Respondent contends the SBA fulfilled its promise to mail an answer to Petitioner's complaint no later than April 25 (i.e., April 24), and could not be reasonably expected to anticipate that Petitioner would be out-of-town and unable to timely receive mail sent to her home address in the normal course of business. Testimony indicated that had Witness Kelleher known in advance that Petitioner would be at another location, he would have made arrangements to

send the agency action letter to her at the other location, which was, in fact, what happened on May 1, 2003.

29. On May 1, 2003, when Petitioner received the unfavorable decision and attempted to make the second election as soon as possible, she made a follow-up phone call to Witness Kelleher who referred her to a financial planner at the MyFRS Financial Guidance Line. Petitioner spoke with an Ernst & Young financial planner who explained the second election process and faxed her a second election form to her out-of-town location. (The recorded conversation with the financial planner was played during the hearing.) During the conversation, Ms. Dye expressed frustration regarding: 1) the quality of the information she had received from the CitiStreet representative she spoke with on or about April 23, 2003, regarding the process of transferring from the Investment Plan back to the Pension Plan, and 2) the fact that her May 1 second election would be based on a buy-back amount calculated as of June 1, 2003. Hence, the difference in making her second election on April 30, the day before, versus her May 1 election date resulted in a buy-back amount increase of \$ [REDACTED], because the final buy-back figure is calculated based on the attributed amount as of the first day of the

month following the month in which the election is made and the transfer form is received by CitiStreet.

30. In response to Petitioner's request for clarification, Respondent sent a letter to Petitioner on May 12, 2003, regarding the effective date of the second election. The letter confirmed the information the Ernst & Young financial planner conveyed to Petitioner on May 1, 2003. Petitioner's failure to submit the second election form by the end of the day on April 30, 2003, caused the DOR to recalculate the buy-back amount, based on a plan membership effective date of June 1, 2003 (instead of May 1, 2003), which resulted in a higher dollar amount owed by Petitioner.

31. Petitioner filed a request for hearing on May 22, 2003.

32. Respondent sent Petitioner a Notice of Proceeding letter, dated June 5, 2003. Therein, the SBA clarified its position in response to Petitioner's Hearing Request and advised Petitioner of her opportunity to present either written or oral evidence.

33. Pursuant to Section 120.57(2)(a)2, Florida Statutes, Petitioner faxed a written statement on June 20, 2003, to Kevin SigRist (Senior Investment Officer - Defined Contribution Programs) reiterating and clarifying her

position. Essentially, she asserted that: 1) the information available on investment funds was insufficient to allow her to make an informed decision; 2) the effect of the buy-back calculation was not prominently described in the resource materials mailed to state employees; 3) she was not aware of the effective date of the second election and its impact on the buy-back amount even after a phone call to CitiStreet which was cited by the DOR as the source of information on the process for transferring retirement plan membership; and 4) it was unfair that the initial choice period transfer (effective September 1, 2002) provided for only two business days of investment activity for the month of September (since the present value of her Pension Plan benefit was not transferred to her new Investment Plan account until September 27, 2002) and her account information was not accessible until September 30, 2002.

34. Witness Kelleher spoke with Petitioner on June 25, 2003, explaining the substantial interest hearing process. This conversation resulted in another letter from Petitioner, faxed to Kevin SigRist, on June 26, 2003, wherein she informed the SBA of her desire to present oral evidence in support of her Complaint Petition.

35. At hearing, Witness Ron Poppell, Director of Educational Services, for the FRS Investment Plan, testified at length about the education program development process; the information provided to all potential participants; additional resources available to potential participants; and how those activities comported with Florida law, specifically the Education Component outlined at Section 121.4501(10), Florida Statutes. Witness Poppell testified that, based on data obtained from employee focus groups and surveys, and oversight and input provided by the SBA's Public Employee Optional Retirement Program Advisory Council (PEORPAC) and Investment Advisory Council (IAC), the statutory multimedia educational format requirement was met in several ways. Retirement Choice Kits were sent to the homes of all FRS employees, including the Petitioner. This comprehensive set of printed material included, among other things, a summary and guide for plan choice considerations, a personalized benefit comparison statement, a side-by-side comparison of the plans, keys to retirement planning and investing, a FRS Bill of Rights, a choice information book, an investment fund summary, a choice workshop registration schedule, and a plan choice form. For ease of comprehension, the print materials were developed to be understood at the 8th grade educational

level. All of the print literature also pointed employees to the same and additional information and resources available on the MyFRS.com website and through the toll-free MyFRS Financial Guidance Line.

36. Nearly 3,000 two-hour plan choice workshops were conducted throughout the state (of which one, at least partially, was attended by Petitioner).

37. Also at hearing, Witness Poppell testified that the primary focus of the education program was to provide information that would allow employees to make the best choice between plans. While the Legislature did provide a one-time, second election option, the education program focus was not on the second election. Witness Poppell noted further that the Legislature did not mention the second election in codifying the education component of the FRS Investment Plan at Section 121.4501(10), Florida Statutes. However, he testified that feedback from a good number of potential participants indicated the significance of the second election as a safety net. Thus, information regarding the second election was provided and available through several channels: in the Retirement Choice Kit sent to all potential participants, by calling the MyFRS Financial Guidance Line, by attending a choice workshop, and on the MyFRS.com website.

38. At hearing, Witness Poppell testified regarding the second election process available pursuant to Section 121.4501(4)(e), Florida Statutes. The second election process would typically begin with a call to the MyFRS Financial Guidance Line and speaking with a CitiStreet representative. While not a requirement, the SBA preferred that participants initially talk with a financial planner on the MyFRS Financial Guidance Line to receive expert guidance to facilitate making the right decision for themselves. The CitiStreet or Ernst & Young representative would steer the caller to the DOR to obtain the buy-back amount necessary to transfer to the Pension Plan - provided that the participant does not already have the information. The DOR performs the buy-back calculation and provides the amount to the requester by mail. Once the participant has the buy-back amount, the participant completes the second election form available from CitiStreet or on the MyFRS.com website. Upon receipt of the election form by CitiStreet, the participant is given 60 days by the DOR to pay the amount due, if any. During that 60-day period, the amount in the participant's FRS Investment Plan account is returned to the FRS Pension Plan. If the participant does not pay the buy-back amount within the 60-day period, the

plan transfer is voided and the participant would remain in the FRS Investment Plan.

