

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

VERONICA HARMON-GUNN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2012-2354
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	
	)	

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**FINAL ORDER**

On August 15, 2012, 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, Veronica Harmon-Gunn, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions, which were due on August 30, 2012. 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.

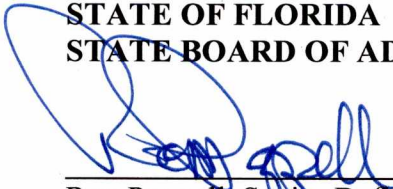
**ORDERED**

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that she be entitled to return to the Florida Retirement System ("FRS") Pension Plan, even though she already has utilized her second election, 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 19<sup>th</sup> day of September, 2012, in Tallahassee, Florida.

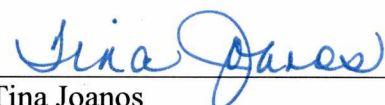
**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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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.



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Tina Joanos  
Agency Clerk

**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 19th day of September, 2012.



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Ruth A. Smith  
Assistant General Counsel  
State Board of Administration of Florida  
1801 Hermitage Boulevard  
Suite 100  
Tallahassee, FL 32308

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GENERAL COUNSEL'S OFFICE

STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION

VERONICA HARMON-GUNN,

Petitioner,

vs.

Case No.: 2012-2354

STATE BOARD OF ADMINISTRATION,

Respondent.

**RECOMMENDED ORDER**

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on May 18, 2012, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner:



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 Petitioner may return to the Florida Retirement System (FRS) Pension Plan or instead has exhausted all allowable opportunities to move between FRS retirement plans.

**EXHIBIT A**

## PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, Defined Contribution Programs. Respondent's Exhibits R-1 through R-4 were admitted into evidence at the hearing without objection.

A transcript of the hearing was made, filed with the agency and provided to all parties, who were invited to submit proposed recommended orders within 30 days. Respondent filed a proposed recommended order; Petitioner made no further filings.

## MATERIAL UNDISPUTED FACTS

1. Petitioner has been employed by the Miami Dade Corrections and Rehabilitation Department, an FRS-covered agency, continuously since 1987, and initially was enrolled in the Pension Plan, as that was the only plan available at that time.

2. When the Investment Plan began, Petitioner had until February 28, 2003 to make an initial election between the Pension Plan and the Investment Plan. Petitioner made no affirmative initial election and therefore defaulted to remaining in Pension Plan membership.

3. On July 23, 2007, Petitioner signed and submitted a second election form stating that she wanted to change from the Pension Plan to the Investment Plan. The second election form Petitioner signed and submitted states in pertinent part:

I understand that this election will constitute my one-time second election as provided under the FRS and that I must remain in this retirement plan until my retirement. I understand that my one-time second election is irrevocable.

4. Petitioner's second election was processed, and she was enrolled in the Investment Plan effective August 1, 2007. Petitioner testified that she made the switch from the Pension Plan to the Investment plan because she thought, at the time, that she might be leaving county employment. Instead, she decided to remain a full 25 years.

5. On September 29, 2008, Petitioner called the MyFRS Financial Guidance Line and asked whether she could switch back to the Pension Plan. She was advised at that time that she had no further elections remaining.

6. On October 10, 2008, Petitioner called the MyFRS Financial Guidance Line again regarding her wish to change plans, stating that she did not like to invest.

7. On March 2, 2009, Petitioner again called the MyFRS Financial Guidance Line, expressing concern over losses in the market.

8. On August 4, 2011, Petitioner again called the MyFRS Financial Guidance Line to revise her portfolio.

9. On January 10, 2012, Petitioner called the MyFRS Financial Guidance Line to determine the amount she would have to pay if she wanted to buy back into the Pension Plan.

10. On January 27, 2012, Petitioner submitted a Request for Intervention asking that she be allowed to change back to the Pension Plan. She stated that she made a second election in 2007 because she believed she had another election remaining. She acknowledged she had spoken with "several FRS representatives regarding my switching back to the Pension Plan" and that "[t]hey each informed me that I had already utilized my second choice when I made the initial change to Investments."

11. Petitioner was advised by Respondent on March 28, 2012 that her request to return to the Pension Plan was denied; she timely filed a petition for hearing that initiated this administrative proceeding.

#### **CONCLUSIONS OF LAW**

12. In 2002, the Florida Legislature amended the Florida Retirement System retirement plan offerings to allow FRS covered employees to participate in either the FRS defined benefit program (the Pension Plan) or the new defined contribution Public Employee

Optional Retirement Program, (now called the Investment Plan). During the roll-out period, participation in the Investment Plan by an employee of a local government such as Petitioner was achieved by the employee filing an election form by February 28, 2003. See §121.4501(4), Fla. Stat. (2002). Because Petitioner did not make an affirmative initial election to join the Investment Plan, she defaulted to Pension Plan membership, as the governing statute provided.

13. After the initial election period expired, the Petitioner still had a one-time, and irrevocable, second election that she could use to switch from the Pension Plan to the Investment Plan. Section 121.4501(4)(e), Florida Statutes (2007) provides in pertinent part that:

(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 [Pension Plan] to the [Investment Plan] or from the [Investment Plan] to the [Pension Plan]...

§121.4501(4)(e), Fla. Stat. (2007) (Emphasis added).

14. Petitioner used the one statutory opportunity to change plans referred to above when she submitted her second election form in July of 2007.

15. Petitioner asserts that she was not made aware that using her second election would exhaust her opportunities to move between plans, but it is undisputed that the second election form she signed warned that her second election choice was irrevocable. As a matter of law, Petitioner is charged with knowledge of the contents of a document she signed. See Addison v. Carballosa, 48 So. 3d 951, 951 (Fla. 3rd DCA 2010); Wexler v. Rich, 80 So. 3d 1097 (Fla. 4th DCA 2012).

16. Petitioner also acknowledges that she was told during her telephone calls to the MyFRS Financial Guidance Line on September 28, 2008, October 10, 2008, March 2, 2009, and August 4, 2011 that she could not switch back to the Pension Plan, as she had already exhausted her elections.

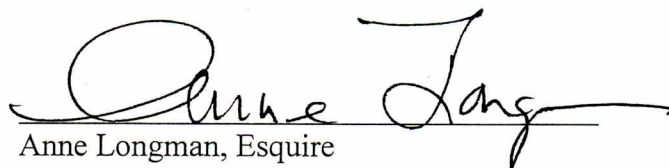
17. Respondent SBA cannot deviate from the Florida Statutes creating and governing the Florida Retirement System, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, 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).

18. Petitioner asserts that her initial default, by which she remained in the Pension Plan, cannot and should not be considered to be the first of two allowable choices between the two FRS plans, because she defaulted rather than making an affirmative choice. But the structure of the governing statute is clear, as is the fact that she was informed at the time, over five years ago, that she was making an irrevocable second election. The SBA has no statutory authority to allow her a third election so that she can again change plans.

### 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 15<sup>th</sup> day of August, 2012.



Anne Longman, Esquire  
Presiding Officer

For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
315 South Calhoun Street, Suite 830  
Tallahassee, FL 32301-1872



**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 15<sup>th</sup> day of August, 2012.

Copies furnished to:



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