

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

GREGORY HUTCHINSON,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2010-1934
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On March 30, 2011, 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, Gregory Hutchinson, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner made no further filings. Neither party filed exceptions, which were due on April 14, 2011. 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. Petitioner's request that he be allowed to make a second election to join the Florida Retirement System (FRS) Investment Plan even though he has terminated FRS-covered employment 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 18th day of April, 2011, 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.



Agency 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 Gregory Hutchinson, pro se, 2390 Austell Road, Marietta, Georgia 30008, 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 April, 2011.



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

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GREGORY HUTCHINSON,

Petitioner,

vs.

Case No. 2010-1934

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on December 16, 2010, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Gregory Hutchinson
2390 Austell Road
Marietta, Georgia 30008

For Respondent: Brian A. Newman, 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 the SBA should allow Petitioner to make a second election to join the Investment Plan even though he has terminated Florida Retirement System (FRS)-covered employment.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner submitted a Request for Intervention to the SBA asking that he be allowed to transfer from the Pension Plan to the Investment Plan even though he was no longer employed by an FRS-covered agency. His request was denied and he was advised of his right to seek review of that decision. Petitioner filed a Petition for Hearing making the same request and this administrative proceeding followed.

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented testimony from the Petitioner and Daniel Beard, Director of Policy, Risk Management, & Compliance, Office of Defined Contribution Programs, State Board of Administration. Respondent's Exhibits 1 through 8 were received in evidence without objection.

A transcript of the hearing was filed with the agency and copies provided to the parties, who were given thirty days after receipt to submit proposed recommended orders. Respondent submitted a proposed recommended order; Petitioner made no further submissions.

MATERIAL UNDISPUTED FACTS

1. Petitioner became an employee of the Broward County School Board, an FRS-covered agency, in 1994, and so was a member of the defined benefit Pension Plan.
2. When the Public Employee Optional Retirement Program, also known as the Investment Plan, was established by the Florida Legislature in 2002, Petitioner was given an opportunity during the September 2002 – November 2002 initial election period to switch to the Investment Plan. Petitioner did not submit an election during this period and so remained in the Pension Plan.
3. Petitioner terminated employment with the Broward County School Board on February 11, 2006, and has been working in the Georgia school system since that time.

4. On May 15, 2006, some three months after he had terminated FRS-covered employment with the Broward County School Board, Petitioner called the MyFRS Financial Guidance Line to inquire about accessing his Florida retirement benefit so that he could combine it with the retirement benefit he would be earning in Georgia. He was told during this call that he was vested in the Florida Pension Plan and so would be entitled to a Pension Plan benefit beginning at age 62, but that he could not now make any changes to his FRS plan choice as he was no longer in FRS employment, and that there was no provision in the FRS that would allow him to transfer his Florida Pension Plan account to his Georgia retirement account.

5. Petitioner also was told that the only way he could effectuate a rollover of his Florida retirement assets to a Georgia account would be from a Florida Investment Plan account, and that he could now enter the Florida Investment Plan only by returning to FRS-covered Florida employment and switching to the Investment Plan while actively working.

6. Petitioner complained that he should have been told that he could switch to the Investment Plan before he terminated employment in Florida.

7. During this 2006 call, Petitioner never said anything about having initially elected membership in the Investment Plan in 2002, and stated that he received quarterly statements, but that the statements had not advised him of the ability to switch plans.

8. On October 1, 2010, Petitioner submitted an EZ Retirement Plan Enrollment Form purporting to elect the Investment Plan. Petitioner was not employed by an FRS-covered Florida employer when this form was submitted. This is the only record evidence of any attempt by Petitioner to elect Investment Plan membership.

9. Petitioner filed a Request for Intervention with the SBA on October 18, 2010, requesting enrollment in the Investment Plan. In his Request for Intervention, Petitioner asserted

for the first time that he previously had enrolled in the Investment Plan during the initial enrollment period in 2002. Petitioner has not, however, produced any evidence to this effect, and his telephone conversation with the MyFRS Guidance line in May, 2006 is completely inconsistent with this assertion.