39. At hearing, Petitioner emphasized several points in support of her Petition: 1) that the information necessary to understand the potential financial consequences of using the second election, as it relates to the buy-back issue, was inadequate and not readily available without knowing the right questions to ask and places to go for information; 2) that her issue was not which retirement plan provided better benefits, but rather that the education component did not adequately and prominently address the mechanics and ramifications of the second election; 3) that she thought that the nine percent employer contribution rate for the FRS Investment Plan would keep up with the benefit that would otherwise be accumulating on her behalf in the FRS Pension Plan, and that any buy-back costs would be limited to her investment losses, if any; and 4) that the Respondent's delay in communicating with her regarding the adverse decision on her Complaint Petition resulted in a \$2,417.97 increase to the buy-back amount due to no fault attributable to her.

CONCLUSIONS OF LAW

40. The State Board of Administration has jurisdiction over the parties and the subject matter of

this proceeding pursuant to Sections 120.569, 120.57, and 121.4501, Florida Statutes.

41. The parties were duly noticed pursuant to Chapter 120, Florida Statutes.

42. The Petitioner has the burden of proof as the party asserting the affirmative of the issue(s) before an administrative tribunal. Florida Dep't of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In order to prevail, Petitioner must prove her claims by a preponderance of the evidence. Subsection 120.57(1)(j), Florida Statutes. Ordinarily, the Petitioner would have the duty of going forward with the evidence. However, the presiding officer asked Respondent to put on its case first to "facilitate an orderly presentation of evidence." General Development Corp. v. Florida Land & Water Comm'n, 368 So. 2d 1323 (Fla. 1st DCA 1979).

43. Petitioner has failed to prove her claims. The totality of the evidence adduced at hearing, audio and documentary evidence received, and the entire record compiled herein does not show by a preponderance that the information provided and made available by the Respondent during the Choice Period and thereafter was inadequate and insufficient to allow for informed retirement plan decision-making by Petitioner.

I

The following discussion will set out the applicable law and will jointly consider the first and second issues, as identified above, that relate to the adequacy and sufficiency of information provided by the Respondent during the initial Choice Period and thereafter.

Applicable Florida Statutory Law - Education Provisions

44. The FRS Investment Plan is established in Chapter 121, Florida Statutes, Part II. The rules related to the statutory requirements are found in Rules 19-9 through 19-12, Florida Administrative Code.

45. The Legislature established specific criteria for the SBA in administering the FRS Investment Plan and providing educational services to potential and actual participants.

46. Subsection 121.4501(8)(b)4, Florida Statutes, sets out a primary objective of "assist[ing] employees in their choice of defined benefit or defined contribution retirement alternatives" and reads in pertinent part:

Educational services include, but are not limited to, disseminating educational materials; providing retirement planning education; explaining the differences between the defined benefit retirement plan and the defined contribution plan; and offering financial guidance on matters such as investment diversification, investment risks, investment costs, and asset allocation.

One of the criteria established by the Legislature for evaluating and selecting an educational provider(s) is whether such prospective provider has the "[a]bility to provide educational services via different media, including but not limited to, the Internet, personal contact, seminars, brochures, and newsletters." Id.

47. The most significant and specific education requirements for the FRS Investment Plan are codified at Subsection 121.4501(10), Florida Statutes. The subsection reads in its entirety:

(10) EDUCATION COMPONENT.—

(a) The [SBA], in coordination with the [Department of Management Services], shall provide for an education component for system members in a manner consistent with the provisions of this section. The education component must be available to eligible employees at least 90 days prior to the beginning date of the election period for the employees of the respective types of employers.

(b) The education component must provide system members with impartial and balanced information about plan choices. The education component must involve multimedia formats. Program comparisons must, to the greatest extent possible, be based upon the retirement income that different retirement programs may provide to the participant. The board shall monitor the performance of the contract to ensure that the program is conducted in accordance with the contract, applicable law, and the rules of the board.

(c) The [SBA], in coordination with the [Department of Management Services], shall provide for an initial and ongoing transfer education component to provide system members with information necessary to make informed plan choice decisions. The transfer education

component must include, but is not limited to, information on:

1. The amount of money available to a member to transfer to the defined contribution program.
2. The features of and differences between the defined benefit program and the defined contribution program, both generally and specifically, as those differences may affect the member.
3. The expected benefit available if the member were to retire under each of the retirement programs, based on appropriate alternative sets of assumptions.
4. The rate of return from investments in the defined contribution program and the period of time over which such rate of return must be achieved to equal or exceed the expected monthly benefit payable to the member under the defined benefit program.
5. The historical rates of return for the investment alternatives available in the defined contribution programs.
6. The benefits and historical rates of return on investments available in a typical deferred compensation plan or a typical plan under s. 403(b) of the Internal Revenue Code for which the employee may be eligible.
7. The program choices available to employees of the State University System and the comparative benefits of each available program, if applicable.
8. Payout options available in each of the retirement programs.

(d) An ongoing education and communication component must provide system members with information necessary to make informed decisions about choices within their program of membership and in preparation for retirement. The component must include, but is not limited to, information concerning:

1. Rights and conditions of membership.

2. Benefit features within the program, options, and effects of certain decisions.

3. Coordination of contributions and benefits with a deferred compensation plan under s. 457 or a plan under s. 403(b) of the Internal Revenue Code.

4. Significant program changes.

5. Contribution rates and program funding status.

6. Planning for retirement.

(e) Descriptive materials must be prepared under the assumption that the employee is an unsophisticated investor, and all materials used in the education component must be approved by the state board prior to dissemination.

