

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

ELIZABETH COHEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2012-2609
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
	)	
_____	)	

**FINAL ORDER**

On September 13, 2013, 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, Elizabeth Cohen, and upon counsel for the Respondent. Both Petitioner and Respondent timely filed a Proposed Recommended Order. Neither party filed exceptions, which were due September 30, 2013. 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**

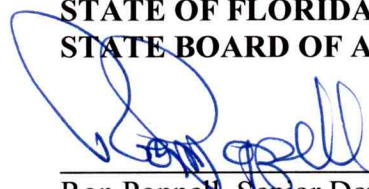
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that she be deemed to have filed an initial election into the Florida Retirement System Investment Plan even though she did not timely file the required election form hereby is denied. There are no special circumstances in her situation that

would support a waiver or excusal of her failure to timely file the appropriate election form to effectuate her plan choice.

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 8<sup>th</sup> day of November, 2013, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



---

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

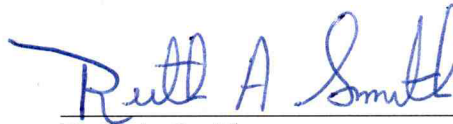
FILED ON THIS DATE PURSUANT TO  
SECTION 120.52, FLORIDA STATUTES  
WITH THE DESIGNATED CLERK OF THE  
STATE BOARD OF ADMINISTRATION,  
RECEIPT OF WHICH IS HEREBY  
ACKNOWLEDGED.



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 Elizabeth Cohen, 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 8th day of November, 2013.



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

ELIZABETH COHEN,

Petitioner,

vs.

Case No. 2012-2609

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 June 19, 2013, at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Elizabeth Cohen, pro se



For Respondent: Brian A. Newman, Esquire  
Pennington, P.A.  
215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301

**STATEMENT OF THE ISSUE**

Respondent SBA posits the issues as whether it correctly determined that Petitioner defaulted into the Florida Retirement System (FRS) Pension Plan as her initial election and whether circumstances exist so as to excuse or waive Petitioner's failure to make an initial

election into the Investment Plan. Petitioner Cohen sets out six issues in her Proposed Recommended Order, as follows:

1. Whether the Respondent, The State Board of Administration, violated Section 121.4501(8)(g), Florida Statutes, by not retaining all of the Petitioner's records for 5 years, including all of the post card notifications that were sent to an out of state address. \* \* \*

2. Whether the Respondent, The State Board of Administration, violated Section 121.4501(9)(a) & 121.4501(9)(b), by not communicating with the Petitioner in any effective way, 90 days prior to the beginning of the election period, and by relying on only one means of communication, the USPS, instead of using any other multimedia format, including the petitioner's state issued email.

3. Whether the Respondent violated section 121.4501(c)(2)(d), by selecting a provider who did not utilize the Internet, personal contact, seminars, brochures or newsletters to communicate with the Petitioner. \* \* \*

4. Whether the Respondent, the State Board of Administration, violated section 121.4501 (9)(f) by not establishing a clear communication component to provide program information in a timely way. \* \* \*

5. Whether the Respondent, State Board of Administration, violated section 121.4501 (9)(h) by not communicating regularly either the existence of the two Florida Retirement Plans or how to commit a plan choice. \* \* \*

6. Whether the Respondent, the State Board of Administration, violated section 121.4501 (11)(h), by assuming the Petitioner, would be able to make a choice

between Investment vs. Pension Plan, without any educational communication from the Respondent.

### **PRELIMINARY STATEMENT**

An informal hearing in this matter was convened on January 29, 2013 pursuant to section 120.57(2), Florida Statutes. During that hearing it appeared to the parties that a disputed issue of fact existed, and at their request, I referred this case to the Division of Administrative Hearings for a formal hearing. During the formal hearing, Petitioner conceded that no fact issue existed, and the Administrative Law Judge relinquished jurisdiction back to Respondent. Another informal hearing was convened on June 19, 2013 pursuant to section 120.57(2), Florida Statutes, to assure that the record was complete and that all parties had been heard in full.

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Petitioner offered no exhibits; Respondent's Exhibits 1 through 19 were admitted into evidence without objection.

A transcript of the hearing was filed with the agency and served on Petitioner on July 29, 2013<sup>1</sup>. The parties were invited to submit proposed recommended orders within 30 days after the transcript was filed. Both parties submitted a proposed recommended order.

### **MATERIAL UNDISPUTED FACTS**

---

<sup>1</sup> The Notice of Filing reflects the transcript was filed on July 29, 2013. Because this office received the transcript on July 23, 2013, Petitioner was informed erroneously that proposed recommended orders were due August 22, 2013, when they were in fact due 30 days after official Notice of Filing of the transcript.

1. Petitioner began her employment with the Marion County School Board, a Florida Retirement System participating employer, on August 18, 2009. She was 62 years old at that time.

