

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

JAY MILLER,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2013-2781
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On December 9, 2013, 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, Jay Miller, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions, which were due on December 24, 2013. 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

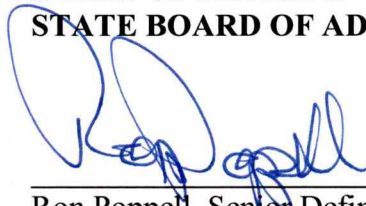
The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that his second election to join the FRS Investment Plan be deemed valid

even though it was submitted after he longer was working and earning service credit hereby 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 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 4th day of February, 2014, 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.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Jay Miller, [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 4th day of February, 2014.



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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

JAY MILLER,

Petitioner,

vs.

Case No.: 2013-2781

STATE BOARD OF ADMINISTRATION,

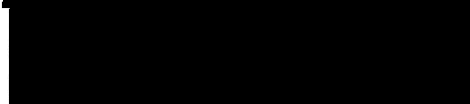
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on August 15, 2013, at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Jay Miller, pro se



For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner made a valid second election to join the Investment Plan.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Respondent's Exhibits 1 through 7 were admitted at the hearing without objection from Petitioner. The record remained open for either party to submit additional evidence regarding when Petitioner terminated his employment. Respondent's Exhibits 8 and 9 were submitted after the hearing, and Petitioner submitted no other exhibits.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Respondent filed a proposed recommended order. I then requested clarification of the exhibits filed after the hearing, which was provided by Respondent on October 29, 2013. Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner enrolled in the Florida Retirement System (FRS) in June of 1996, and was a member of the defined benefit Pension Plan, the only plan available at that time.
2. After the defined contribution Investment Plan was created, Petitioner was given a deadline of February 27, 2004 to make an initial election to join that plan.
3. Petitioner did not make an affirmative election to join the Investment Plan, and so defaulted to continued Pension Plan membership.
4. Petitioner resigned in lieu of termination from his FRS-covered employment with Marion County on February 20, 2013 and was escorted from the work premises on that day. After February 20, 2013, Petitioner performed no work for his FRS-participating employer.

5. On February 21, 2013, Petitioner submitted a second election form to the FRS Plan Choice Administrator, indicating his desire to join the Investment Plan.

6. Petitioner's Second Election was deemed invalid by Respondent because it was filed after he terminated employment.

7. Petitioner filed a Request for Intervention to challenge this decision, thus initiating this administrative proceeding.

8. Mr. Beard, Respondent's Director of Policy, Risk Management, and Compliance, testified that he investigated Petitioner's request for intervention by comparing Petitioner's termination date as reported by Petitioner's FRS-participating employer on the IRIS Contribution Account Detail against the date the Second Election form was submitted for processing.

9. Because the Second Election form was submitted after Petitioner was terminated from employment, the decision to declare his Second Election invalid was upheld.

10. Petitioner filed a Petition for Hearing to challenge that determination and asserted during the hearing that although he did not perform any work for his employer beyond February 20, 2013, his employment was not terminated until February 22, 2013 when the Marion County human resources department processed his termination paperwork, and that he may have been paid through February 22, 2013.

11. Petitioner was advised during the hearing that if he ensured Respondent received a corrected IRIS Contribution Account Detail that reflected a termination date after February 21, 2013, Respondent would deem his Second Election valid.

12. After the hearing, Petitioner submitted a Marion County – Finance Plus Concise Check History Report. That report does not demonstrate that Petitioner's employer changed his

termination date from February 20, 2013. The Supplemental Exhibits indicate that the last day Petitioner worked and was compensated is February 20, 2013.

CONCLUSIONS OF LAW

13. Second elections must be made while the FRS member is earning service credit in an employer-employee relationship with an FRS-covered employer. § 121.4501(4)(g), Fla. Stat. (2012). See also Rule 19-11.007(2), F.A.C. Petitioner has not challenged Rule 19-11.007(2), which is the source of the further requirement that, “the 2nd election must be made and processed while the member is actively working and being paid for that work” and that terminated members cannot use their second election. According to the report submitted by Petitioner’s former employer, he last actively worked for the Marion County Board of County Commissioners on February 20, 2013. Petitioner’s assertion that he was not terminated until February 21st or 22nd cannot be accepted without proof from his former employer that demonstrates that fact, and that he was actually working and earning service credit when the second election form was received by the FRS Plan Choice Administrator. These are the requirements of Rule 19-11.007(2), Florida Administrative Code.

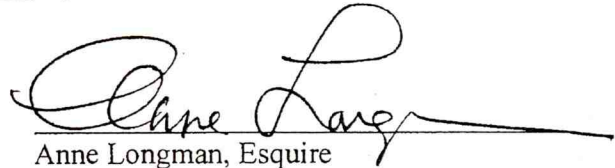
14. Section 121.4501(8)(a), Florida Statutes obligates the SBA to administer the Investment Plan. The SBA is not authorized to depart from the requirements of this statute when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The SBA’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, 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), or in excess of its statutory authority. Petitioner here has not been able to show that his attempted second election into the Investment Plan was in compliance with Respondent's rules.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 9th day of December, 2013.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

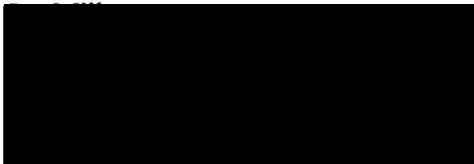
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

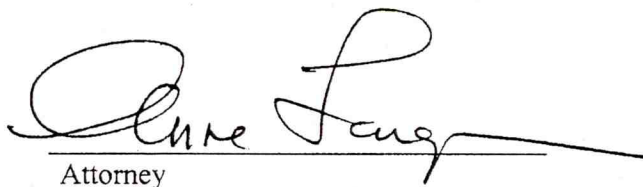
Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
Daniel.beard@sbafla.com
(850) 488-4406

This 9th day of December, 2013.

Copies furnished to:
Via U.S. Mail:



Via electronic delivery:
Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
slindsey@penningtonlaw.com
Attorneys for Respondent


Attorney