

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

NICHOLE BAILEY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2006-702
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On February 1, 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, Nichole Bailey, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on February 18, 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 file a second election form to transfer from the FRS Pension Plan to the FRS Investment Plan, even though she is no longer employed by an FRS-covered agency, 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.

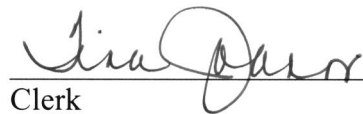
DONE AND ORDERED this 20th day of February, 2008, in Tallahassee, Florida.

**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 Nichole Bailey, 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 20th day of February, 2008.

J

Ruth L. Gokel

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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NICHOLE BAILEY,

Petitioner,

v.

CASE NO. 2006-702

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 10, 2007, in Tallahassee, Florida. The Respondent appeared in person and the Petitioner through her husband, who was present as follows:

For Petitioner:

Stuart Bailey


For Respondent:

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

STATEMENT OF THE ISSUE

The issue is whether the SBA should grant the Petitioner's request to file a second election form to transfer from the Pension Plan to the Investment Plan, even though Petitioner is no longer employed by an FRS-covered agency.

Exh. A

PRELIMINARY STATEMENT

On October 4, 2006, Petitioner filed a Request for Intervention seeking authorization to file a second election form to transfer from the Pension Plan to the Investment Plan, even though she was no longer employed with an FRS-covered agency. Respondent conducted an investigation and provided notice to Petitioner of its intent to deny her request. Petitioner then filed a Petition for Hearing which was transmitted to the undersigned for informal hearing.

The hearing was consolidated, without objection, with two other cases involving teachers formerly employed by the Palm Beach County School Board who sought the same relief: Stuart Bailey vs. SBA, Case No. 2006-701 and Daniel Levi vs. SBA, Case No. 2006-700. Petitioner Stuart Bailey is Nichole Bailey's husband; he represented her interests at the hearing; she was not present. Petitioner Stuart Bailey and Petitioner Levi both testified on their own behalf and on behalf of each other and Petitioner Nichole Bailey. Prior to the hearing, Petitioner submitted copies of parts of the MyFRS website and a copy of an email from Ernie Camarino of the Palm Beach County School District. This email is also part of her Petition for Hearing. The SBA presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance and exhibits R1-15, consisting of official agency records and communications by and to the Petitioner. A recorded telephone call between Petitioner Stuart Bailey and the MyFRS Financial Guidance Line was played at the hearing. All exhibits were admitted without objection. 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.

MATERIAL UNDISPUTED FACTS

1. Petitioner began FRS-covered employment in 1994.
2. Petitioner was given the option to elect membership in the FRS Investment Plan

during the period from September 2002 to November 2002. Petitioner did not elect at that time to participate in the FRS Investment Plan, and therefore remained a member of the FRS Pension Plan by default.

3. On February 28, 2003, Petitioner's husband called the MyFRS Financial Guidance Line and spoke to an Ernst and Young counselor regarding whether he had used his first election to remain a member of the FRS Pension Plan. Petitioner was told that he defaulted into the FRS Pension Plan by failing to affirmatively elect membership in the FRS Investment Plan, and that he could transfer assets to the Investment Plan by filing a second election at any time in his career.

4. Petitioner terminated her FRS-covered employment on July 4, 2006.

5. Petitioner did not file a second election form to change membership to the FRS Investment Plan before her FRS-covered employment terminated.

6. Petitioner's FRS Pension Plan balance is fully vested.

7. Pension Plan members receive personal forecast statements, FRS bulletins, and member annual statements that advise them to call the MyFRS Financial Guidance Line or log onto the MyFRS.com website if they have questions about their retirement benefits. Petitioner had access through numerous different avenues to educational materials that state that the second election form must be filed before terminating employment.

8. The MyFRS.com website has been running and available to members since July 1, 2002; it advises members in several different places that the one-time second election must be filed before FRS-covered employment terminates in order to be valid. Under MyFRS.com, "Frequently Asked Questions," the website states:

Do I need to work in FRS covered employment to be eligible for benefits under the investment plan?

If you are a current FRS covered employee and using your second election opportunity to change plans, your second election enrollment form must be submitted and received by the plan choice administrator, CitiStreet, while still earning service credit and prior to your termination from employment. If you terminate prior to the receipt of the form by CitiStreet your plan change will be rejected. For example, if you submit your second election enrollment form and it is received by CitiStreet on May 15th, you may terminate beginning on May 16th or after. However, if you terminated on May 12th and your form is received by CitiStreet on May 15th, your second election will be rejected.