(f) The board and the department shall also establish a communication component to provide program information to participating employers and the employers' personnel and payroll officers and to explain their respective responsibilities in conjunction with the retirement programs.

(g) Funding for education of new employees may reflect administrative costs to the optional program and the defined benefit program.

(emphasis added).

48. Florida law provides for a second election, in Subsection 121.4501(4)(e), Florida Statutes. Specifically stated:

After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, 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.

While the second election is provided for in statute, the topic is not specifically identified as a subject for the education component.

49. Subsection 121.4501(4)(e), Florida Statutes, also addresses the buy-back issue (although the term "buy back" is not specifically used). The pertinent part reads:

If the employee chooses [to use his or her second election] to move [i.e., transfer back] to the defined benefit program, the employee must transfer from his or her Public Employee Optional Retirement Program 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. . . .

(emphasis added).

While the buy-back issue is addressed in statute, the topic is not specifically identified as a subject for the education component.

50. Clearly, the overarching goal of the educational component is to assist employees in making the choice between the defined benefit and the defined contribution retirement alternatives by imparting impartial and balanced information about those plan choices. The primary focus, as guided by the Legislature, of Respondent's education efforts was on assisting employees in making the best retirement plan choice, based on their unique and personal situations, the first time.

51. An initial retirement plan choice is mandatory - through affirmative election during the Choice Period or by default. The second election provided by the Legislature is a choice that an employee may or may not ever use.

52. Respondent did, in fact, provide general second election and buy-back information in several media formats: in the "Your Choice Book" (a part of the Retirement Kit sent to Petitioner and other FRS employees); on the MyFRS.com website; and in the Retirement Choice Workshop book and slides presented and shown, respectively, at workshops conducted throughout the state. More specific information, which would be uniquely tailored to each employee's individual situation, was available from the Ernst & Young financial planners at the MyFRS Financial Guidance Line, from the representatives at CitiStreet, and through the personalized resources available on the MyFRS.com website.

53. Petitioner argues that employees might not use the Internet or attend a workshop. This is true, but highly unlikely and not supported by related survey and focus group data (especially as it relates to use of the Internet). Assuming, arguendo, that Petitioner's hypothetical is valid, one must turn to the Retirement Choice Kit. A key component of the Kit is the "Your Choice

Book." Page 12 of this 20-page book is devoted to the second election. The narrative stresses several points: 1) the second opportunity to switch plans is a very valuable one-time opportunity that allows an employee to reconsider her decision, 2) employees should "take advantage of all the resources available to [them] and make a good decision **NOW**," and 3) employees who remain in the FRS Pension Plan and later use their second election to switch to the Investment Plan will have the present value of their Pension Plan accumulated benefit transferred to their Investment Plan account and will pay nothing.³

(capitalization and bold type in original). With respect to a second election switch from the Investment Plan back to the Pension Plan - as was the case with Petitioner - the following information is clearly and prominently provided on Page 12:

[I]f you choose the Investment Plan now and want to switch back to the Pension Plan later:

- You'll have to "buy back" into the Pension Plan with money in your Investment Plan account. The CHOICE SERVICE, on MyFRS.com, can help you figure your buy-back amount.
- If you don't have enough money in your Investment Plan account, you can still get back in ... but you'll have to make up the difference from your other savings.

(italics and capitalizations in original).

If there was ambiguity in the meaning of the term "buy back," it was elucidated on Page 20 of the choice book in the glossary:

Buy Back: If you choose the Investment Plan, you can use your second opportunity to switch back to the Pension Plan. If you do, you must "buy back" into the Pension Plan with the money in your Investment Plan account. If that buy-back cost is more than your Pension Plan benefit, you'll have to make up the difference from other savings. If that buy-back cost is less than the money in your Investment Plan account, you can keep the extra amount in your Investment account. Then you'll get a retirement benefit from both plans. After your Choice period ends, you can use the modeling resources available on MyFRS.com to calculate your buy-back cost.

(italics in original).

It is difficult to envision more cautionary language - that is both impartial and balanced - regarding the second election and potential buy-back than that provided on Pages 12 and 20 of the choice book.

54. Witness Kelleher testified at hearing that of the 79 FRS employees who used their second election to switch from the Investment Plan back to the Pension Plan, 51 employees (65 percent) had more money in their Investment Plan account than was necessary to buy back into the Pension Plan, resulting in surpluses for those employees. Only 27 employees (34 percent) had to use personal savings to buy back in the Pension Plan, as did Petitioner.

55. The evidence suggests that it was not the inadequacy or insufficiency of Respondent's educational resources that led to Petitioner's predicament, but rather it was a result of the choices she made, the timing of execution of her choices, and the timing of her action to consult the various informational resources (i.e., print, electronic and people) available to her. The due diligence and research process strongly stressed in all of the education materials to be undertaken prior to making the retirement plan election, and in the case of the Investment Plan, the investment fund choices, seemingly was not done by Petitioner until after the fact. All the resources and information in the world might be provided and made available, but it must be utilized and understood to be of benefit in the decision-making process.

56. Petitioner made several particularly telling statements during a recorded conversation with an Ernst & Young financial planner on April 2, 2003, some seven months after making her Investment Plan election. Pertinent excerpts from the recorded conversation are as follows:

EY - While I am pulling up your record, how can I help you today?

Dye - I went into the Investment Plan and it's evidently the biggest mistake because there's a lot of things I didn't know when I went into it.

EY - OK.

Dye - So, anyway, so, I looked up on Choice Services how much it would cost to go back to FRS.

EY - OK.

Dye - And, uh, it appears that when I went out it was based on my current salary or estimate of current salary or something and now to get back in it's estimated on, a lot, you know, its another, my salary is . . .

EY - Much different?

Dye - Yeah.

EY - OK, just give me one second while I pull this up for you OK? How many years of service do you have?

Dye - Twenty, I think.

