

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

WILLIAM COLLINS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1332
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On July 8, 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, William Collins, and upon counsel for the Respondent. Both Petitioner and Respondent filed Proposed Recommended Orders. Neither party filed Exceptions, which were due on July 23, 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.

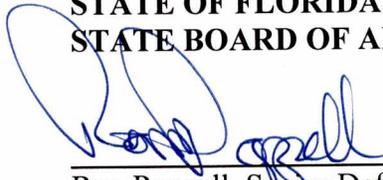
ORDERED

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. Petitioner's request to have his opening account balance in the Investment Plan recalculated is to be referred to the Division of Retirement for ultimate resolution and response.

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 5th day of August, 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

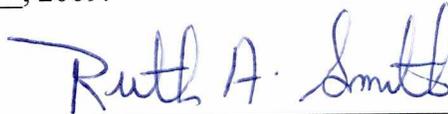
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to [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 5th day of August, 2009.



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

WILLIAM COLLINS,

Petitioner,

vs.

CASE NO. 2008-1332

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on February 25, 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

RECEIVED
STATE BOARD OF ADMIN
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GENERAL COUNSEL'S OFFICE

EXHIBIT A

STATEMENT OF THE ISSUE

The issues are whether Petitioner's second election into the Florida Retirement System (FRS) Investment Plan (formally known as the Public Employee Optional Retirement Program) can be rescinded, and alternatively whether the opening balance of his Investment Plan account should be recalculated to a higher amount.

PRELIMINARY STATEMENT

Petitioner filed a Request for Intervention dated September 22, 2008 asking that he be allowed to return to the Pension Plan or alternatively that his Investment Plan opening account balance be changed. This request was investigated and denied by Respondent by letter of September 24, 2008. An informal hearing ensued and was convened on December 15, 2008, at which time the Petitioner requested a continuance. The undersigned granted the continuance and the informal hearing was held on February 25, 2009.

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 (SBA) as well as that of Ira Gaines, Benefits Administrator, Florida Division of Retirement (DOR). Petitioner's Exhibit P-1 and Respondent's Exhibits R-1 through R-7 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. Both Petitioner and Respondent filed proposed recommended orders.

UNDISPUTED MATERIAL FACTS

1. Petitioner is an employee of Miami-Dade County.

2. Petitioner was a member of the FRS Pension Plan.

3. On March 7, 2008, the Petitioner called the MyFRS Financial Guidance Line and stated that he wanted to change to the Investment Plan. During that telephone call, Petitioner sought guidance regarding this decision, but he did not ask, and the counselor did not state, what the opening balance of his Investment Plan account would be or how it would be calculated.

4. The MyFRS Financial Guidance Line counselor advised Petitioner that he could download a second election form from the MyFRS website in order to make the requested Second Election.

5. Petitioner executed his Second Election on March 7, 2008 to change from the Pension Plan to the Investment Plan.

6. The Second Election form executed by the Petitioner states:

If you selected Option 2 in Section 1: (Note: If you are currently a member of the FRS Hybrid Option, you cannot select this option.) **I understand that I have elected to switch to the FRS Investment Plan and that any accrued value I may have in the FRS Pension Plan will be transferred to the FRS Investment Plan as my opening account value.** I understand that any Pension Plan accrued value transferred to my account will be subject to the 6-year vesting requirement of the FRS Pension Plan. **I can find out the accrued value of my FRS Pension Plan account by calling the MyFRS Financial Guidance Line and selecting Option 3 to connect to the Division of Retirement.** I understand the initial transfer amount is an estimate and that my account will be reconciled within 60 days of that transfer pursuant to Florida law using my actual FRS membership record. The reconciled amount could be more or less than the estimate I receive and my account will be adjusted accordingly. I also direct that all future employer contributions be deposited in my FRS Investment Plan account.

[Id. (emphasis added)].