9. Members also have access to a 2nd Election flyer distributed to FRS-covered employers that states: "If you are terminating FRS-covered employment, your 2nd Election Retirement Plan Enrollment Form must be received by the Plan Choice Administrator, CitiStreet, prior to the date of your termination."

10. The FRS Summary Plan Description, FRS Investment Plan, also available on MyFRS.com, states, in underlined type:

Your 2nd Election Retirement Plan Enrollment Form must be received by the Plan Choice Administrator, CitiStreet, prior to your termination. If received after your termination, it will be considered late and your plan change will be rejected.

11. The second election form available to members on the MyFRS.com website also states in bold and underlined type:

Your 2nd election will be final at 4 p.m. (Eastern Time) on the day that it is received. If terminating FRS covered employment this form must be received by the FRS Plan Choice Administrator prior to your date of termination to be effective.

12. Members may also attend workshops that address various retirement topics,

including how and when to file a second election form. The materials presented at a workshop for Palm Beach County School Board employees such as the Petitioner specifically state: “You have the opportunity to make a one-time ‘Second Election’ and move between plans before terminating employment.”

13. Petitioner’s husband asserts that, had he been properly informed of the need to file a second election before leaving FRS employment, he would have done so. He stated that he was erroneously told by a Palm Beach County School Board employee that he had up to a year after leaving FRS employment to switch plans, that he looked to the School Board as the source of information closest to him to guide his actions and that his employer did not adequately inform him of his options or what would be needed to switch to the Investment Plan. He did not, however, dispute any of the Material Undisputed Facts set out in Respondent’s Pre-Hearing Statement filed August 30, 2007, and the material facts and circumstances of Petitioner Nichole Bailey’s case are the same as those of Stuart Bailey.

CONCLUSIONS OF LAW

14. Section 121.4501(4)(e), Florida Statutes, sets out the right to a second election and how it must be exercised. It states:

(e) After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, or the month following the receipt of the eligible employee’s plan election, if sooner, the employee shall have one opportunity, at the employee’s discretion, to choose to move from the defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. Eligible employees may elect to move between Florida Retirement

System programs only if they are earning service credit in an employer-employee relationship consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except that the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System. (emphasis added).

15. Petitioner's Palm Beach County School Board employment terminated July 4, 2006, but she did not attempt to effectuate moving from the Pension Plan to the Investment Plan until October 3, 2006, well past the date when she stopped earning service credit with her FRS employer as required by section 121.4501(4)(e), Florida Statutes.

16. Petitioner asserts that she should be allowed to submit a second election form now because she is vested in her retirement and restricting the second election to the time before termination makes no sense. Unfortunately, this has no bearing on the above-cited statutory authority under which the SBA must operate.

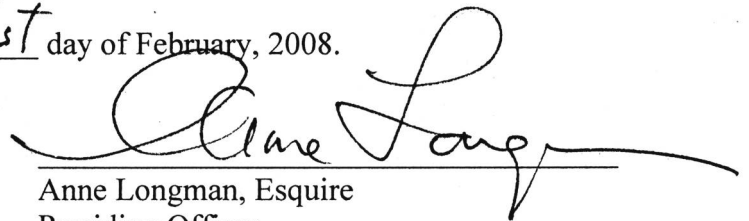
17. Even if Petitioner's husband received bad advice when speaking with a Palm Beach County School Board human resources employee, this is not material to a proceeding in this forum. The undisputed facts show that Petitioner had full access to educational materials which correctly set out the requirements for exercising the one time second election, and that no second election form was timely filed.

18. Because section 121.4501(4)(e), Florida Statutes, requires a second election form to be filed before the member terminates FRS-covered employment, the SBA regrettably cannot grant Petitioner's request, and her Petition must be denied.

RECOMMENDATION

Having considered the undisputed facts in this matter, I recommend that the State Board of Administration issue a Final Order denying the relief requested by Petitioner Nichole Bailey.

RESPECTFULLY SUBMITTED this 1st day of February, 2008.



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.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been provided via U.S. Mail this 1st day of

February, 2008 to:

Filed with:

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308

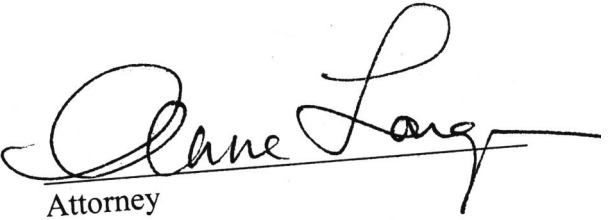
Copies furnished to:

Nichole Bailey



Petitioner

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Respondent


Attorney