EY - OK, and did you talk to someone here before you went into the Investment Plan?

Dye - Yeah, I did.

EY - OK. And, can I ask why you decided to go with the Investment Plan?

Dye - Well, because, I, no, I, I don't know, I don't know why I did.

EY - OK, fair enough.

Dye - But, if I had known then what I know now, I wouldn't have done it.

* * *

Dye - OK, so what would it cost to go back into the FRS.

EY - The cost that they are telling you is the correct cost -- unfortunately.

Dye - Because they base it [the buy-back amount] on your current salary, but when you go out of it, they base it on the average of your last five [average final compensation] . . .

EY - No - they use the same formula to go in and out.

Dye - Well, how come it [the buy-back amount] went up like \$ [REDACTED]?

EY - Because that's actually how the Pension Plan grows at your When did you do the switch, last year?

Dye - Yeah.

EY - OK, that's about how much, for someone your age

Dye - See, I had no idea of that, I had no idea and I had no idea that you couldn't, you know, like put a stop loss in, I had no idea that you wouldn't get

EY - What do you mean a stop loss?

Dye - I mean like if you got into a stock fund, you couldn't say when this fund goes below \$10, you know, put it into money market.

EY - You're right, you can't do that.

Dye - And I didn't know you couldn't, huh, that there's no history, that you know, they didn't tell you, I mean, you just find out what it is that day and what it was the day before, the service doesn't provide any history.

EY - And what funds did you choose?

Dye - Well, right now, I'm money market.

EY - Right now you're in the money market?

Dye - Yeah.

EY - OK, and you chose stock funds originally? Or, you

Dye - No, no, I was going to go into it, but see, once I was in the Investment Plan, then I found all this stuff out, and, you know, I didn't, and then I found out that you couldn't get a history of what the, how the funds were fluctuating. And, you couldn't, you couldn't, say, you know, when it got at a certain point to, you know, make a change. There's so many things I didn't know.

EY - OK, I'll be honest with you. In general, with mutual funds, they're not like stocks, you can't

Dye - Yeah, I know, now I know that.

EY - Even if you had, like, bought a mutual fund directly from a mutual fund company and you had an account with them you would not be able to put a stop loss in on it. I've never seen a mutual fund company that had that feature.

* * *

Dye - Is there a chance, is anybody talking about giving those of us who, you know, weren't savvy enough, you know, another choice? I know I can do one more and go back to FRS. But, can I ever get out of FRS and back into Investment Plan?

EY - The only way you can get back into the Pension Plan is by coming up with the \$██████.

* * *

EY - What age do you plan on leaving? I mean, I want to be able to run some numbers for you here?

Dye - You know, maybe, maybe 62.

* * *

EY - I see you've called here quite a few times.

Dye - Yeah, I know, I know and it's all afterwards.

EY - This seems to have been what you wanted to do.

Dye - Yeah, yeah, cause I did it.

* * *

57. Petitioner's conversation with the Ernst & Young financial planner on April 2, 2003, demonstrates several important facts germane to opining on the issues at hand:

- Petitioner admitted that her decision to go into the Investment Plan was a "big mistake" and stated, "[I]f I had known then what I know now, I wouldn't have done it." What Petitioner does not acknowledge is that the information and resources that she eventually consulted were provided and available to her long before she availed herself to such.
- When asked why she initially went into the Investment Plan, Petitioner indicated she did not know why she did. However, when Petitioner called the MyFRS Financial Guidance Line on August 29, 2002, she implied that her reason for choosing the Investment Plan was because she was leaving state government. Her only questions involved how often she could switch investment choices after she terminated and whether financial guidance would still be available after she terminated. Apparently, circumstances changed, for Petitioner, between August 29, 2002 and April 2, 2003, as on the latter date she

indicated that she would possibly remain in state government until age 62.

- When asked on April 2, 2003, if she had spoken with someone at Ernst & Young prior to electing to go into the Investment Plan, Petitioner responded affirmatively.

What Petitioner failed to mention is that she had already made up her mind, regarding her retirement plan choice and her investment options within the Investment Plan, when she placed her first call to the MyFRS Financial Guidance Line on August 29, 2002. While the financial planner did not offer concrete advice, as he was not asked for any, he did inquire regarding the rationale for Petitioner's planned investment choices and he cautioned her regarding the duplicity of her choices. Finally, regarding asset allocation his advice to Petitioner was, "All right, yeah, you may just want to give that a bit of thought before you make your actual election."

- Petitioner demonstrated her confusion regarding the inapplicability of defensive securities trading strategies, such as stop-loss orders, to mutual fund transactions. More fundamentally, she demonstrated her lack of understanding that the basis for accrual of variable retirement benefits under the FRS Investment Plan (i.e., defined contribution plan) was the

performance of her self-directed investments from monies contributed to account by her employer, and that the basis for accrual of fixed retirement benefits under the FRS Pension Plan (i.e., defined benefit plan) was a three-part formula (average final compensation x percentage value x years of service). Seemingly, Petitioner did not understand that the accrual of benefits under both plans did not run parallel and, different from the Investment Plan, that the benefits under the Pension Plan increased exponentially as years of service are attained. This information was provided and readily available throughout the Choice Period and thereafter.

- Three times during her conversation with the Ernst & Young financial planner on April 2, 2003, Petitioner mentioned that she had accessed the 2nd Choice Service at the MyFRS.com website to discover the estimated buy-back amount that would be required to return to the Pension Plan. This resource and information was also available to Petitioner long before she availed herself to it.

Applicable Federal and Florida Statutory Law - Fiduciary Provisions

58. Subsections 121.4501(8)(b)4 and (15), Florida Statutes, adopt and incorporate fiduciary standards and

responsibilities related to the Employee Retirement Income Security Act of 1974 (ERISA), as amended, and, more importantly, the federal law concept of participant control established for ERISA section 404(c) plans.

