

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ARTHUR VAN DAMME,)
)
 Petitioner,)
)
 vs.)
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
)
)
)
 _____)

Case No. 2008-1220
SBA-09-02-FOI

FINAL ORDER

On January 21, 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, Arthur Van Damme, and upon counsel for the Respondent. Respondent submitted a proposed recommended order. Neither party filed Exceptions, which were due on February 5, 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.

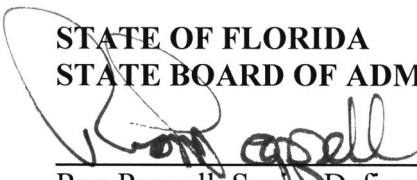
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to use his second election to switch from the Investment Plan into the Pension Plan without having to pay the required "buy back" amount 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 10th day of February, 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

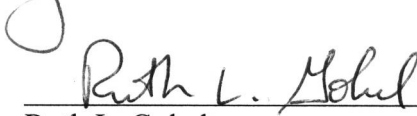
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Arthur Van Damme, 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 10th day of February, 2009.



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

ARTHUR VAN DAMME,

Petitioner,

v.

CASE NO.: 2008-1220


STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on June 30, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Arthur Van Damme, Pro Se

Petitioner

For Respondent: Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether the Petitioner's request to use his second election to switch from the Investment Plan into the Pension Plan without having to pay the "buy back" amount should be granted.

PRELIMINARY STATEMENT

On April 24, 2008, Petitioner executed a Request for Intervention seeking placement in the Florida Retirement System (FRS) Pension Plan, also known as the defined benefit program, from the FRS Investment Plan, formally known as the Public Employee Optional Retirement Program, via use of his second election, without payment of the "buy back" amount. That request was denied. Petitioner then filed a Petition for Hearing requesting the same relief.

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

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

UNDISPUTED MATERIAL FACTS

1. Petitioner is employed by Collier County School District, a Florida Retirement System ("FRS") participating employer.
2. He was hired by Collier County in 2003 and had between August 12, 2003 and January 30, 2004 to make his initial election between participation in the FRS Pension Plan and the FRS Investment Plan.
3. On October 31, 2003, the Petitioner called the MyFRS Financial Guidance Line and spoke with Ernst & Young representative Victor. Victor and the Petitioner had the following discussion:

MR. VAN DAMME: Well, I just – this is my first year teaching in Florida. And when I signed up, I signed up for the investment plan. And I think they got me in the pension thing. I got something from you, it says that I have to make a call, make your choice between 81203 and 130204 (sic).

E&Y ADVISOR: Okay. We can certainly assist you with that. You do have a choice right now between the state pension plan and the state investment plan.

MR. VAN DAMME: Yeah, I want the investment plan.

E&Y ADVISOR: Okay. No problem. Do you have your six digit PIN number handy?

MR. VAN DAMME: Yep.

E&Y ADVISOR: Okay. We could certainly record that election for you over the phone. I would have to conference in a representative from CitiStreet to handle that for you. Before I do, do you have any questions on both plans or do you –

MR. VAN DAMME: Well, I have already got a pension from Michigan. I am 53 years old, so I won't be getting any pension here, but – so I think the investment plan is my best way, right?

E&Y ADVISOR: Okay. Do you plan to be there at least six years of service?

MR. VAN DAMME: Well, I may be six years, I'm not sure.

E&Y ADVISOR: And the reason I ask is under the investment plan there's only a one-year vesting period. So if you think that you may be there for anything less than the six years of service, the investment plan is certainly the way to go. But if you think that you will be there for at least six years of service, you do have the choice to make. And you can compare both the pension plan and the investment plan side by side to see which one is likely to give you the higher benefit in retirement.

MR. VAN DAMME: Yeah. I don't know if I will be six years. I mean, I can't tell you that.

E&Y ADVISOR: Okay, all right. No problem. So if you don't think that you are going to be there for six years, or if you are just not sure, the investment plan would guarantee that you walk away with a benefit if you are not there for the full six years.

...

MR. VAN DAMME: I see here on this thing in front of me, if I would teach nine years and, you know, I don't know if I'm going to, if you stay in the pension plan you get about 7100 a year, and if I'm in the investment plan it is only 3100 a year.

E&Y ADVISOR: That is right. The pension plan does provide the higher benefit for the employer (sic) who plans to finish their career under the Florida Retirement System pension plan.

MR. VAN DAMME: Yeah.

E&Y ADVISOR: But if you don't think that you are going to be there for at least six years, that's really the first concern, to make sure that you walk away with something rather than nothing.

MR. VAN DAMME: Well, what if I – what if I, after six years I'm going to stay in it, can I switch back to the pension plan then?

