

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SHARON HAUPFEAR,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2011-2192
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On January 18, 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, Sharon Haupfear, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner made no further filings. Neither party filed exceptions, which were due on February 2, 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) is hereby adopted in its entirety. The Petitioner's request that she be deemed vested in benefits transferred from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan before Petitioner had attained six years of creditable FRS service 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 8th day of February, 2012, 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 Sharon Hauptfear, 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 February, 2012.



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

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GENERAL COUNSEL'S OFFICE

SHARON HAUPFEAR,

Petitioner,

vs.

Case No.: 2011-2192

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case came before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on September 29, 2011, at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Sharon Haupfear


Petitioner

For Respondent: Brandice D. Dickson, 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's second election, submitted while she was on an unpaid leave of absence, was correctly found by the SBA to have been invalid.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner submitted a Request for Intervention to the SBA after learning that her second election seeking to move from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan had been deemed invalid. After investigation, Respondent SBA informed Petitioner by letter from Daniel Beard, Director of Policy, Risk Management and Compliance, that her request could not be honored because her second election was submitted while she was on an unpaid leave of absence, even though she had returned to paid work for a few days after the form was submitted. Petitioner then filed a Petition for Hearing seeking the same relief, and this hearing followed.

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Petitioner and Mr. Beard. Respondent's Exhibits R-1 through R-10 were admitted into evidence without objection.

At the conclusion of the hearing, I requested Respondent's counsel to consider whether, under the very narrow circumstances presented by this case, Petitioner's second election could be deemed to have been submitted during the three day period when she returned to paid work in June, 2011, after her form had been received. After further investigation, Respondent SBA stated that it could not find any authority in Chapter 121, Florida Statutes which would authorize this action.

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

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed with the Orange County Public Schools and was a member of the FRS Pension Plan beginning in August 2002.

2. She was on paid leave during the time period from March 14, 2011 to March 24, 2011, during which time she was dealing with family medical problems and the care and custody of a grandchild. She was on unpaid leave from March 25, 2011 to June 3, 2011.

3. Between February 24, 2011 and May 31, 2011, Petitioner spoke with the MyFRS Financial Guidance Line on several occasions. In these conversations, she related that she wanted to cash out her retirement assets (which can only be done from the Investment Plan) in order to start a home business. She did not mention to the counselors that she was on leave, paid or unpaid, from her employer.

4. On May 31, 2011, while on unpaid leave, Petitioner faxed a 2nd Election EZ Retirement Plan Enrollment Form to the Respondent's third party administrator requesting to move from the Pension Plan to the Investment Plan.

5. The form executed by Petitioner contained the following language:

IMPORTANT INFORMATION – Review Carefully

Your 2nd Election retirement plan change becomes effective on the first day of the month after the Plan Administrator receives your form, provided it is complete and signed. **You must be actively employed earning service credit when your form is received by the FRS Plan Choice Administrator.** If you are leaving FRS-covered employment, this form must be received prior to your termination date. If you are on an unpaid leave of absence or you are an employee of an educational institution on summer break, you cannot use your 2nd Election until you return to work. If it is subsequently determined that you were not eligible to make a plan choice, your election will be considered invalid and will be reversed. For your plan change to occur in a specific month, the form must be received no later than 4 PM ET on the last business day of the month prior to the effective month. If you have questions, call the MyFRS Financial Guidance Line. **Before you change retirement plans**, take advantage of the FREE resources offered through the MyFRS Financial Guidance Program to help you understand the

impact of changing from one plan to another. These resources include:

*The toll-free MyFRS Financial Guidance Line at 1-866-446-9377, Option 2

*The 2nd Election CHOICE SERVICE, an online benefits projection tool, available at MyFRS.com or by calling the MyFRS Financial Guidance Line, Option 2.

(Bold emphasis in original; underline added.)

6. Petitioner returned to paid work on June 6, 2011 for three days, and then resigned her FRS-covered employment on June 13, 2011, after learning that her employer would not provide her any additional leave.

CONCLUSIONS OF LAW

7. Movement between the FRS Pension Plan and the FRS Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes, which states:

(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)(e), Fla.Stat. (emphasis added).

8. Rule 19-11.007, Florida Administrative Code, governs second elections and states, in pertinent part:

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; or 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. A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator while the member is earning service credit in an employer-employee relationship consistent with the requirements of Section 121.021(17)(b), F.S. FRS members must be actively employed earning salary and service credit to be eligible to make a valid 2nd election. **Members on an unpaid leave of absence, terminated members, or employees of an educational institution on summer break cannot use their 2nd election until they return to covered FRS employment.** In general terms, this means that the 2nd election must be made and processed while the member is actively working and being paid for that work. It is the responsibility of the member to assure that the 2nd election is received by the Plan Choice Administrator no later than 4:00 p.m. Eastern Time on the last business day the member is earning salary and earning service credit.

...

(3) General Procedures.

...

(d) The member may elect to move between the Florida Retirement System retirement programs only if the member is earning service credit in an employer-employee relationship consistent with the requirements under Section 121.021(17)(b), F.S. FRS members must be actively employed earning salary and service credit to be eligible to make a valid 2nd. election. **Members on an unpaid leave of absence, terminated members, or employees of an educational institution on summer break cannot use their 2nd. election until they return to covered FRS employment.** The election must be received and processed by the FRS Plan Choice Administrator before the member terminates covered FRS employment. It is the responsibility of the member to ensure the election is received by the Plan Choice Administrator no later than 4:00 p.m. Eastern Time on the last business day the member is earning salary and earning service credit.

Rule 19-11.007, F.A.C.

9. For an FRS participant to make a valid second election and move from the Pension Plan to the Investment Plan, the above statute and rule require the member to be earning service credit “in an employer-employee relationship” with an FRS-covered employer when the second election is made and when it is received. Movement between FRS plans is expressly disallowed if the employee is on an unpaid leave of absence.

10. Petitioner asserts that she was never advised that she could not use her second election while she was on unpaid leave, but the form she executed clearly stated that she could not switch plans while on unpaid leave. The MyFRS Financial Guidance Line counselors with whom she spoke had no way of knowing that she was on unpaid leave, and she did not inform them that she was.

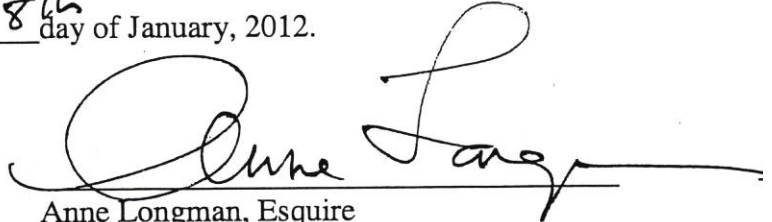
11. Because Petitioner submitted her second election while she was on an unpaid leave of absence, that election was invalid.

12. It is unfortunate that there is no latitude in the applicable statutes and rules for situations such as this one, where Petitioner’s intentions with regard to her retirement asserts were clear, and she did in fact return briefly to paid employment after submitting her second election form. But the SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and the SBA’s construction and application of those statutes 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 DCA1998).

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 18th day of January, 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 18th day of January, 2012.

Copies furnished to:

Sharon Haupfear


Petitioner

Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent


Attorney