7. Petitioner did not call the Division of Retirement to find out how the accrued value of his FRS Pension Plan account would translate into a present opening Investment Plan account balance prior to executing his second election form.

8. On March 14, 2008, Respondent's third party administrator received Petitioner's second election form.

9. A Second Election Plan Choice Confirmation Statement mailed to Petitioner shows a transaction date of March 14, 2008 for his switch from the Pension Plan to the Investment Plan, with an election effective date of April 1, 2008. This correspondence also states, "[t]he estimated present value of your Pension Plan benefit will be transferred to your Investment Plan account by the end of the month following the effective date of this election;" it does not show any calculated or estimated opening account balance. Petitioner acknowledges that he received this Statement and did not request rescission of his second election at this point, but at this time he had only his own incorrect assumption of what his opening account balance would be and no knowledge that he could request rescission.

10. On April 29, 2008, Respondent mailed Petitioner an Investment Plan Opening Balance Confirmation Statement which showed his Investment Plan account opening balance as [REDACTED]. Petitioner received this Statement after April 30, 2008, the date his rescission period expired.

11. Ira Gaines, a Benefits Administrator with the Florida Division of Retirement, testified that the Division of Retirement is the entity responsible for calculating an opening account balance for FRS participants transferring from the Pension Plan to the Investment Plan, and explained how Petitioner's opening balance was calculated at \$ [REDACTED] pursuant to the formula set out at Section 121.4501(3)(c)2., Florida Statutes.

12. Respondent first learned that Petitioner wished to rescind his second election and disputed the amount of his opening balance on or about September 22, 2008, which is the date of his Request for Intervention.

13. Dan Beard, the Director of Policy, Risk Management & Compliance with the State Board of Administration, testified that the SBA has no authority to calculate or recalculate an opening account balance. If an opening account balance is miscalculated to a member's detriment, the SBA would have no authority to increase the amount of assets transferred from the FRS Pension Plan trust to make up the difference, because the Division of Retirement is responsible for transferring assets sufficient to fund a member's Investment Plan opening account balance.

14. Petitioner testified that he thought he had a "pretty good" understanding of what his Investment Plan opening account balance would be based upon a Statement of Account he received, generated February 16, 2004, in which the Division of Retirement calculated a cost to him of [REDACTED] to purchase 3.75 years of his prior service from the State of Maryland. Petitioner testified that since purchasing 3.75 credit service years was calculated to cost \$33,379.66, he thought his opening Investment Plan account balance based on approximately 10 years of service would surely be higher than that.

15. Mr. Gaines testified that the formula used by the Division of Retirement to calculate purchase of credit from other states, found at Section 121.1115, Florida Statutes, bears "no relation whatsoever" to the formula used to calculate an Investment Plan member's opening account balance. Petitioner acknowledged that the February 16, 2004 Division of Revenue Statement of Account does not state or imply that it is based on the same formula that is used to generate an Investment Plan account opening figure.

16. Mr. Gaines further testified that in almost all cases members call the Division of Retirement prior to moving from the Pension Plan to the Investment Plan, to get an estimate of their opening account balance. Petitioner acknowledged that he did not call the Division for such

an estimate prior to making his switch. Had he requested an estimated opening account balance, he would have been transferred to an Ernst & Young Financial Planner who would have run the calculation for him using the online calculator at the MyFRS.com website.

17. In its letter denying Petitioner's request to return to the Pension Plan or to change his opening account balance, Respondent SBA informed Petitioner, for the first time, that he could have rescinded his second election pursuant to Rule 19-11,007(6), Florida Administrative Code, if he had submitted notification by April 30, 2008. Petitioner notes that being informed of the rescission period after it has run is of no use to him, that there appears to be no specific statutory authority for this rescission period, and that he did not receive an opening balance confirmation statement until after the time for rescission had run. He therefore asserts he did not receive adequate notice of his calculated present benefit or of his right to rescind and that there is as much authority under the applicable statutes for rescission to occur now as for it to occur "before assets are transferred from the FRS Pension Plan to the member's FRS Investment Plan account," per the grace period rule.