E&Y ADVISOR: Yes, you do have a one-time option to switch plans, all right, but at that time the State will give you a buy-back amount. They will tell you if you want to come back over into our plan it'll cost you X amount of dollars.

MR. VAN DAMME: Yeah.

E&Y ADVISOR: If you have that money in the investment plan you could simply transfer that over, but usually for an employee who is at the end of their career, it is a rather

expensive buy-back amount and the contributions really would not have equaled out at that point.

MR. VAN DAMME: Well, how much of a difference are we talking?

E&Y ADVISOR: That number I don't have for you. We don't have those details.

MR. VAN DAMME: I will have to call back I guess.

4. On January 26, 2004, the Petitioner called the MyFRS Financial Guidance Line again and made his initial election into the FRS Investment Plan during that call. He also acknowledged during that telephone call that he understood the effect of his decision to join the Investment Plan.

5. The Petitioner now wants to use his remaining one-time second election to switch from the Investment Plan to the Pension Plan.

6. The Petitioner was informed by the Division of Retirement that in order to switch to the Pension Plan he would have to "buy back" into the plan and would need approximately \$ [REDACTED] more than what is currently in his Investment Plan account to complete the transaction. Petitioner does not believe that he should be required to pay this amount to enroll in the Pension Plan.

CONCLUSIONS OF LAW

7. Movement between the two FRS plans is governed by Section 121.4501(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. 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.

1. If the employee chooses to move to the Public Employee Optional Retirement Program, the applicable provisions of this section shall govern the transfer.
2. If the employee chooses to move to the defined benefit program, **the employee must transfer from his or her Public Employee Optional Retirement Program account and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement,** determined assuming that attained service equals the sum of service in the defined benefit program and service in the Public Employee Optional Retirement Program. Benefit commencement occurs on the first date the employee would become eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the Florida Retirement System defined benefit plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the defined benefit plan, the then-present value of such accrued benefit shall be deemed part of the required transfer amount described in this subparagraph. The division shall ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary.
3. **Notwithstanding subparagraph 2., an employee who chooses to move to the defined benefit program and who became eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a state employer after June 1, 2002; a district school board employer after September 1, 2002; or a local employer after December 1, 2002, must transfer from his or her Public Employee Optional Retirement Program account and, from other employee moneys as necessary, a sum representing that employee's actuarial accrued liability.**

§ 121.4501(e), Fla.Stat. (2007) (emphasis added).

8. Rule 19-11.007, Florida Administrative Code states, in pertinent part:

19-11.007. Second Election Enrollment Procedures for the FRS Retirement Programs.

(1) Purpose. The purpose of this rule is to establish procedures for making the second election permitted by Section 121.4501(4)(e), F.S. This rule includes procedures for members who initially chose the FRS Investment Plan or the FRS Investment Plan Hybrid Option to use their 2nd election to transfer to the FRS Pension Plan; for members who chose or defaulted into the FRS Pension Plan to use their 2nd election to transfer to the FRS Investment Plan or the FRS Investment Plan Hybrid Option.

(2) Definitions.

(a) "FRS Investment Plan" means the optional defined contribution retirement plan within the Florida Retirement System, established in Parts II and III of Chapter 121, F.S., ...

...

(c) "FRS Pension Plan" means the defined benefit retirement plan within the Florida Retirement System, established in Part I of Chapter 121, F.S.

...

(4) Specific Procedures for the "2nd Election Retirement Plan Enrollment Form.

(a) All members are required to fill out Section 1 of the form by providing the member's name and Social Security number and checking only one of three boxes, indicating which choice the member is making. These boxes contain the following information:

1. Change from the FRS Investment Plan or FRS Investment Plan Hybrid Option to the FRS Pension Plan (Please complete Section 4, as described in paragraph (d) below.) **I understand I am using my existing FRS Investment Plan account balance to "buy" into the FRS Pension Plan. I understand that if my account balance is not sufficient to cover the cost of the "buy in", I must pay the balance due from my personal funds before being allowed into the FRS Pension Plan.** The Division of Retirement

is responsible for calculating the buyback amount for those wishing to use their second elections to transfer to the FRS Pension Plan. The actuarial calculation is a forward-looking projection based on the employee's salary and service and increases as additional creditable service and salary are earned. I understand that I may move my FRS Investment Plan account balance into more conservative, less risky investment options within the FRS Investment Plan in order to potentially reduce the volatility of my account balance prior to liquidation and movement to the FRS Pension Plan.

...

(d) ...

