

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

MICHAEL RYSHOUWER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2012-2521
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	
	)	
	)	

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**FINAL ORDER**

On December 4, 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, Michael Ryshouwer, 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 December 19, 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**

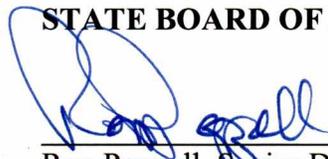
The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that he be permitted to switch from the Florida Retirement System ("FRS" Pension Plan to the FRS Investment Plan when, prior to termination, he had filed

only an FRS Investment Plan beneficiary designation form and not a second election form, 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 1st day of February, 2013, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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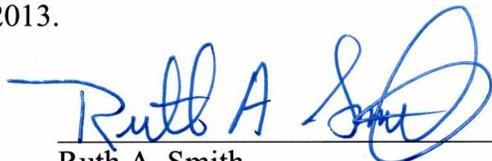
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

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.

  
\_\_\_\_\_  
Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by U.S. Mail to Michael Ryshouwer, 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 1st day of February, 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

MICHAEL RYSHOUWER,

Petitioner,

vs.

Case No. 2012-2521

STATE BOARD OF ADMINISTRATION,

Respondent.

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**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 September 6, 2012, at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Michael Ryshouwer

[REDACTED]

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 made a valid second election to switch from the Pension Plan to the Investment Plan when he filed only a Florida Retirement System (FRS) Investment Plan beneficiary designation form and not a second election form prior to his termination from all FRS-covered employment.

**EXHIBIT A**

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone along with his wife, Linda Ryshouwer, and both testified on Petitioner's behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Respondent's Exhibits R-1 through R-5 were admitted into evidence without objection.

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

## **MATERIAL UNDISPUTED FACTS**

1. Petitioner was employed with an FRS-covered employer from October 1986 through January 1990 and most recently with the Department of Agriculture from September 2005 through June 2012.

2. Petitioner defaulted into the Pension Plan on February 28, 2006.

3. On May 30, 2012, after deciding he was going to leave his Department of Agriculture position, Petitioner contacted the MyFRS Financial Guidance Line to request instructions on switching from the FRS defined benefit Pension Plan to the FRS defined contribution Investment Plan. During that telephone call, Petitioner was advised that he had to be actively working to make the switch, that he needed to fill out and return the second election form in order to effectuate the switch, and that he would also receive another form to designate a beneficiary.

4. As a result of that telephone call, the Petitioner was sent, and he received, a second election form as well as a beneficiary designation form via email from the MyFRS

Financial Guidance Line representative. Those forms were emailed to Petitioner on May 30, 2012.

5. Petitioner admits that he was "in a hurry" and did not appreciate that the email contained two forms. Consequently, on May 31, 2012 he filled out only the beneficiary form and not the second election form and returned only the beneficiary form to the Respondent's administrator on June 4, 2012. No second election form was ever filled out by the Petitioner or received by the Respondent.

6. Petitioner's last day of work for the Department of Agriculture was June 7, 2012.

7. The Respondent requires a second election be executed so that: (a) the plan selection (Investment, Pension, Hybrid) is made known to the third party administrator; (b) the member acknowledges the consequences of the election (e.g., that it is final and they must remain in the chosen plan until retirement); and (c) investment selections can be made.

### CONCLUSIONS OF LAW

8. Movement between the FRS plans 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**

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).

9. Rule 19-11.007, Florida Administrative Code, governs the timing of the receipt of the Second Election form and it 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; 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.**

...

(g) **If the member submits a form that is incomplete, it will not be processed. An incomplete form is a form which is missing the name of the member, social security number, plan selection, or signature, or one on which the total investment elections are greater or less than 100%. The member will be required to resubmit a completed second election enrollment form. If the form is incomplete only because the member has made no investment selection, the form will be processed and the member will be defaulted into the FRS Select Moderate Balanced Fund for investing the member's accumulated benefit obligation and all future contributions. Note that this default selection may be changed by the member at any time once the account is activated.**

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

10. The statute governing movement between the plans requires "receipt of the election" before a switch can be effective. § 121.4501(4)(e), Fla.Stat. Here, no election was made, and therefore no switch was effective. As a member of the FRS Pension Plan, Petitioner could have been electing between the FRS Investment Plan and the Hybrid Plan and submitting a beneficiary form would have been needed for either election. Simply submitting the beneficiary form did not comply with the statute or fully inform the Respondent which plan he selected, and the statute does not give Respondent authority to guess or to make a default decision for him between the two.

11. Rule 19-11.007, Florida Administrative Code makes clear that only the second election form will effectuate a switch; a beneficiary form is ineffective for that purpose.

Respondent will accept an incomplete second election form, but only if the form is incomplete due to no investment selections having been made.

12. There appears to be no statutory or rule provision which would allow Respondent to waive the requirement that a valid second election form be filed in order to switch plans, even where, as here, Petitioner's intention to effectuate the switch is evident.

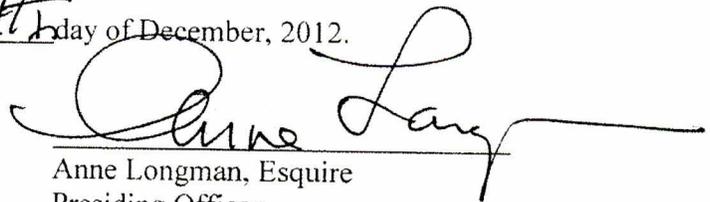
13. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction 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).

14. It is unfortunate that Petitioner was not able to carry out his intention for his retirement assets, but I see no legal basis for waiving the requirements that all FRS participants must meet.

### 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 4<sup>th</sup> day of December, 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.

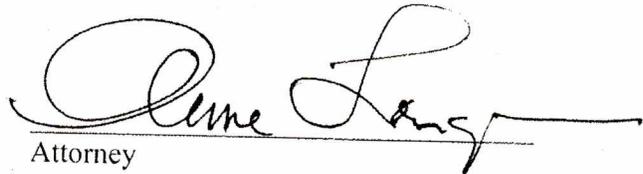
Filed via electronic delivery with:  
Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Blvd., Suite 100  
Tallahassee, FL 32308  
Tina.joanos@sbafla.com  
(850) 488-4406

This 11 day of December, 2012.

Copies furnished to:  
Via U.S. Mail to:  
Michael Ryshouwer

  
  
Petitioner

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

  
Attorney