

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

QIYUAN PENG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2008-1345
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On August 27, 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 counsel for the Petitioner and upon counsel for the Respondent. Both Petitioner and Respondent filed Proposed Recommended Orders. Neither party filed Exceptions, which were due on September 11, 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**

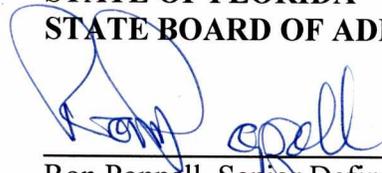
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to rescind his second election and be returned to the Pension Plan without having to pay the "buy back" amount is denied.

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 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 14th day of September, 2009, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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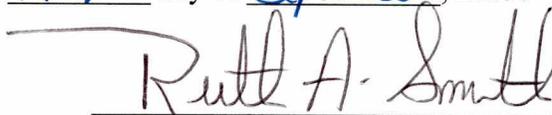
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

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.

  
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 Lawrence Zietz, Esq., [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 14<sup>th</sup> day of September, 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

QIYUAN PENG,

Petitioner,

vs.

CASE NO. 2008-1345

STATE BOARD OF ADMINISTRATION,

Respondent.

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned presiding officer on May 14, 2009, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Lawrence Zietz, Esquire

[REDACTED]

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

**EXHIBIT A**

## 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 October 1, 2008, Petitioner executed a Request for Intervention seeking placement in the Florida Retirement System (FRS) Pension Plan from the FRS Investment Plan via use of his second election, without payment of the "buy back" amount. That request was investigated by Respondent and denied. Petitioner then filed a Petition for Hearing requesting the same relief.

Petitioner attended the informal hearing by telephone and was represented by counsel, Lawrence Dietz, Esq. Petitioner testified on his own behalf. The Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Also present were Andrew Clarke of Ernst & Young and John Roten of ING. Respondent's Exhibits R-1 through R-6 were admitted into evidence without objection, as was R-7, filed after the hearing. Petitioner's Exhibits P-1 through P-12 also were admitted into evidence. There is substantial overlap between Petitioner's and Respondent's exhibits. I find that there is no substantial dispute as to any material fact, and therefore proceed to my recommendation.

A transcript of the 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 was employed by the Broward County Medical Examiner's Office, which is an FRS participating employer, beginning in January 2003, and had until June 30, 2003 to make his initial election between participation in the FRS Pension Plan and the FRS Investment Plan.

2. On June 26 and June 27, 2003, shortly before his initial election period expired, Petitioner called the toll-free MyFRS Financial Guidance Line and spoke with Ernst & Young representatives. During the June 26, 2003 telephone call the following exchanges occurred:

MR. PENG: Yes, sir. I'm not quite sure if I understand the difference between Pension Plan and the Investment Plan.

E&Y ADVISOR: Okay. I can help you with that today.

MR. PENG: All right. So I need – here it says Pension and Investment. Pension means that I do everything, I choose myself; right?

E&Y ADVISOR: No. Under the Pension Plan – it's just the opposite. Under the Pension Plan, the State does everything for you, you don't do anything.

MR. PENG: Okay.

E&Y ADVISOR: Under the Investment Plan, that's when you would do everything.

MR. PENG: Okay.

E&Y ADVISOR: Let me give you an overview of the two plans and the pros and cons of each; okay?

MR. PENG: Okay.

E&Y ADVISOR: All right. Of course, those are the two plans that you can choose, either to go with the State's Pension Plan or to choose the State's new Investment Plan.

MR. PENG: Right.

E&Y ADVISOR: Now if you elect to go with the Pension Plan, like I said, the State is responsible for the investment risk.

MR. PENG: Okay.

E&Y ADVISOR: You don't assume any risk in the Pension Plan.

MR. PENG: Right.

...

E&Y ADVISOR: The other plan is the Investment Plan.

MR. PENG: Right.

E&Y ADVISOR: This is where you do all the work.

MR. PENG: Right.

E&Y ADVISOR: You manage your own retirement account.

...

E&Y ADVISOR: Now, what you could do, is you could start out in the Investment Plan.

MR. PENG: Right.