2. For members choosing to transfer to the FRS Pension Plan:

...

c. I understand that there may be a cost to change to the FRS Pension Plan, which I can get by calling the MyFRS Financial Guidance Line and connecting to the Division of Retirement, and that such cost may require that I pay some amount greater than my current FRS Investment Plan account balance. Such payment, if necessary, must be received by the date determined by the Division of Retirement. If the required amount is not received by the Division of Retirement by the date due, the election will be voided. The member will receive notification and proper instructions from the Division of Retirement detailing where and in what form to send any personal payments. The Division of Retirement is responsible for calculating that amount for those wishing to use their second elections to transfer to the FRS Pension Plan. The actuarial calculation is a forward-looking projection based on the employee's salary and service and increases as additional creditable service and salary are earned.

...

(h) For members transferring to the FRS Pension Plan, the election may require a personal payment if the member's account balance was less than the calculated amount required to buy back into the FRS Pension Plan. Such payment, if necessary, must be received by the date determined by the Division. If the required amount is not received by the Division by the date due, the election will be voided. The member will receive notification and proper instructions from the Division detailing where and in what form to send any personal payments.

Rule 19-11.007, F.A.C. (emphasis added).

9. At the time the Petitioner made his election into the Investment Plan, he had access to several educational resources including the toll-free MyFRS Financial Guidance Line and the MyFRS.com website. Petitioner also had access to the FRS Investment Plan Summary Plan Description and the Retirement Plan Enrollment Form.

10. The statutes cited above are clear that Florida Retirement System members have a one-time opportunity to switch from the Investment Plan to the Pension Plan. § 121.4501(e), Fla.Stat. FRS members who wish to use their one-time second election to switch from the Investment Plan to the Pension Plan must "buy back" into the Pension Plan with the money which has accumulated in their Investment Plan account. Id. If there are insufficient funds in the Investment Plan account, the member has to make up the difference from other financial resources in order to complete the transaction. Id.

11. Petitioner was expressly told during the October 31, 2003 telephone conversation with Ernst & Young representative Victor that the "buy back" amount would be "expensive" due to his age, and that in all likelihood, the Investment Plan account would not cover the amount.

12. Like every other new member of the FRS, the Petitioner was faced with the decision of whether to enroll in the FRS Investment Plan which has only a one year vesting requirement, or the Pension Plan, which has a six year vesting requirement. As stated by the Petitioner during his October 31, 2003 telephone conversation with Victor, he was unsure whether he would serve six years with his FRS participating employer. Enrolling in the Investment Plan was the only way he could assure that he would in fact have any FRS retirement

benefit, if he left FRS-covered employment before six years elapsed.

13. It does not appear that the Petitioner was given erroneous advice or was misled.

14. During the hearing, Petitioner stated his belief that having to make a choice between the Pension Plan and the Investment Plan at the outset of employment with an FRS participating employer is fundamentally unfair given the disparate vesting periods, uncertainty in the job market, and the consequences of making the "wrong" decision.

15. While there is no question that the decision Petitioner was required to make in choosing between the two FRS plans is a difficult one, it must be made by every new FRS member, and arises from the structure of the programs as created by the Legislature and codified in Chapter 121, Florida Statutes.

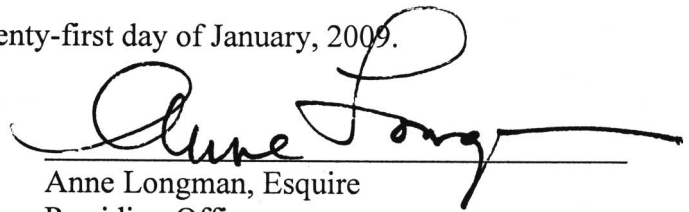
16. The State Board Administration (SBA) is not authorized to depart from the requirements of Chapter 121, Florida Statutes when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). In charging a "buy back" amount to Petitioner, Respondent is applying the relevant requirements of statute.

17. Petitioner's request to enter the Pension Plan without having to contribute the actuarially accrued amount determined to be necessary to produce the benefit to which he would then be entitled is contrary to the express requirements of the applicable statutes. Respondent lacks the statutory authority to grant Petitioner's request.

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 twenty-first day of January, 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 should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

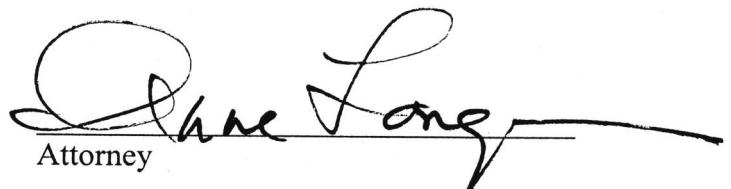
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 21st day of January, 2009.

Copies furnished to:

Arthur Van Damme


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