10. At hearing, Petitioner stated that he either gave or mailed a form indicating his desire to join the Investment Plan to someone employed by the school district in 2002. Petitioner stated that this person was not a representative of the SBA.

CONCLUSIONS OF LAW

11. To submit a valid initial election to join the Investment Plan in 2002, Petitioner was required to comply with Section 121.4501(4)(b)1.a., Florida Statutes (2002), providing in pertinent part as follows:

a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. The election must be made in writing or by electronic means and must be filed with the department and the personnel officer of the employer within 90 days after September 1, 2002, or, in the case of an active employee who is on a leave of absence on September 1, 2002, within 90 days after the conclusion of the leave of absence....

b. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed 90 days 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.

This provision was later amended to clarify that the initial election should be submitted to the third party administrator of the Investment Plan, as follows:

a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. The election must be made in writing or by electronic means and must be filed with the third-party administrator by November 30, or, in the case of an active employee who is on a leave of absence on July 1, 2002, by the last business day of the 5th month following the

month the leave of absence concludes...

b. 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.

§ 121.4501(4)(b)1.a., Fla. Stat. (2010)

12. There is no record that Petitioner submitted an initial election form to the Respondent, and no record of any call made by Petitioner to switch plans during the initial election phase. Consequently, Petitioner retained Pension Plan membership when his initial election period expired on November 30, 2002 in accordance with Section 121.4501(4)(b)1.b., Florida Statutes (2002).

13. Petitioner contends that he provided an initial election form indicating his desire to transfer to the Investment Plan, before his initial election period expired, to an unidentified person who was employed by the school district. This contention is inconsistent with his May, 2006 conversation with the MyFRS Guidance Line, as he made no mention in that call of having elected the Investment Plan in 2002, but could not in any event be deemed by the SBA to constitute a valid election into the Investment Plan. FRS employers, like the school district that employed Petitioner, have never been authorized to accept or process initial election selections from FRS members.

14. As to the EZ Retirement Plan Enrollment Form Petitioner submitted on October 1, 2010, Section 121.4501(4)(e), Florida Statutes, requires Petitioner to have been actively working at FRS-covered employment in order to submit a valid second election to change FRS retirement plans. The SBA therefore lacks statutory authority to process this form, filed over four years after Petitioner left FRS-covered employment.

15. The Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The Respondent's construction and application of Chapter 121 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).

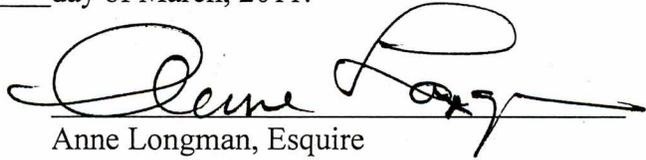
16. Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements before being allowed to transfer to the Investment Plan. See Young v. Department of Community Affairs, 625 So.2d 837 (Fla. 1993); Department of Transportation v. J.W.C., 396 So.2d 778 (Fla. 1st DCA 1981).

17. It is unfortunate that Petitioner cannot create the retirement account structure he apparently desires, by transferring his vested Florida Pension Plan benefit directly to his Georgia account, but the SBA can administer the Investment Plan only according to applicable statutory authority. If Petitioner returns to FRS-covered employment in a qualified position, he would be entitled (under current Florida law) to transfer to the Investment Plan upon the submission of a validly executed second election form; and in any event, he has a vested Florida Pension Plan benefit which he will receive when he retires.

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 30th day of March, 2011.



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.

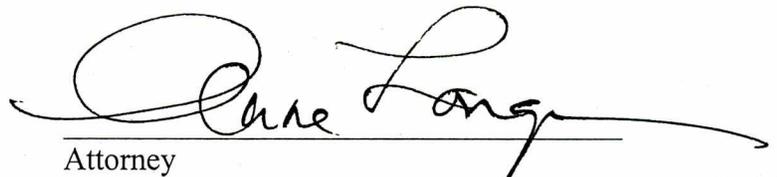
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 30th day of March, 2011.

Copies furnished to:

Gregory Hutchinson
2390 Austell Road
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Petitioner

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Attorney