18. Petitioner has also asserted that his opening account balance was incorrectly computed, and in a Motion to Reopen Testimony filed April 2, 2009, alleges that he has discovered that he has an additional 1.88 years of FRS service which should have been included in the Division of Retirement calculation of his opening Investment Plan balance. He has requested the Miami-Dade County benefits office to conduct an audit of his years of FRS service, and states that the results of this audit will be available at some point in the near future.

19. Petitioner further asserts in his Proposed Recommended Order that agencies such as the SBA are authorized to grant variances pursuant to Section 120.542(1) and Chapter 28-104

Florida Administrative Code, and that under these provisions, Respondent should grant a variance to its grace period rule allowing rescission in this case.

CONCLUSIONS OF LAW

20. Section 121.4501(3), Florida Statutes, states, in pertinent part:

(3) Eligibility; retirement service credit.—

(a) Participation in the Public Employee Optional Retirement Program is limited to eligible employees. Participation in the optional retirement program is in lieu of participation in the defined benefit program of the Florida Retirement System.

(b) An eligible employee who is a member of the defined benefit retirement program of the Florida Retirement System at the time of his or her election to participate in the Public Employee Optional Retirement Program shall retain all retirement service credit earned under the defined benefit retirement program of the Florida Retirement System as credited under the system and shall be entitled to a deferred benefit upon termination, if eligible under the system. However, election to participate in the Public Employee Optional Retirement Program terminates the active membership of the employee in the defined benefit program of the Florida Retirement System, and the service of a participant in the Public Employee Optional Retirement Program shall not be creditable under the defined benefit retirement program of the Florida Retirement System for purposes of benefit accrual but shall be credited for purposes of vesting.

(c) 1. Notwithstanding paragraph (b), **each eligible employee who elects to participate in the Public Employee Optional Retirement Program and establishes one or more individual participant accounts under the optional program may elect to transfer to the optional program a sum representing the present value of the employee's accumulated benefit obligation under the defined benefit retirement program of the Florida Retirement System.** Upon such transfer, all service credit previously earned under the defined benefit program of the Florida Retirement System shall be nullified for purposes of entitlement to a future benefit under the defined benefit program of the Florida Retirement System. A participant is precluded from transferring the accumulated benefit obligation balance from the defined benefit program upon the expiration of the period afforded to enroll in the optional program.

2. **For purposes of this subsection, the present value of the member's accumulated benefit obligation is based upon the member's estimated creditable service and estimated average final compensation under the**

defined benefit program, subject to recomputation under subparagraph 3. For state employees enrolling under subparagraph (4)(a)1., initial estimates will be based upon creditable service and average final compensation as of midnight on June 30, 2002; for district school board employees enrolling under subparagraph (4)(b)1., initial estimates will be based upon creditable service and average final compensation as of midnight on September 30, 2002; and for local government employees enrolling under subparagraph (4)(c)1., initial estimates will be based upon creditable service and average final compensation as of midnight on December 31, 2002. The dates respectively specified above shall be construed as the "estimate date" for these employees. **The actuarial present value of the employee's accumulated benefit obligation shall be based on the following:**

a. The discount rate and other relevant actuarial assumptions used to value the Florida Retirement System Trust Fund at the time the amount to be transferred is determined, consistent with the factors provided in sub-subparagraphs b. and c.

b. A benefit commencement age, based on the member's estimated creditable service as of the estimate date. The benefit commencement age shall be the younger of the following, but shall not be younger than the member's age as of the estimate date:

(I) Age 62; or

(II) The age the member would attain if the member completed 30 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting requirement that would otherwise apply under the defined benefit program of the Florida Retirement System.

c. For members of the Special Risk Class and for members of the Special Risk Administrative Support Class entitled to retain special risk normal retirement date, the benefit commencement age shall be the younger of the following, but shall not be younger than the member's age as of the estimate date:

(I) Age 55; or

(II) The age the member would attain if the member completed 25 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting

requirement that would otherwise apply under the defined benefit program of the Florida Retirement System.

d. The calculation shall disregard vesting requirements and early retirement reduction factors that would otherwise apply under the defined benefit retirement program.