2. Given her start of employment date, Petitioner had until January 29, 2010 to make an initial election to join either the FRS Pension Plan, a defined benefit plan with a six year vesting requirement, or the FRS Investment Plan, a defined contribution plan with a one year vesting requirement.

3. Between August 18, 2009 and February 2, 2010, Petitioner's address of record with her employer was 2741 Whitehurst Drive, N.E. Marietta Georgia. Respondent and its third party administrators obtain member addresses from the employer's payroll. During the relevant time, Petitioner was living and working in Marion County, Florida, having moved there from her previous home in Georgia to take a position with the Marion County Schools.

4. During this time, Petitioner was in transition to her new job and lived at a Residence Inn, and had her mail forwarded there. When she bought a home in Ocala, she notified her school employer of her new address.

5. Respondent sent the Petitioner a New Hire Kit and several reminder letters prior to her January 29, 2010 election cut-off date, advising her of her right to make an election between the Pension Plan and the Investment Plan. The New Hire Kit and the reminder letters were all mailed to her Marietta, Georgia address, and Petitioner testified that she never received these mailings.

6. Petitioner testified also that she never notified Respondent SBA of her address

change, and her employer reported that it was first notified in January 2010 that her address changed to [REDACTED]

7. Employers submit their payroll information to the Division of Retirement and Respondent on or before the 5<sup>th</sup> day of the month for the previous month. Included in that information is change of address information.

8. The first time Respondent was notified of Petitioner's change of address, therefore, was in February 2010, which was after her initial election period had run.

9. A Member Annual Statement was mailed to Petitioner showing her benefit as of June 30, 2010. It showed she had not vested because she had not met the six year vesting requirement applicable to the Pension Plan. Petitioner was mailed a similar statement for 2011 showing she was still not vested with two years of service credited at that time.

10. Petitioner terminated her employment with the Marion County School Board on June 9, 2011. She could have made her second election to switch to the Investment Plan at any point prior to this date.

11. She submitted a 2<sup>nd</sup> Election Retirement Plan Enrollment form that was received by the Plan Choice Administrator on September 12, 2011.

12. Petitioner received an Investment Plan confirmation of opening balance of \$23,949.69 on October 31, 2011. This confirmation notice states, "If it is subsequently determined that you were not eligible to join the FRS Investment Plan, your election will be considered invalid and will be reversed."

13. The SBA determined that Petitioner submitted the 2<sup>nd</sup> Election Form after she terminated FRS-covered employment, and on November 28, 2011, a notice was mailed to her



advising that her 2<sup>nd</sup> Election had been reversed “because [she] terminated FRS-covered employment prior to [her] election.”

14. Petitioner submitted a request for intervention on October 29, 2012, asking that she be allowed to enroll in the Investment Plan as her initial election. That request was denied on October 31, 2012. Petitioner timely filed a petition for hearing requesting the same relief and this administrative proceeding followed.

### CONCLUSIONS OF LAW

15. Section 121.4501(4)(b)2., Florida Statutes governs initial elections between the Pension Plan and the Investment Plan for those employees who became eligible to participate in the Investment Plan by virtue of employment with a school board after July 1, 2002. That statute provides an initial election period of up to the last business day of the fifth month following the month of hire. If no election is made, the statute provides for default into the Pension Plan:

b. Any such employee who fails to elect to participate in the investment plan within the prescribed time period is deemed to have elected to retain membership in the pension plan, and the employee's option to elect to participate in the investment plan is forfeited.

§121.4501(4)(b)2., Fla. Stat. (2012).

16. Petitioner was defaulted to Pension Plan membership pursuant to section 121.4501(4)(b) because she did not timely make an initial election in the manner required by law.

17. Section 121.4501(8)(g), Florida Statutes, is cited by Petitioner as requiring the SBA to have retained all postcard notifications, which in this case were sent to her Georgia address. It states in relevant part: “The third party administrator shall retain all member records

for at least 5 years for use in resolving member conflicts.” I see nothing in this statute that requires the SBA or its administrator to keep or produce copies of postcards sent to Petitioner, nor does it appear that such would be relevant even if available. There is no apparent dispute that postcards and other materials were sent to Petitioner’s Georgia address and presumably were not forwarded, and so were not received by Petitioner.

18. Petitioner also cites Section 121.4501(10)(a)(b):

EDUCATION COMPONENT.—

(a) The state board, in coordination with the department, shall provide for an education component for system members in a manner consistent with the provisions of this section. **The education component must be available to eligible employees at least 90 days prior to the beginning date of the election period for the employees of the respective types of employers.**

(b) The education component must provide system members with impartial and balanced information about plan choices. **The education component must involve multimedia formats.** Program comparisons must, to the greatest extent possible, be based upon the retirement income that different retirement programs may provide to the member. The state board shall monitor the performance of the contract to ensure that the program is conducted in accordance with the contract, applicable law, and the rules of the state board.