59. Section 121.4501(8)(b)4, Florida Statutes, states:

Educational services shall be designed by the [SBA] and [Department of Management Services] to assist employers, eligible employees, participants, and beneficiaries in order to maintain compliance with United States Department of Labor regulations under s. 404(c) of the Employee Retirement Income Security Act of 1974 and to assist employees in their choice of defined benefit or defined contribution retirement alternatives. Educational services include, but are not limited to, disseminating educational materials; providing retirement planning education; explaining the differences between the defined benefit retirement plan and the defined contribution retirement plan; and offering financial planning guidance on matters such as investment diversification, investment risks, investment costs, and asset allocation. An approved provider may also provide educational information, including retirement planning and investment allocation information concerning its products and services.

60. Section 121.4501(15)(a), Florida Statutes, incorporates ERISA fiduciary duties, as follows:

Investment of optional defined contribution retirement plan assets shall be made for the sole interest and exclusive purpose of providing benefits to plan participants and beneficiaries and defraying reasonable expenses of administering the plan. The program's assets are to be invested, on behalf of the program participants, with the care, skill, and diligence that a prudent person acting in a like manner would undertake. The performance of the investment duties set forth in this paragraph shall

comply with the fiduciary standards set forth in the Employee Retirement Income Security Act of 1974 at 29 U.S.C. s. 1104(a)(1)(A)-(C). In case of conflict with other provisions of law authorizing investments, the investment and fiduciary standards set forth in this subsection shall prevail.

61. More importantly, in Section 121.4501(15)(b), Florida Statutes, the Legislature also provided for an ERISA section 404(c) plan, as follows:

If a participant or beneficiary of the Public Employee Optional Retirement Program exercises control over the assets in his or her account, as determined by reference to regulations of the United States Department of Labor under s. 404(c) of the Employee Retirement Income Security Act of 1974 and all applicable laws governing the operation of the program, no program fiduciary shall be liable for any loss to a participant's or beneficiary's account which results from such participant's or beneficiary's exercise of control.

These provisions provide a safe harbor for plan fiduciaries relieving them of liability for a participant's investment losses, provided the requirements of section 404(c) of ERISA and the accompanying regulations issued by the federal Department of Labor are met. Petitioner has not proved by the greater weight of the evidence that Respondent failed to meet the ERISA requirements incorporated by reference into Florida law.

62. The Employee Retirement Income Security Act of 1974 (ERISA), as amended, is the foremost federal law applicable to employee benefits. As the Act's name

implies, its fundamental purpose is to safeguard employees' retirement income. However, governmental pension plans are not required to comply with the requirements of ERISA. See 29 U.S.C. § 1003(b)(1). Nonetheless, the Florida Legislature has incorporated ERISA standards into Chapter 121, Florida Statutes, as noted above. Therefore, it follows that ERISA caselaw would provide persuasive, if not controlling, authority in cases related to the FRS Investment Plan, to the extent ERISA requirements are at issue.

63. The ERISA issues raised in this proceeding relate to the obligation of a fiduciary to disclose plan information to participants and beneficiaries.

64. "ERISA contemplates that the summary plan description will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." Layaou v. Xerox Corp., 238 F.3d 205, 209 (2d Cir.2001) (quoting Heidgerd v. Olin Corp., 906 F.2d 903, 907-08 (2d Cir.1990)). The summary plan description (SPD) must "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such

participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a).

65. Pursuant to Section 121.4501(15)(c)2, Florida Statutes, the FRS Investment Plan SPD has been available on the MyFRS.com website since March 1, 2002. In addition to the various aforementioned sources of information, the following information, in pertinent part, appeared on Page 10 of the SPD⁴ dated October 1, 2002:

Your One-time Opportunity to Switch to the Pension Plan

If you currently participate in the Pension Plan and choose to participate in the Investment Plan, you will have a one-time opportunity to switch to the Pension Plan at any point while working for an FRS employer. If you decide to switch, you must "buy back" into the Pension Plan with the money in your Investment Plan account. If you don't have enough money in your Investment Plan account, you can still get back in ... but you'll have to make up the difference from your other financial resources.

* * *

The Choice Service on MyFRS.com can help you estimate your buy-back amount. Or, you can call the MyFRS Financial Guidance Line at 1-866-44-MyFRS (1-866-446-9377; or TTY: 1-888-429-2160). The Division of Retirement will calculate the actual buy-back amount you may owe.

(bold type and italics in original).

This section of the SPD also contained examples to further illustrate important information regarding the second election and the potential buy-back requirement.

Applicable Caselaw

66. The Florida Courts have not opined on any issues arising under the provisions of Section 121.4501, Florida Statutes, which established the Public Employee Optional Retirement Program (more commonly referred to as the FRS Investment Plan).

67. The federal courts, on the other hand, have rendered a plethora of opinions regarding ERISA fiduciary standards. Salient cases that bear on the issues at hand are discussed below.

68. In Layaou, the court provided a concise summary of SPD disclosure requirements:

Generally, for a SPD to meet the disclosure requirements of 29 U.S.C. § 1022, the limitation or elimination of technical jargon and of long, complex sentences and the use of clarifying examples is required. The SPD must include, among other things, a description of the circumstances which may result in the disqualification, ineligibility, or denial or loss of benefits. . . . The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, or restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant and shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits.

238 F.3d at 209 (citing 29 C.F.R. §§ 2520.102-2(a), .102-2(a), and .120-3(1)) (internal quotation marks omitted).

69. Again, Petitioner has not met her burden of proof. To the contrary, Respondent provided information regarding the second election and the buy-back requirement using a bold type heading as prominently presented as other sections of important Investment Plan information. Further, on Page 13 of the SPD, Respondent included a section entitled "Where to Go for More Information," also presented in bold type, that directed participants to the MyFRS.com website and the toll-free MyFRS Financial Guidance Line. Still further, the substantially same information was sent unsolicited to Petitioner in the Retirement Choice Kit.