3. For each participant who elects to transfer moneys from the defined benefit program to his or her account in the optional program, the division shall recompute the amount transferred under subparagraph 2. not later than 60 days after the actual transfer of funds based upon the participant's actual creditable service and actual final average compensation as of the initial date of participation in the optional program. If the recomputed amount differs from the amount transferred under subparagraph 2. by \$10 or more, the division shall:

a. Transfer, or cause to be transferred, from the Florida Retirement System Trust Fund to the participant's account in the optional program the excess, if any, of the recomputed amount over the previously transferred amount together with interest from the initial date of transfer to the date of transfer under this subparagraph, based upon effective annual interest equal to the assumed return on the actuarial investment which was used in the most recent actuarial valuation of the system, compounded annually.

b. Transfer, or cause to be transferred, from the participant's account to the Florida Retirement System Trust Fund the excess, if any, of the previously transferred amount over the recomputed amount, together with interest from the initial date of transfer to the date of transfer under this subparagraph, based upon 6 percent effective annual interest, compounded annually, pro rata based on the participant's allocation plan.

4. As directed by the participant, the board shall transfer or cause to be transferred the appropriate amounts to the designated accounts. The board shall establish transfer procedures by rule, but the actual transfer shall not be later than 30 days after the effective date of the member's participation in the optional program unless the major financial markets for securities available for a transfer are seriously disrupted by an unforeseen event which also causes the suspension of trading on any national securities exchange in the country where the securities were issued. In that event, such 30-day period of time may be extended by a resolution of the trustees. Transfers are not commissionable or subject to other fees and may be in the form of securities or cash as determined by the state board. Such securities shall be valued as of the date of receipt in the participant's account.

§ 121.4501(3), Fla.Stat. (2008)(emphasis added).

21. Section 121.4501(4), Florida Statutes, states, in pertinent part:

(4) Participation; enrollment.—

...

(c)1. With respect to an eligible employee who is employed in a regularly established position on December 1, 2002, by a local employer:

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 February 28, 2003, or, in the case of an active employee who is on a leave of absence on October 1, 2002, by the last business day of the 5th month following the month the leave of absence concludes. This election is irrevocable, except as provided in paragraph (e). Upon making such election, the employee shall be enrolled as a participant of the Public Employee Optional Retirement Program, the employee's membership in the Florida Retirement System shall be governed by the provisions of this part, and the employee's membership in the defined benefit program of the Florida Retirement System shall terminate. The employee's enrollment in the Public Employee Optional Retirement Program shall be effective the first day of the month for which a full month's employer contribution is made to the optional program.

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.

...

(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.

§ 121.4501(4), Fla.Stat.(2008)(emphasis added).

22. 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.

23. In this case, Petitioner could have ascertained his approximate opening account balance for an Investment Plan account before making his second election. He had ample opportunities to do this and was not justified in relying on a calculation made for other purposes to estimate this amount. When he called the MyFRS Guidance Line on March 7, 2008, he stated

simply and clearly that he wanted to make this change, and did not reveal any hesitation about his decision. He then immediately submitted a form reflecting his election to transfer to the Investment Plan. The SBA and its third party administrators cannot second guess the directions given by FRS participants on forms that are properly executed and submitted.

24. The validity of the grace period rule and the question of whether Respondent is required to inform participants of that rule by means other than links on its website to Chapter 19-11, Florida Administrative Code, are not at issue here. After he received his opening account balance confirmation statement of April 29, 2008, Petitioner waited almost five months to question the amount shown on the statement.