E&Y ADVISOR: And if at some point you decided that I think I might be here long-term and actually make a career, then you could switch back to the Pension Plan --

MR. PENG: Okay.

E&Y ADVISOR: -- at some later point in your, you know, in your career.

MR. PENG: Oh, I can?

E&Y ADVISOR: Yes, because you have two opportunities to switch plans.

MR. PENG: Okay.

E&Y ADVISOR: The first one you're going to make before June 30th; right?

MR. PENG: Okay. I'm still okay then.

E&Y ADVISOR: Right. You still have – everyone gets two opportunities to switch plans. The first one you need to make by June 30th.

MR. PENG: Okay.

E&Y ADVISOR: After that, you have one other opportunity which you can use at any time.

MR. PENG: Okay.

E&Y ADVISOR: Do you follow me?

MR. PENG: Yes.

E&Y ADVISOR: Okay. Now, what questions do you have for me?

MR. PENG: I don't have any questions. I'm going to go with the Investment Plan.

3. At the time he made the June 26, 2003 telephone call, Petitioner consulted the MyFRS.com website, which included, among other things, the applicable Florida Statutes, rules governing the Florida Retirement System and the then-current Summary Plan Description.

4. Those materials explained that while there was still a one-time opportunity to switch back to the Pension Plan after making an initial election of the Investment Plan, there could be a cost to do this if there was not enough money in the participant's account to pay the total cost of the present value of his accumulated Pension Plan benefit obligation:

If you currently participate in the Pension Plan and choose to participate in the Investment Plan, you will have a one-time opportunity to switch to the Pension Plan at any point while working for an FRS employer. If you decide to switch, you must "buy back" into the Pension Plan with the money in your Investment Plan account. If you don't have enough money in your Investment Plan account, you can still get back in...but you'll have to make up the difference from your other financial resources. (Summary Plan Description at 10)

Or, if you choose the Investment Plan now and want to switch back to the Pension Plan later: You'll have to "buy back" into the Pension Plan with the money in your Investment plan account. The CHOICE SERVICE, on MyFRS.com can help you figure your buy-back amount. (Your Choice Book at 12)

5. On June 27, 2003, Petitioner called the MyFRS Financial Guidance Line again, and made his initial election into the FRS Investment Plan during that telephone call. Prior to making his election, Petitioner advised the MyFRS Financial Guidance Line counselor that he understood that he could lose money in the Investment Plan. He had a lengthy conversation with a counselor, while on the MyFRS.com website, determining his level of risk and exploring the different funds available to him if he chose the Investment Plan.

6. At some point Petitioner realized that he would be working for Broward County for longer than six years, that therefore he could vest in the Pension Plan, and that the Pension Plan might be more advantageous to him in retirement. He now wants to use his remaining one-time second election to switch from the Investment Plan to the Pension Plan, which he can do, but has learned from the Division of Retirement that it will cost him a substantial amount of money, in excess of the balance of his Investment Plan account, to buy back into the Pension Plan.

7. Petitioner testified at hearing that he was never advised verbally by Respondent or any of its third party providers that there could be a buy back amount associated with using his second election. Nor was he told that buy back would not be required; transcripts of the calls between Petitioner and the telephone counselors show that the subject was not discussed.

#### **CONCLUSIONS OF LAW**

8. 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. (emphasis added).

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

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

...

**(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).

10. The law is clear that Florida Retirement System members have a one-time opportunity to move between plans. § 121.4501(e), Fla.Stat. Members who wish to use their one-time second election to switch from the Investment Plan to the Pension Plan are required to fund the present value of their accumulated Pension Plan benefit obligation. If there are insufficient funds in their Investment Plan account to meet this obligation, the member must make up the difference from other financial resources in order to complete the transaction. If this is not done, the attempted second election is void.

11. In 2003, Petitioner, like every other new FRS member, was faced with deciding whether to enroll in the FRS Investment Plan, with its one year vesting requirement, or the Pension Plan, which has a six year vesting requirement. Petitioner asserts that he was misled in making this choice by material misrepresentations, consisting generally of 1) failure of counselors on the MyFRS Guidance Line to expressly inform him that anyone choosing the Investment Plan who later wished to switch back to the Pension Plan might have to come up with additional money, and 2) failure of the Respondent's website materials to highlight this same

information. The remedy he seeks is to be transferred to the Pension Plan without having to fund the full present value of that benefit.