70. Petitioner has alluded that while relevant information may have been provided and available, nonetheless, it was not prominent or detailed enough. Her prominence argument having failed, next is the issue of detail. The plaintiff in Lorenzen v. Employees Retirement Plan of the Sperry & Hutchinson Co. Inc., 896 F.2d 228, 235 (7th Cir.1990), claimed that her deceased husband's "[SPD] should have advised [him] more clearly than it did that if he postponed his retirement he was risking a net loss of benefits, since pre-retirement death benefits were lower than retirement benefits." In ruling that the defendant's SPD was not defective for want of clarity, the court

stated, "the law is clear that the plan summary is not required to anticipate every possible idiosyncratic contingency that might affect a particular participant's or beneficiary's status. If it [did], the summaries would be choked with detail and hopelessly confusing." Id. at 236 (internal citations omitted).

71. Similarly, the court in Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 7 (2nd Cir. 1997), addressed the issue of an SPD reasonably describing "the circumstances under which retirement benefits might be lost." While, somewhat skeptically, acknowledging the Seventh Circuit decision in Lorenzen, this court stated its belief that certain uncommon situations do merit special mention in a SPD. Id. The plaintiffs in Estate of Becker, "argue[d] that Kodak's SPD was deficient because it did not explain properly that a participant who dies before the 'effective date' of her retirement is ineligible for the lump sum payment." Id. at 9. Looking at the facts in their totality, the court "question[ed] whether the SPD adequately inform[ed] an 'average plan participant' of an important circumstance 'which may result in a loss of benefits.'" Id. (quoting 29 U.S.C. § 1022). The court stated further its disbelief "that the possibility of death in the period between the election of retirement and the

effective date of retirement [was] such a remote or 'idiosyncratic' contingency." Id. (quoting Lorenzen at 236).

72. There is no question that, via the SPD and other sources, Petitioner was made aware of the potential loss of benefits by initially electing to go into the Investment Plan during the Choice Period and then subsequently using her second election to go back into the Pension Plan. Notwithstanding the persuasive authority provided by Estate of Becker v. Eastman Kodak Co., the case here is distinguished because there were so many sources for reasonably obtaining relevant general and specific information that an ordinary, prudent FRS employee would have to work hard to avoid discovery of the information. Indeed, the court in Stahl v. Tony's Building Materials, Inc., 875 F.2d 1404, 1408-09 (9th Cir.1989), stated that "[e]very employee stands on a different footing and therefore would require different advice. What properly would guide one employee might be inconsistent with the interests of another. . . . Summary plan descriptions, in other words, cannot provide advice that is equally applicable to all employees. They should focus, instead upon describing general rules in a way that allows the ordinary employee to understand when and where opportunity

beckons and danger lurks." Further, the Stahl court "decline[d] to rule [] that the Trust Fund's fiduciary duties required it to provide any individualized notice to Stahl." Id. Stated differently, "ERISA does not require 'plan administrators to investigate each participant's circumstances and prepare advisory opinions for literally thousands of employees,' but it does require plans to provide material information to participants and beneficiaries." Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 590-91 (7th Cir.2000) (quoting Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810, 817-18 (7th Cir. 1997)).

73. Lastly, the issue of duty to provide truthful information is discussed. The United States Supreme Court in Varity Corp. v. Howe, 516 U.S. 489 (1996), addressed the issue. The facts in Varity Corp. involve a private employer's use of trickery and deception to induce its employees to voluntarily transfer to a new benefit plan under the guise that their benefits would remain secure. Id. at 492-94. In holding that Varity's deception violated ERISA-imposed fiduciary obligations, the Court stated:

ERISA requires a fiduciary to discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries. To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at

the beneficiaries' expense is not to act solely in the interest of the participants and beneficiaries.

Id. at 506 (internal citations and quotations omitted).

The Court specifically declined, however, to "reach the question of whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries." Id.

74. Other courts have addressed the issue further. In 1993, the Sixth Circuit, in Electro-Mechanical Corp. v. Ogan, 9 F.3d 445, 451-52 (6th Cir.1993), stated "ERISA imposes a duty upon fiduciaries to respond promptly and adequately to employee-initiated inquiries regarding the plan or any of its terms. Absent a specific employee-initiated inquiry, however, a fiduciary is not obligated to seek out employees to ensure that they understand the plan's provisions as described in the explanatory booklet."

(citing Hopkins v. FMC Corp., 535 F.Supp. 235, 239-40 W.D.N.C.1982); Lee v. Union Elec. Co., 606 F.Supp. 316, 321 (E.D.Mo.1985), aff'd, 789 F.2d 1303 (8th Cir.1986), cert. denied, 479 U.S. 962 (1986)); accord Switzer v. Wal-Mart Stores, Inc., 52 F.3d 1294, 1299 (5th Cir.1995).

In Eddy v. Colonial Life Insurance Company of America, 919 F.2d 747, 750 (D.C. Cir.1990), the court held:

The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA. At the request of a beneficiary (and in some circumstances upon his own initiative), a fiduciary must convey complete and correct material information to a beneficiary. . . . A fiduciary's duty, however, is not discharged simply by the issuance and dissemination of [] documents and notices. Instead,

that duty carries through in all of the fiduciary's dealings with beneficiaries; in general, a fiduciary may not materially mislead those to whom the duty of loyalty and prudence are owed.

(quoting Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154, 1163 (6th Cir.1988) (internal quotation omitted).

Citing Eddy approvingly, the court in Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3rd Cir.1993), stated:

[The] duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful. In addition, the duty recognizes the disparity of training and knowledge that potentially exists between a lay beneficiary and a trained fiduciary. Thus, while the beneficiary may, at times, bear a burden of informing the fiduciary of her material circumstance, the fiduciary's obligations will not be excused merely because she failed to comprehend or ask about a technical aspect of the plan.

