

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

NICHOLAS MARZIANI,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1259
)	SBA-09-3-FOI
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On January 23, 2009, the presiding officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Nicholas Marziani, and upon counsel for the Respondent. Petitioner filed a letter of November 4, 2008, with attachments. Respondent filed a Proposed Recommended Order. Petitioner filed Exceptions on February 6, 2009. Respondent did not file a response to Petitioner's Exceptions. 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.

RULINGS ON EXCEPTIONS

First, Petitioner says that he was under the impression that the retirement planning guide furnished to him by St. Johns County included the “essentials of retirement planning for public school teachers in the county.” Further, that the “repeated references to MyFRS planning resources were most reasonably understood by [Petitioner] to refer to the details of retirement planning . . . and most decidedly NOT the essential features of the same” and “these details did not seem pertinent at the front end of [Petitioner’s] employment history with St. Johns County.” Petitioner said exactly the same thing at the hearing. Tr 21, lines 1 through 6. Petitioner clearly misunderstood the purpose of the booklet he received from St. Johns County, which was not produced by Respondent, and also misunderstood the value of the MyFRS resources and did not use those resources until it was too late. This exception is rejected because it has already been ruled on as part of the Recommended Order since it was made clear as part of the transcript.

Second, Petitioner asks for this matter to be handled in equity. That is not possible because Petitioner did not make this request during the course of the hearing and the hearing is now concluded. Further, Petitioner simply asks for “equity” but does not provide any reasons why equity should be granted. This second exception is also rejected because there is no basis for ruling on an equitable basis.

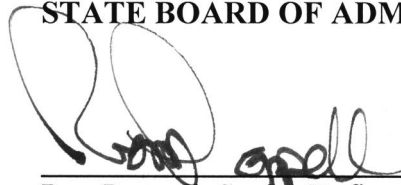
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s request to be placed in the Investment Plan retroactive to his first day of employment, absent a record of a timely filed initial election form, 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.

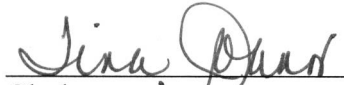
DONE AND ORDERED this 16th day of February, 2009, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



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

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


Clerk TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Nicholas Marziani, 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 16th day of February, 2009.



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

NICHOLAS MARZIANI,

Petitioner,

v.

CASE NO. 2008-1259

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on September 2, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Nicholas Marziani, *pro se*


Petitioner

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

STATEMENT OF THE ISSUE

The issue is whether Respondent has the authority to place the Petitioner in the FRS Investment Plan retroactive to his first day of employment, absent a record of a timely filed initial

election form.

PRELIMINARY STATEMENT

Petitioner executed a request for intervention on May 27, 2008 which was investigated and denied by the Respondent, State Board of Administration (SBA) in a letter of June 6, 2008. Petitioner then filed the subject Petition for Hearing.

Petitioner attended the informal hearing by telephone and testified on his own behalf. The Respondent presented the testimony of Dan Beard, SBA Director of Policy, Risk Management & Compliance. Respondent's Exhibits R-1 through R-4 were admitted into evidence without objection.

A transcript of the informal hearing was made, filed with the agency and made available to the parties, who were invited to submit proposed recommended orders. Petitioner filed a letter of November 4, 2008 with attached educational materials provided to him by Bartram Trail High School. Respondent filed a Motion for Leave to file its Proposed Recommended Order Outside of Time Schedule on December 3, 2008, with its proposed recommended order. That motion is granted.

UNDISPUTED MATERIAL FACTS

1. Petitioner was hired by the St. Johns County School District on August 7, 2006.
2. Petitioner had until January 31, 2007 to elect between membership in the FRS Pension Plan (also known as the defined benefit plan) and the Investment Plan (formally known as the Public Employee Optional Retirement Program). He testified that he mailed an initial election form selecting the Investment Plan within the applicable timeframe.
3. CitiStreet, the SBA's third party administrator, has not been able to locate this election form and has no record of it.

4. Petitioner was defaulted into the FRS Pension Plan.

5. Petitioner received a confirmation statement about a month after the January 31, 2007 initial election deadline, confirming that no initial election was received and that he had defaulted into the FRS Pension Plan.

6. Petitioner did not dispute the default at that time.

7. Petitioner testified that he did not dispute the default at that time because he relied on a retirement booklet given to him by the school where he worked, Bartram Trail High School, titled *The Fundamentals of Planning for Retirement, Annual Benefits Guide 2007*, which did not mention vesting requirements with respect to assets transferred from the FRS Pension Plan to the FRS Investment Plan. This booklet is attached to Petitioner's letter of November 4, 2008, submitted after the hearing. Petitioner further stated that he decided to "let it go" when he received the confirmation statement showing he was in the Pension Plan rather than the Investment Plan, because he believed that he could switch to the Investment Plan at any time, and did not understand that assets in the Pension Plan would still be subject to the six year vesting requirement.

8. Petitioner first notified the Respondent that his January, 2007 default was incorrect in May, 2008, by way of a Request for Intervention.

9. Petitioner filed a second election with the Respondent's third party administrator which was effective on June 1, 2008. He did this as a protective measure only, as he had by then learned that the value of the assets transferred from his FRS Pension Plan account to his FRS Investment Plan account would be subject to the 6 year vesting requirement, and that therefore the majority of his FRS Investment Plan account would still be unvested.

10. During his initial election period (prior to January 31, 2007), the Petitioner was aware that he had access to the Respondent's website and its financial guidance line, where he could review FRS educational materials or talk to a counselor about specific questions regarding his retirement planning, including which FRS plan would best suit his needs.

