

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

THOMAS PETTENATO,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2009-1591
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On January 7, 2010, 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, Thomas Pettenato and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order, but Petitioner did not. Neither party filed Exceptions, which were due on January 22, 2010. 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

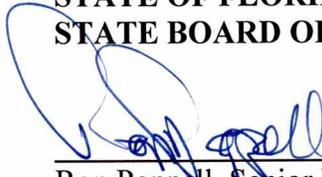
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to rescind his second election and be returned to the Pension Plan is denied.

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 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.

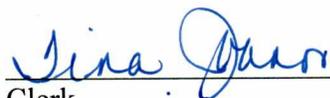
DONE AND ORDERED this 28th day of January, 2010, in Tallahassee, Florida.

**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.

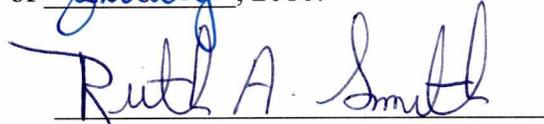


Clerk

TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Thomas Pettenato, pro se, [REDACTED], [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 28th day of January, 2010.



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

THOMAS PETTENATO,

Petitioner,

vs.

Case No.: 2009-1591

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This cause was heard in an informal proceeding before the undersigned presiding officer on October 20, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

[REDACTED]

Petitioner

For Respondent:

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

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether the State Board of Administration (SBA) should grant Petitioner's request to switch from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan, despite his having filed a second election choice form moving to the Investment Plan.

PRELIMINARY STATEMENT

Pursuant to a request for intervention dated August 14, 2009, Respondent SBA investigated Petitioner's contention that he had been denied the opportunity to make a second election, and his request that he now be permitted to use a second election to transfer from the Investment Plan to the Pension Plan. This request was denied by letter of September 1, 2009, and Petitioner filed a Petition for hearing requesting the same relief, and further alleging that he was being unfairly denied the opportunity to participate in the Deferred Retirement Option Program (DROP). The instant hearing resulted.

Petitioner attended the hearing in person and testified on his own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-6 were admitted into evidence.

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 within 30 days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner was employed by the Florida Department of Transportation, an FRS participating employer, beginning in February 2001.
2. At the time Petitioner's employment began, the FRS had only one retirement program, a defined benefit program referred to as the Pension Plan.

3. Beginning in 2002, as mandated by the Florida Legislature, the FRS began offering the Public Employee Optional Retirement Program, a defined contribution program which is known informally as the Investment Plan.

4. All FRS employees were given the opportunity, at the time the Investment Plan began, to elect to stay in the Pension Plan or move to the new Investment Plan. Those who did not actively make an election remained in the Pension Plan by default.

5. On July 16, 2003, Petitioner executed a 2nd Election Retirement Plan Choice Form to switch from the FRS Pension Plan into the FRS Investment Plan.

6. Prior to making this switch, Petitioner telephoned the MyFRS Financial Guidance Line and spoke to a counselor in a recorded conversation. When asked if he had chosen to remain in the Pension Plan during the initial choice period, he replied: "Well, I didn't do anything. I don't know what I did with that paperwork, to be honest," and concurred that he had previously defaulted into the FRS Pension Plan. He advised the counselor that he wanted to make the switch, that he understood the differences between the two plans, that he had a stockbroker's license, that he was more concerned with the timing of his retirement than how much money he was going to receive as a benefit, and he was specifically informed that this was his second choice.

7. The MyFRS Financial Guidance Line counselor instructed Petitioner on how to navigate the MyFRS website and find additional educational materials.

8. Petitioner's second election form was submitted, processed and confirmed on July 18, 2003, thus effectuating his transfer to the Investment Plan.

9. Some six years later, Petitioner filed a Petition for Hearing seeking review of the Respondent's determination that he could not switch from the FRS Investment Plan back to the FRS Pension Plan as he had already utilized his second election.

10. At hearing, Petitioner acknowledged that the second election form itself informed him that he would have to remain in the Investment Plan until his retirement and that utilizing his second election would exhaust his opportunities to switch plans. He stated however, that he had not made an election before and thus thought that this was his first election.

CONCLUSIONS OF LAW

11. The Florida Legislature created the Investment Plan for implementation in 2002, and divided FRS-participating employers into three groups for purposes of offering employees enrollment in the Investment Plan: state employers, school board employers and local government employers.

12. Petitioner's FRS-participating employer was a state agency, and he was therefore in the first group, which was further subdivided into those who were existing employees as of June 1, 2002 and those who commenced their employment after June 1, 2002. § 121.4501(4), Fla.Stat.

13. Because Petitioner commenced his employment in 2001, he was among the group of state employees who were eligible to elect between the two plans during the June 1, 2002 through August 31, 2002 window, referred to as the initial election period. Any employee who failed to elect to participate in the Investment Plan during the applicable initial election period was deemed to have elected to retain membership in the Pension Plan. Id.

14. Once a member is beyond the initial election period, he has remaining to him only one other opportunity to switch plans. Movement between the two plans after the initial election

period 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.

15. Members of the FRS are allowed only one opportunity to switch plans after their initial election period expires. Because Petitioner's initial election period expired in September 2002 and because he has already used his one-time second election, he has exhausted the opportunities to move between plans.

16. Petitioner apparently did not remember that he had the opportunity to make a choice of plans during the initial election period. He refers during his 2003 call to the MyFRS Guidance Line to having received "that paperwork," and concurs that he defaulted into the Pension Plan – but presumably he did not realize that this was in fact his first election. The form he filled out in 2003 to switch to the Investment Plan was his second election and was clearly identified and specifically titled as such.

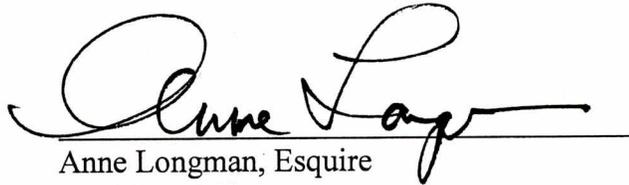
17. It is not clear from the record why Petitioner sought six years later to re-enroll in the Pension Plan, although his Petition cites his desire to participate in DROP. But whatever the reason, Petitioner's initial choice period passed long ago, and in 2003 he used the only other opportunity afforded by statute to switch plans and must now remain in the Investment Plan.

18. Respondent SBA cannot deviate from the requirements of the Florida Statutes creating and governing the Florida Retirement System, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and does not appear to have done so in this case.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 7th day of January, 2010.



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 7th day of January, 2010.

Copies furnished to:



Petitioner

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


Attorney

Joanos_Tina

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Sent: Friday, January 29, 2010 1:42 PM
To: Joanos_Tina
Subject: UPS Delivery Notification, Tracking Number [REDACTED]



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At the request of STATE BOARD OF ADMINISTRATION, this notice is to confirm that the following shipment has been delivered.

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Tracking Number: [REDACTED]
Reference Number 1: General Counsel

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