

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

DAVID FEENAUGHTY	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2008-1361
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On February 26, 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, David Feenaughty, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on March 13, 2009. 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**

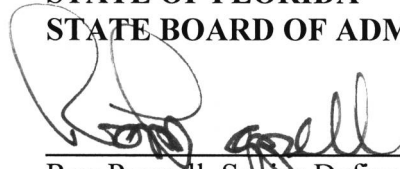
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to rescind his second election and be returned to the Pension Plan is denied.

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.

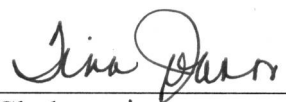
DONE AND ORDERED this 18th day of March, 2009, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



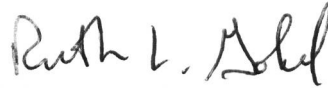
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

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 JOANDS

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS to David Feenaughty, 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 18th day of March, 2009.



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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

DAVID FEENAUGHTY,

Petitioner,

vs.

CASE NO. 2008-1361

STATE BOARD OF ADMINISTRATION,

Respondent.

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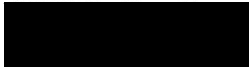
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GENERAL COUNSEL'S OFFICE

**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned Presiding Officer on December 8, 2008, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: David Feenaughty



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 Petitioner may rescind his second election into the Investment Plan and be returned to the Pension Plan.

Exhibit A

## **PRELIMINARY STATEMENT**

On October 10, 2008, Petitioner executed a Request for Intervention asking to be allowed to switch back to the Florida Retirement System Pension Plan (the defined benefit plan) from the Investment Plan (formally known as the Public Employee Optional Retirement Plan). This request was denied by letter of October 17, 2008 from the State Board of Administration (SBA) to Petitioner. The Petitioner then filed a Petition for Hearing which resulted in the instant proceeding.

Petitioner attended the informal hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management and Compliance, and offered Exhibits R-1 through R-5, which were admitted into evidence without objection.

A transcript of the informal hearing was filed with the agency and made available to the parties, who were invited to submit proposed recommended orders. Respondent submitted a Proposed Recommended Order; Petitioner made no further filings.

## **UNDISPUTED MATERIAL FACTS**

1. Petitioner defaulted into the FRS Pension Plan effective March 1, 2003.
2. He executed a 2nd Election Retirement Plan Enrollment Form on December 12, 2006, and transferred into the Investment Plan.
3. Petitioner's second election was effective on January 1, 2007 and assets were transferred from his FRS Pension Plan account to his FRS Investment Plan account on January 31, 2007.
4. Petitioner utilized his second election on the advice of a Primerica financial planning representative, and he now believes this was not a wise decision and may result in his

outliving his retirement income. He states that the Primerica representative made incorrect and misleading representations about his financial status and his options under the FRS. Neither Primerica nor this individual are affiliated in any way with the SBA or FRS.

5. Petitioner first gave notice to the Respondent of his wish to rescind his second election in October, 2008.

6. The second enrollment form contained the following statement:

**I understand that this enrollment will constitute my one-time second election as provided under the FRS; I will have to remain in this retirement plan until my retirement from the FRS.**

#### CONCLUSIONS OF LAW

7. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes. That section states, in pertinent part:

(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.

§ 121.4501(4)(e), Fla.Stat.

8. Members of the FRS are allowed only one opportunity to switch plans after their initial election period. Because Petitioner used his one-time second election, he has exhausted the opportunity to move between plans.

9. Petitioner cannot rescind his second election, because he failed to do so within the window provided by the applicable rule. Rule 19-11.007, Florida Administrative Code provides a grace period for rescission of second elections as follows:

(6) Grace Period.

(a) If a member files an election with the TPA and the employee realizes that the election was made in error, the SBA will consider, on a case-by-case basis, whether the election will be voided, subject to the following requirements:

1. Member Elects the FRS Investment Plan. The SBA must be notified, by a telephone call to the toll free number: 1(866)446-9377, or by e-mail, or by written correspondence directly to the SBA, to the TPA, or to the Division of Retirement, before assets are transferred from the FRS Pension Plan to the member's FRS Investment Plan account. This transfer occurs no later than the last business day of the month following the election month.

2. Member Elects the FRS Pension Plan. The SBA must be notified no later than the last business day of the month following the election month.

Rule 19-11.007, F.A.C.

10. In this case, assets were transferred from Petitioner's Pension Plan benefit to his Investment Plan account prior to any request for rescission.

11. 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. 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).

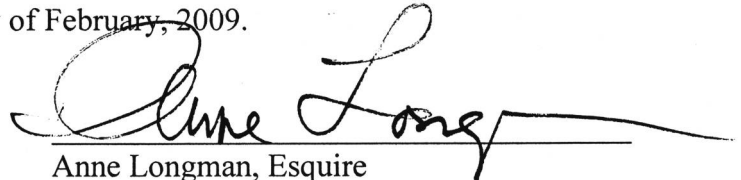
12. It is unfortunate that Petitioner appears to have been victimized by an unscrupulous or ill-informed financial planner, but the SBA and this tribunal have no jurisdiction

over this person or the company he works for. The SBA lacks the statutory authority to allow Petitioner to rescind his election.

### 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 26th day of February, 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 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 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 26th day of February, 2009.

Copies furnished to:  
David P. Feenaughty

  
Petitioner



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