Accord Watson v. Deaconess Waltham Hospital, 298 F.3d 102 (1st Cir.2002); Griggs v. E.I. Dupont De Nemours & Co., 237 F.3d 371 (C.A. 4 2001); Krohn v. Huron Memorial Hosp., 173 F.3d 542 (6th Cir.1999); Shea v. Esensten, 107 F.3d 625 (8th Cir.1997), cert. denied, 522 U.S. 914 (1997); and Bins v. Exxon Company U.S.A., 220 F.3d 1042 (9th Cir.2000).

75. The evidence indicates that the Respondent and its educational service providers did nothing but provide, and attempt to provide, Petitioner with material and truthful information to assist her in her decision-making processes in a manner consistent with Section 121.4501, Florida Statutes, including ERISA fiduciary standards and

responsibilities. When Petitioner initially contacted the MyFRS Financial Guidance Line and disclosed her already-made decision to opt into the Investment Plan, apparently as a precursor to plans to terminate state government, the financial planner questioned her investment choices and cautioned her to give her decision a bit of thought before she made her actual election. Petitioner contends that she was given flawed information when she spoke with the CitiStreet representative on or about April 23, 2003, regarding transferring from the Investment Plan back to the Pension Plan. That neither party communicated very clearly during one conversation, hardly rises to the level of a material breach of fiduciary responsibility. Even if the information was found to be false, "not every error in communicating information regarding a plan will be found to violate a fiduciary's duty under ERISA." Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 590 (7th Cir.2000).

76. Petitioner has not met her burden of proving, by a preponderance of the evidence, that the information provided by the Respondent during the initial Choice Period and thereafter was inadequate and insufficient to allow for informed decision-making as it relates to the second election and the buy-back requirement. To the contrary, the information provided and made available was

comprehensive, extensive and repetitive; it was not misleading; and it was widespread enough to invite further specific inquiry.

II

The following discussion addresses the second issue regarding whether the timeliness of Respondent's notification of the decision on Petitioner's complaint improperly resulted in increasing Petitioner's buy-back amount at no fault attributable to her.

77. Petitioner asserts that Respondent's four-day delay in returning her phone call was the proximate cause for her incurring an increase of \$ [REDACTED] to the buy-back amount, and from which she should be provided relief.

78. On April 7, 2003, after receiving Petitioner's Complaint Petition on April 6, 2003, Witness Kelleher promptly notified Petitioner by letter that "[a] response will be sent to you no later than April 25, 2003." Indeed, the evidence established that Respondent's adverse response was sent to Petitioner's home address on April 24, 2003, as promised. Petitioner called Witness Kelleher and left message on his answering machine alerting him that she was going out-of-town and he should return her call at the number provided. Witness Kelleher was out of the office on personal leave the afternoon of Friday, April 25, 2003, and

did not obtain Petitioner's message until Monday, April 28, 2003. Witness Kelleher testified at hearing that a priority assignment, ironically to satisfy an information request from Petitioner's own employer, prevented him from returning her call until Thursday, May 1, 2003. Upon speaking with Petitioner, Witness Kelleher faxed the response to Petitioner at her out-of-town location, wherein she executed her second election to return to the Pension Plan. Because the second election is not effective until the first day of the month following the month of execution, Petitioner's buy-back amount was increased. Petitioner maintains that the proximate cause of the increase is directly attributable to Respondent because its employee's actions prevented her from acting on its decision prior to May 1, 2003.

79. Respondent contends the SBA fulfilled its promise to mail an answer to Petitioner's complaint no later than April 25 (i.e., April 24), and could not be reasonably expected to possess the clairvoyance necessary to know that Petitioner would be out-of-town and unable to timely receive mail sent to her home address in the normal course of business, nor that she would not have sought to obtain information through other means given the stakes involved.

80. The timing of Witness Kelleher's return phone call to Petitioner is unfortunate, but it does not provide a legal basis for granting Petitioner's requested remedy.

81. The Florida Customer Service Standards Act, codified at Section 23.30, Florida Statutes, is illustrative. Under the Act, state departments are required, in pertinent part, to:

- (a) Designate an employee or employees in the department who shall be responsible for facilitating the resolution of customer complaints, including any customer complaints regarding unsatisfactory treatment by department employees.
- (b) Provide available information, except information which is confidential pursuant to any other state or federal law, and accurate responses to questions and requests for assistance in a prompt manner.
- (c) Acknowledge receipt of a telephonic or electronic question or request by the end of the next business day.
- (d) Provide local or toll-free telephonic or electronic access either through a centralized complaint-intake call center or directly to a department employee or employees designated to resolve customer complaints.
- (e) Develop a process for review by upper-level management of any customer complaints not resolved by the department employee or employees designated to resolve customer complaints. In evaluating the appropriateness of response time, management may consider periodic, high volume inquiries as a justifiable cause of delay.

Id. § (3).

Subsection 23.30(8), Florida Statutes, provides an exception, in that the "section does not apply to a person who uses or requests services or information from a department when such service or information is related to that person's . . . [p]ending administrative action," as is the case with Petitioner. Notwithstanding the Act's exemptions, it is arguable that Respondent's actions still were not grossly out of line. A fair reading of the Act's provisions suggest that when a series of customer inquiries are made, it is the initial inquiry that is subject to the most prompt standard of acknowledgement. The evidence suggests that Witness Kelleher's responsiveness and attentiveness went beyond the call of duty until personal business and a priority assignment caused him to not be able to address Petitioner's issues as promptly as had earlier been the case.

82. In Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 9 (2nd Cir.1997), the plaintiffs argued "that Kodak's SPD was deficient because it did not explain properly that a participant who dies before the 'effective date' of her retirement is ineligible for the lump sum payment." The Becker court addressed certain facts similar to the instant cause, stating:

Although the SPD perhaps implies that an employee "retires" only by filling out a retirement election form and surviving until the effective date of retirement, it does not state this explicitly. The SPD does not make clear that the effective date is always the first of the month *following* the employee's election. Thus, an employee electing to retire on March 2 might think that the effective date of her retirement was March 1, rather than April 1. Under the circumstances, the employee might reasonably believe that she had retired—and was thus eligible for retirement benefits—upon submitting an election to retire.

