

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MIRIAM ZWICK,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2006-621
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On January 24, 2008, the presiding officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Miriam Zwick, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order on January 18, 2008. Neither party filed Exceptions, which were due on February 8, 2008. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

ORDERED

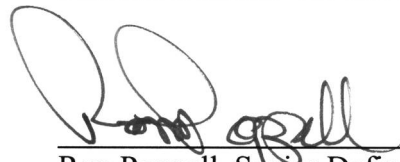
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be enrolled in the FRS Investment Plan as if she had made the

election within the applicable election period, or as of the date she filed her Request for Intervention, is denied.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 200, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

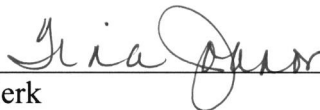
DONE AND ORDERED this 11th day of February, 2008, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



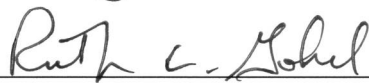
Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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


Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Miriam Zwick, pro se, [REDACTED], and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 11th day of February, 2008.


Ruth L. Gokel
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

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GENERAL COUNSEL'S OFFICE

MIRIAM ZWICK,

Petitioner,

vs.

CASE NO.: 2006-621

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer for the STATE BOARD OF ADMINISTRATION (SBA) on September 4, 2007, in Tallahassee, Florida. The Petitioner and Respondent appeared as follows:

APPEARANCES

For Petitioner:

Miriam Zwick, pro se


For Respondent:

Brian A. Newman, Esquire
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095

Exh. A

STATEMENT OF THE ISSUE

The issue is whether the SBA may grant Petitioner's request to be enrolled in the Investment Plan as if she had made this election within the applicable election period, or as of the date when she filed a Request for Intervention.

PRELIMINARY STATEMENT

Petitioner submitted a Request for Intervention dated June 8, 2006, seeking to be deemed enrolled in the Investment Plan as of the date she could have elected that option as a newly-covered employee or as of the date of her Request. Respondent conducted an investigation and provided notice to Petitioner of its intent to deny this request. Petitioner then filed a Petition for Hearing, which was transmitted to the undersigned for informal hearing.

At the hearing, Petitioner testified on her own behalf and had with her Mr. Stan Novak, Finance Director of the Town of Highland Beach. The SBA presented the testimony of Dan Beard, Director of Policy and Risk Management and Compliance and exhibits R1-7, consisting of official agency records and communications by and to the Petitioner. A transcript of the informal hearing was made, filed and made available to the parties; Respondent filed a Proposed Recommended Order, Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner is an elected Commissioner with the Town of Highland Beach (Town). On October 1, 2005 the Town joined the Florida Retirement System (FRS) as a participating employer.

2. Petitioner was eligible to participate in the FRS and was given until May 31, 2006 to choose between the Pension Plan and the Investment Plan. She received multiple notices to this effect, but did not timely file an election.

3. Petitioner testified that she did not make an election within the applicable time period because she did not believe she was covered, either because she was an elected official or because she would not remain in office long enough to vest, and didn't want to cause the Town to incur expense unnecessarily. She had not been a member of the Town's pension plan.

4. During a conversation with Stan Novak in June, 2006, she realized that she was eligible to participate in the FRS and to make an election between the Pension Plan and the Investment Plan. Also in June, Petitioner received a Plan Choice Default Confirmation Statement from SBA, confirming that because she did not make an active election during the choice period, she had defaulted into the Pension Plan. She then submitted a Request for Intervention asking that she be allowed to select the Investment Plan as if she had acted within the choice period.

5. After her Request for Intervention was denied, Petitioner executed a second election on September 26, 2006, using her one-time option to switch from the Pension Plan to the Investment Plan. That election was effective October 1, 2006.

CONCLUSIONS OF LAW

6. The statutory provisions applicable in this case are found at section 121.4501(4)(c)2., Florida Statutes:

2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a local employer commencing after October 1, 2002:

a. Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the Public Employee Optional Retirement Program. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. The election to participate in the optional program is irrevocable, except as provided in paragraph (e).

b. If the employee files such election within the prescribed time period, enrollment in the optional program shall be effective on the first day of employment. The employer retirement contributions paid through the month of the employee plan change shall be transferred to the optional program, and, effective the first day of the next month, the employer shall pay the applicable contributions based on the employee membership class in the optional program.

c. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed time period is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

7. The above statutes make clear that persons entering the FRS after October 1, 2002 are enrolled by default in the Pension Plan and then are given at least five months to affirmatively choose to switch to the Investment Plan, with enrollment in the Investment Plan then being effective as of the beginning of employment (or presumably, in this case, as of the beginning of the Town's participation in the FRS). Id. at (a),(b). If the member does not choose the Investment Plan within the initial choice period, she remains in the Pension Plan by default. Id. at (c).

8. There is still a one-time opportunity for a participant to move between plans, id. at (4)(e), and Petitioner used this opportunity when she executed a second election form on September 26, 2006.

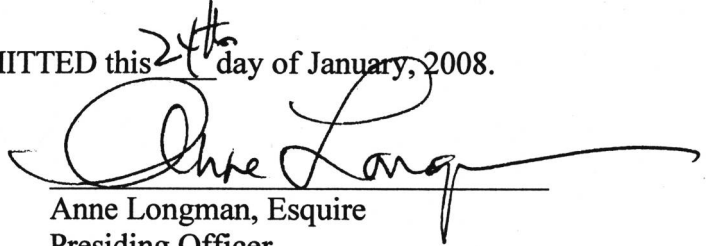
9. The SBA rules at 19-11.006(6), Florida Administrative Code, provide a grace period that enables the SBA to consider on a case-by-case basis whether an election will be voided, when an employee realizes an election has been made in error. The express terms of this rule, however, provide this grace period only to members who “file[s] an election with the TPA [third party administrator],” not as here, where no election at all was made and the member has defaulted into the Pension Plan.

10. While it is clear that the Petitioner was trying to act responsibly in her role as an elected official and would have chosen the Investment Plan over the Pension Plan if she had utilized the initial choice period, it does not in this case appear that there is any statutory authority or construction of the applicable statutes and rules which would allow the SBA to honor Petitioner’s request.

RECOMMENDATION

Having considered the undisputed facts in this matter and the applicable provisions of law, and finding no basis on which the relief Petitioner requests can be granted in this forum, I recommend that a final order be entered by the State Board of Administration denying the Petition.

RESPECTFULLY SUBMITTED this 24th day of January, 2008.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 10788
Tallahassee, FL 32302

NOTICE: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

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

This 24 day of January, 2008