12. Petitioner clearly had doubts in 2003 as to whether he would serve six years in an FRS covered job. By enrolling in the Investment Plan, he was able to assure that he would have at least some benefit from his FRS participation, if he left before six years elapsed. The decision Petitioner was required to make in choosing between the Pension Plan and the Investment Plan at the beginning of FRS employment is a difficult one, but it is common to every new FRS member, and arises from the structure of the programs as created by the Legislature and codified in Chapter 121, Florida Statutes. All FRS participants have the opportunity to change their choice of plans, but there will always be a cost to making the “wrong” initial decision: if the participant chooses the Pension Plan and does not remain employed for the six years required to vest, all of that benefit is lost; if he chooses the Investment Plan, remains employed and wants to convert to the defined benefit available only under the Pension Plan, the out of pocket cost of doing so may be high, depending on when the second election is made and how the participant’s investment selections have performed during his time in the Investment Plan.

13. During the hearing, the Petitioner acknowledged that he was given the opportunity, before making his initial election, to ask questions and become fully informed about the possible cost of transferring back to the Pension Plan, and that he did not ask any such questions.

14. Petitioner asserts, however, that the failure to affirmatively caution him during his telephone conversations with Guidance Line counselors regarding the possible cost of a second election amounts to a misrepresentation which, as a matter of law, should preclude Respondent

from now imposing this cost as a precondition of exercising his second election and switching to the Pension Plan. This is in essence a claim of equitable estoppel.

15. To establish equitable estoppel against a governmental agency such as Respondent, Petitioner must prove that: 1) the agency made a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel due to the misrepresentation of fact. Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3rd DCA 1983) *citing* Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). Estoppel will be applied against an agency only in the most exceptional circumstances. Salz, 432 So. 2d at 1378 *citing* North American Co. v. Green, 120 So. 2d 603 (Fla. 1959).

16. There is no dispute as to what was said to Petitioner on the phone, and no untrue statements of fact were made. It certainly would have been preferable for the counselors to mention that there could be additional cost to transfer back to the Pension Plan, especially since Petitioner may readily have assumed that if he could switch back to the Pension Plan at any time without penalty, choosing the Investment Plan initially was the only rational decision. But their failure to affirmatively point this out cannot be the basis for a claim of estoppel, especially given that extra cost was a possibility rather than a certainty, and that no affirmative misrepresentations were made.

17. The Summary Plan Description and other materials available to Petitioner accurately described the way the second election back to the Pension Plan would work, and telephone counselors cannot be charged with reciting all possibilities to a participant who has been given the opportunity to ask questions and has indicated his choice.

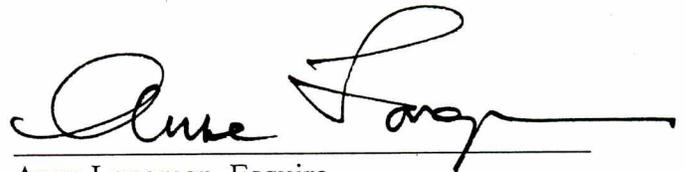
18. The applicable case law creates a very stringent standard for a finding of estoppel against an agency of the state. The cases cited in this matter do not support a finding for Petitioner, given the undisputed facts. (I note as well that Long v. State of Florida, 805 F.2d 1542 (11<sup>th</sup> Cir. 1986), cited by Petitioner, has been reversed, Florida v. Long, 487 U.S. 223 (1988)).

19. It is unfortunate that Petitioner was not expressly warned that a later second election switching to the Pension Plan could be expensive, but under the applicable Florida Statutes, Respondent is required to charge the buy-in amount to Petitioner if he now wishes to change to the Pension Plan. The 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.), Final Order NO.:DMS-05-009 (Dept.Mgmt.Svs. April 4, 2005).

### 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 27<sup>th</sup> day of August, 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 27<sup>th</sup> day of August, 2009.

Copies furnished to:



Attorney for Petitioner

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

  
Attorney