11. In making his decision not to dispute the January, 2007 default, Petitioner testified he relied solely on the booklet given to him by his employer and did not consult the FRS materials and personnel available to him.

CONCLUSIONS OF LAW

12. The statutory section governing initial elections into the Investment Plan provides, in pertinent part:

121.4501. Public Employee Optional Retirement Program

(4) Participation; enrollment.—

...

(b)...

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 district school board employer commencing after July 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.

3. For purposes of this paragraph, "district school board employer" means any district school board that participates in the Florida Retirement System for the benefit of certain employees, or a charter school or charter technical career center that participates in the Florida Retirement System as provided in s. 121.051(2)(d).

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

13. New employees hired by FRS-participating employers are eligible to participate in either the FRS Pension Plan or the Investment Plan.

14. Participation in the Investment Plan by a new employee is achieved by the employee filing an election form prior to expiration of the five month statutory enrollment period, and failure to file a timely election results in a default into the Pension Plan. See § 121.4501(4)(b)2.a., c, Fla.Stat.

15. Petitioner has testified that he timely mailed his initial election form, but has presented no further evidence, such as a copy or receipt, to bolster this testimony. Respondent's representative has testified that a diligent search of its records has not produced Petitioner's form or any record of it. In his Response to Respondent's Pre-Hearing Statement, filed August 26, 2008, Petitioner correctly recognizes that whether or not his initial election can be deemed to have been

received by CitiStreet is the ultimate question in this proceeding. There does not appear to be any dispute as to the evidence establishing the underlying facts asserted by each party: Petitioner has testified that he mailed his form timely, and this testimony is not directly contradicted; Respondent's representative has testified that CitiStreet does not have this form or any record of it, and this testimony is not directly contradicted. Given these undisputed facts and the period of time that elapsed before Petitioner protested being placed by default into the Pension Plan, I cannot find that Petitioner's initial election was, as a matter of law, timely made.

16. Respondent is constrained by the applicable statutes and, unfortunately, cannot retroactively place the Petitioner in the FRS Investment Plan without his initial election having been made through the mandated procedure.

17. Had he filed his initial election within the six month window afforded by statute, Petitioner would be fully vested, because Section §121.4501(4)(b)2.b., Florida Statutes provides for retroactive effect to the employee's first day of employment. But that provision applies only if the election is made during the employee's initial election window. Although Petitioner has now made a valid second election into the Investment Plan, benefits which were accumulated while the Petitioner was a member of the Pension Plan are still subject to a six year vesting requirement, pursuant to Section 121.4501(6)(b)(1), Fla.Stat. That provision states, in pertinent part:

A participant shall be vested in the amount transferred from the defined benefit program, plus interest and earnings thereon and less administrative charges and investment fees, upon meeting the service requirements for the participant's membership class as set forth in s. 121.021(29).

§ 121.4501(6)(b)1., Fla.Stat.

18. Section 121.021(29), Florida Statutes mandates the above-referenced vesting

requirement as "6 or more years of creditable service." Because the Petitioner had less than six years of creditable service when he filed his second election, he has not vested in the benefits transferred from the Pension Plan.

19. Petitioner also asserts that he was induced not to act to attempt to correct his default placement in the Pension Plan, when he learned of it through his first confirmation statement, because the booklet provided by his employer led him to believe that he could make a second election into the Investment Plan at any time while he was still working, and did not mention that this remedy would not include any amounts not fully vested under the Pension Plan.

20. I have carefully reviewed the booklet that Petitioner submitted after the hearing, especially the section on second elections which he highlighted, even though it is clear that this material was not produced or distributed by Respondent. The booklet does state: "At any time during your total active career ... you can change your mind and return to the FRS Pension Plan or move into the FRS Investment Plan by using your one-time 2nd election." This is a true statement, as far as it goes, despite the fact that it does not explain that a second election into the Investment Plan does not carry with it unvested Pension Plan balances. But the booklet does not purport to be a full explanation of all facets of the FRS; it is a retirement overview covering, among other things, new proposed IRS regulations and descriptions of 403(b) Tax Sheltered Accounts, with only approximately one third of the twenty page booklet devoted to FRS programs. And the information it does provide about the second election, while not complete in all details, is fundamentally accurate.

The sentence immediately following the one quoted above states: "To make your 2nd election, visit www.MyFRS.com to access and print the 2nd Election Retirement Plan Enrollment

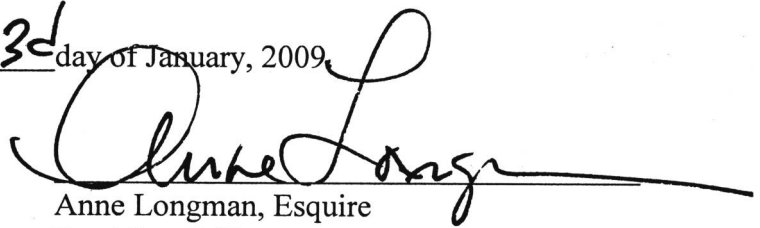
Form.” The booklet repeatedly and pointedly refers the reader to the MyFRS Financial Guidance Line and to the MyFRS website; by my count, no fewer than ten times, and encourages use of those resources, which would have clarified the vesting requirement for second elections into the Investment Plan.

21. The SBA is not authorized to depart from the requirements of the statutes it administers when exercising its jurisdiction, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and Respondent’s construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA 1998).

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 23^d day of January, 2009.



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

NOTICE: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which 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 23^d day of January, 2009.

Copies furnished to:

Nichols A. Marziani


Petitioner

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



Attorney