Id. at 9-10. (*italics in original*).

Although the court questioned whether the SPD was so deficient as to violate § 1022(b), it expressly did not rule that the SPD was insufficient as a matter of law. Id. The court, however, did "conclude that Kodak breached its fiduciary duty to provide Becker with complete and accurate information about her retirement options." Id. Not, though, because of the ambiguity regarding the actual effective date of Becker's retirement election, but rather because Kodak's representative "exacerbated the lack of clarity inherent in the SPD and thereby provided Becker with materially misleading information." Id. While factually similar regarding want of clarity of effective dates of retirement election (*i.e.*, Becker) and section election transfer (*i.e.*, Petitioner Dye), the cases are nonetheless distinguishable. In the instant case, there was never any attempt to intentionally mislead Petitioner,

and Respondent explicitly made available sources of individualized, employee-specific information and actively encouraged employees to utilize such resources.

83. Finally, given the financial gravity of Petitioner's concerns, it is regrettable that Petitioner did not call Witness Kelleher or someone else in his office on April 28, or 29, or 30. As discussed at hearing, Petitioner did not know whether Witness Kelleher had gotten her message or not. Given Witness Kelleher's previous promptness, if Petitioner had considered that he was not in the office or was otherwise unavailable, then she might have contacted someone else in Respondent's office who would have been able to find her file and respond to her questions. An ordinary, prudent person might also have contacted CitiStreet in anticipation of an impending second election, obtained the 2nd Election Retirement Plan Choice Form, and discovered the difference between the effective dates of choice execution and choice implementation.

84. Petitioner's response at hearing was that she did not call because she had no sense of urgency as she did not know that failing to file her second election form before May 1 would result in an increase in her buy-back amount. Although the resources were available for Petitioner to discover specific information about the second election

process, her telephone call on or about April 23, 2003, to CitiStreet did not prove helpful to Petitioner. As stated earlier, that particular conversation was not a paragon of clear and effective communications. While the CitiStreet representative's answers left something to be desired, Petitioner contributed to the problem by not revealing that she already knew the buy-back amount when directly asked that question, as well, her curt air and tone did not facilitate positive communications.

85. Respondent might have been at fault if Respondent had failed to respond and had failed to point out the resources freely available to acquire the relevant information. However, here, all the appropriate information had been supplied to Petitioner and the available resources had been pointed out to her on more than one occasion. When Petitioner eventually availed herself of those resources, the damage was done.

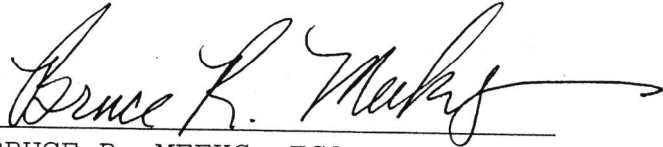
86. Regrettably, Petitioner has not carried her burden with sufficient weight to establish that Respondent's actions, or lack thereof, caused her to submit her second election request on May 1, 2003, resulting in a transfer effective date of June 1, 2003 and an increased buy-back amount.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is:

RECOMMENDED that the State Board of Administration enter a Final Order finding that Respondent's education process is not in noncompliance with Florida and federal law, and denying Petitioner's request for relief of the buy-back amount for the period May 1 to June 1, 2003.

DONE and ENTERED this 15th day of April, 2004, in Tallahassee, Leon County, Florida.



BRUCE R. MEEKS, ESQ.
Presiding Officer
State Board of Administration
1801 Hermitage Boulevard
Tallahassee, Florida 32308
(850) 488-4406

Filed with the Agency Clerk of the State Board of Administration this 16th day of April, 2004.

ENDNOTES

1/ Petitioner's Issue 4, was stated as, "The appropriateness of the amount of the accumulated benefit obligation transferred from the FRS Pension Plan to the FRS Investment Plan when the participant chooses to join the FRS Investment Plan." (Parties' Pre-hearing Statement of Facts and Issues at 1, ¶ 4.) The Department of Management Services, Division of Retirement, has subject matter jurisdiction to hear this matter pursuant to Section 120.569, Florida Statutes.

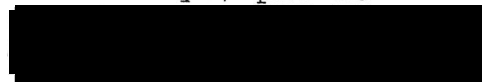
2/ At hearing, Respondent proffered "the exhibits that were set out in the prehearing stipulation, Exhibits 1 through 13, to be entered into evidence." After the presiding officer inquired regarding the authenticity of Exhibit 13 (recordings of Ms. Dye's conversations with representatives of Ernst & Young [compact disc] and CitiStreet [audiotape]), Exhibits 1 through 13 were admitted without objection. However, in the Parties' Pre-hearing Statement of Facts and Issues, 14 exhibits were identified (and were provided to the presiding officer along with the parties' statement). Exhibit 14 was "Exhibits related to the buy back calculation." Respondent purposefully did not proffer Exhibit 14 at hearing because of its direct relationship to Petitioner's Issue 4, which was not heard. In essence, the buy-back amount is the difference between Petitioner's present value in the Investment Plan and what her accumulated benefit obligation would have been had she remained in the Pension Plan.

3/ Page 12 of the "Your Choice Book" also contained information on the Hybrid Option as a second election choice. As is the case with a second election from Pension Plan to Investment Plan, a Pension Plan transfer to hybrid option cannot result in any out-of-pocket expense for the transferring employee because the present value of the accumulated benefit is transferred regardless of the amount involved.

4/ The FRS Investment Plan SPD has been revised since its initial publication on March 1, 2002. The information regarding the second election and potential buy-back requirement has remained substantially the same or has been expanded (as in the case of the most recent version dated December 1, 2003).

COPIES FURNISHED:

Jane R. Dye, pro se



Ruth L. Gokel, Esq.
State Board of Administration
Office of the General Counsel
1801 Hermitage Blvd.
Tallahassee, FL 32308
(850) 413-1199

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.