25. Nor does it appear that Petitioner has properly invoked the waiver or variance provisions of the Florida Administrative Procedures Act, as he did not cite section 120.542 or style his action as one for a variance or waiver until filing his Proposed Recommended Order, and has not in any event made the showing required under those provisions.

26. Petitioner has requested the opportunity to present additional evidence as to his correct opening Investment Plan account balance, asserting that he has found an error in the record of his FRS service. Respondent opposes this on the grounds that the SBA has no authority over calculations or recalculations of these balances. The issue of Petitioner's correct opening balance was raised from the beginning in this proceeding, as recognized by Respondent's Prehearing Statement.

27. If the audit of Petitioner's years of service by Miami-Dade County reveals that he has additional qualified FRS service, Petitioner may have a valid complaint, on this basis, as to the amount in his Investment Plan account. If this issue has now come to rest, as Petitioner asserts, on whether DOR applied the statutory formula with an incorrect number for his years of

FRS service, it would be up to DOR under 121.4501(3)(c)3, Florida Statutes, to recalculate his opening balance and transfer or cause to be transferred from the Florida Retirement System Trust Fund the proper amount of the excess, if any, or to raise any defenses thereto.

28. Pursuant to Section 121.4501(9)(f)3, Florida Statutes and Rule 19-11.005(1), Florida Administrative Code, Respondent SBA is to receive and resolve participant complaints against a provider (the term "Investment Plan providers" is defined at Rule 19-11.005(2)(c)5 to include any state agency providing Investment Plan services, which appears to include DOR), and "when appropriate, refer such complaints to the appropriate agency." *Id.* The statute and rule seem to contemplate that Respondent SBA is to resolve complaints against its providers, such as DOR, and if the complaint or dispute involves actions within the purview of an agency providing Investment Plan services, refer such complaints to that agency. In Petitioner Collins' case, Respondent SBA would refer the remaining dispute as to the correct opening balance for Petitioner's Investment Plan account to the Division of Retirement, as the agency responsible for computing amounts and transferring monies from Pension Plan to Investment Plan accounts, under Section 121.4501(3)(c)3, Florida Statutes.

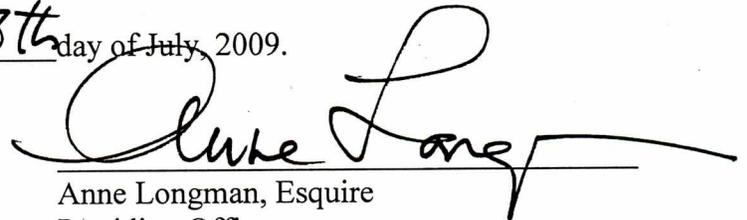
29. While pension statutes are to be liberally construed in favor of the intended recipients, Green v. Gray, 87 So.2d 504 (Fla.1956), Respondent SBA is charged by Section 121.4501, Florida Statutes with administering the Investment Plan in accordance with statute, for the benefit of all participants. Respondent 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.), Final Order No.: DMS-05-009 (Dept.Mgmt.Svs. April 4, 2005). It is unfortunate that Petitioner made an erroneous assumption about what the opening balance of his Investment Plan account would be, and the timing and

content of the various notifications Petitioner received could have been clearer or more helpful, but I see no statutory or rule basis for recommending that Respondent permit him to rescind his second election. As to the issue of whether Petitioner's opening account balance should be recalculated, I grant Petitioner's motion to introduce additional evidence, limited to the question of whether the correct number of years of FRS service was used in this calculation, and recommend that this issue be referred to DOR for resolution.

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 as to Petitioner's request to rescind his second election and refer the question of his correct opening Investment Plan balance to the Division of Retirement.

RESPECTFULLY SUBMITTED this 8th day of July, 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 8th day of July, 2009.

Copies furnished to:



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Attorneys for Respondent


Attorney