(Emphasis added.)

She asserts that the above required Respondent to communicate with her by email or some means other than U.S. mail to her record address. There is no dispute that the FRS education

component was available to Petitioner at least 90 days prior to her election period, and that it involved multimedia formats. It consisted of materials which were sent to her, were on the My FRS website and were presented by or through her employer. I see no requirement in this statute to support Petitioner's assertion that this did not constitute effective communication, and note as well that an initial election could be made by mail, on line or over the telephone.

19. Nor does Section 121.450(8)(c)(2)(d), which compels the SBA to consider vendors' ability to provide multimedia formats when evaluating them as proposed educational providers, support a finding that the communication to Petitioner in this case was inadequate. As noted above, multiple educational formats were in fact used, and nothing in this statute requires an email notification to Petitioner.

20. Section 121.4501(9)(f) requires the SBA to provide program information to participating employers and personnel to explain their respective responsibilities. Petitioner asserts that the SBA or its third party provider violated this statute by not establishing adequate methods of insuring that employees in Petitioner's situation would be provided relevant information in a timely way. She complains specifically that the time elapsed before her change of address was effectively communicated to the SBA unlawfully impacted her ability to make a timely plan choice. But Petitioner's employer was not notified until January 2010 of her new address – her initial enrollment period closed on January 29, 2010, and I see no undue delay in her new address information being recorded.

21. Section 121.4501(9)(h) is a requirement addressed to employers regarding communicating about the FRS plans, and not relevant to Petitioner's complaint against the SBA.

22. Section 121.4501(11)(h) requires all Investment Plan materials to be prepared

assuming an unsophisticated investor, and likewise is irrelevant here. Petitioner's assertion that by failing to provide her with educational materials, SBA illegally assumed that she could make a plan choice without them, is really a restatement of her primary point – that the SBA had an obligation to communicate with her by email or registered mail or some method of assured receipt, so that she could timely make her initial choice.

23. When Petitioner realized that she was enrolled in the Pension Plan rather than the Investment Plan, she tried to cure this by submitting a second election to join the Investment Plan. Such elections must be made while the member is actively employed with an FRS-covered employer. § 121.4501(4)(g), Fla. Stat. Petitioner did not submit her second election until more than three months after she terminated FRS-covered employment. Her second election therefore had to be reversed as invalid. Even if Respondent were authorized to deem Petitioner's second election form properly filed, the funds transferred from the Pension Plan to her Investment Plan account would remain subject to the six year vesting requirement.

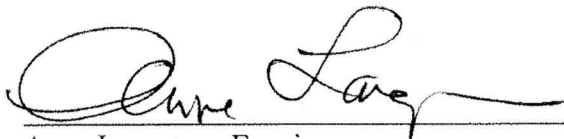
24. Section 121.4501(8)(a), Florida Statutes obligates the SBA to administer the Investment Plan, and the SBA is not authorized to depart from the requirements of the applicable statute when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The SBA's construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled to great weight and 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). Respondent lacks the statutory authority to place Petitioner into the Investment Plan without a timely election having

been made with the third party administrator. The circumstances surrounding Petitioner's initial period of employment created a situation that made communicating with her by mail very problematic, and perhaps at least one formal notice of the initial election period by confirmed receipt would be the best method of assuring that a new FRS employee knows when the choice must be made. But there is no statutory requirement that the SBA do this and the undisputed facts do not support a finding that the SBA's efforts to communicate with Petitioner were inadequate as a matter of law.

### 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 13<sup>th</sup> day of September, 2013.



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 OF RIGHT TO SUBMIT EXCEPTIONS: 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. Any exceptions 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 via electronic delivery with:

Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Blvd., Suite 100  
Tallahassee, FL 32308  
Tina.joanos@sbafla.com  
Daniel.B Beard@sbafla.com  
(850) 488-4406

This 13<sup>th</sup> day of September, 2013.

Copies furnished to:

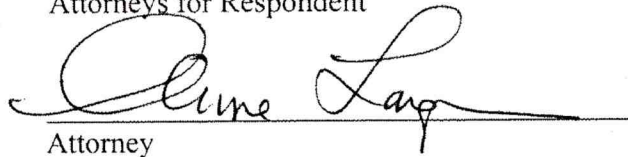
Via U.S. Mail:



Petitioner

Via electronic delivery:

Brian A. Newman, Esquire  
Brandice D. Dickson  
Pennington, Moore, Wilkinson Bell & Dunbar  
Post Office Box 10095  
Tallahassee, FL 32302-2095  
[slindsey@penningtonlaw.com](mailto:slindsey@penningtonlaw.com)  
Attorneys for Respondent

  
Attorney