

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ZHAWN DENISE ENOS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2012-2583
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
)	

FINAL ORDER

On November 28, 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, Zhawn Denise Enos, 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 12, 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.

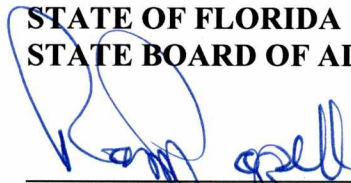
ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that she be deemed to have made a valid election to switch from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan account when she was on unpaid and not earning service credit 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**



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

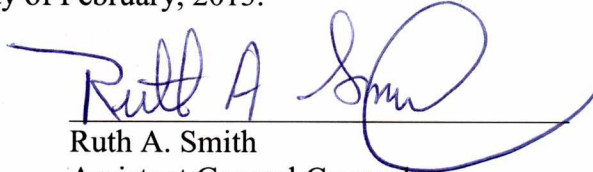
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Zhawn Denise Enos, pro se, [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 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

ZHAWN DENISE ENOS,

Petitioner,

vs.

Case No.: 2012-2583

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 November 27, 2012, at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Zhawn Denise Enos, Pro Se

[REDACTED]

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner made a valid second election to switch from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan when she was on medical leave.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf and offered testimony by telephone from her financial planner, Frank Arnall. She did not offer any exhibits. Respondent presented the testimony of Petitioner and Daniel Beard, Director of Policy, Risk Management, and Compliance for the State Board of Administration. Respondent's Exhibits R-1 through R-8 were admitted at the hearing without objection from Petitioner.

Respondent submitted a proposed recommended order before the transcript of the hearing was available to expedite a decision for Petitioner's benefit, given the unusual exigent circumstances of this case. Petitioner has elected not to accept any pension benefit she may be entitled to now by virtue of her disability, pending a determination on the merits in this case.

MATERIAL UNDISPUTED FACTS

Petitioner acknowledged that the following facts are true at the hearing held November 27, 2012:

1. Petitioner was a member of the Florida Retirement System's Pension Plan by virtue of her employment with an FRS-participating employer since 1982. Following an emergency third heart surgery in April 2012, Petitioner's doctor informed her she could not return to work. She began receiving pay under the Family Medical Leave Act (FMLA), but at some point those payments ran out. She did not earn any pay after April 27, 2012, but did return to her work site in May to close out her employment.
2. On May 3, 2012, Petitioner executed a 2nd Election Retirement Plan Enrollment Form expressing her intent to switch from the FRS Pension Plan to the FRS Investment Plan.
3. Petitioner's election form was faxed to the Respondent's third party administrator on May 3, 2012.

4. Petitioner's election form stated:

You must be actively employed earning salary when your form is received by the Plan Choice Administrator...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. [Emphasis added.]

5. On May 7, 2012, the Petitioner was advised that her election form had been received and that if it was subsequently learned she was on an unpaid leave of absence at the time she made her election, it would be reversed.

6. On June 29, 2012, the Petitioner was advised of her Investment Plan opening balance and that if it was subsequently learned that she was ineligible to make the election, it would be reversed.

7. On July 18, 2012, Kelly Watson, Benefits Specialist with the Florida Department of Management Services, emailed Mabel Kwok, the Payroll Specialist at Petitioner's employer, to determine if Petitioner worked during May 2012. Ms. Watson emailed Ms. Kwok as a part of the DMS's review of Petitioner's second election to determine whether it was a valid election. Specifically, Ms. Watson was trying to determine whether Petitioner had earned service credit by working during the month of May 2012.

8. Ms. Kwok confirmed that Petitioner had no working hours in May 2012 and that all May 2012 wage time was from leave time. Petitioner testified that she did work at least one hour in the month of May 2012, but that she was not paid for that work.

9. On July 24, 2012, Petitioner was notified that her election was reversed because it was found to be invalid due to her failure to earn service credit at the time her election was made.

10. Petitioner filed a Request for Intervention with Respondent seeking reinstatement of her election because she made the election believing that she was on paid leave at the time. In

her Request, she acknowledges that she had exhausted all paid leave on April 27, 2012, prior to making her election.

11. Petitioner's request for reinstatement into the Investment Plan was denied and she timely petitioned for a hearing, raising the same issues.

CONCLUSIONS OF LAW

12. Section 121.4501(g), Florida Statutes governs movement between plans. That section states:

(g) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, 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 pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are 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 when the election is received by the third-party administrator. This paragraph is contingent upon approval by the Internal Revenue Service.

§121.4501(g), Fla.Stat. (2011)(emphasis added).

13. Rule 19-11.007, Florida Administrative Code, governs the making of a Second Election and 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.

Rule 19-11.007, F.A.C.

14. To make a valid second election to move from the Pension Plan to the Investment Plan the member must be earning service credit "in an employer-employee relationship" with an FRS-covered employer when the second election is made. § 121.4501(4)(g), Florida Statutes (2011). Movement between the plans is expressly disallowed during the period the employee is on an unpaid leave of absence. Accordingly, Petitioner's second election was not valid because she submitted it when she was on a leave of absence without pay (not earning service credit).

15. The fact that the Petitioner suffers from a medical hardship was not questioned by the SBA in this case. Nevertheless, the existence of such a hardship does not authorize the SBA to depart from the statute that governs movement between plans, 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).

16. Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements to make a valid election into the Investment Plan. Young v. Department of Community Affairs, 625 So.2d 837 (Fla. 1993); Department of Transportation v. J.W.C., 396 So.2d 778 (Fla. 1st DCA 1981). Based on the undisputed facts stipulated to at hearing, Petitioner cannot demonstrate that the second election form she submitted is valid.

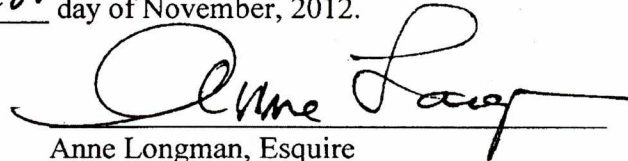
17. If, however, Petitioner's former FRS-covered employer were to pay her for the one hour of work she states she performed during the month of May, 2012, then the SBA would be authorized to process Petitioner's second election form (assuming there is no other intervening fact that has not been considered in this Recommended Order). Likewise, this recommended decision does not foreclose the possibility that Petitioner could return to work in an FRS-covered position and submit a valid second election form at that time.

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. This

recommendation would not, however, foreclose the possibility that Petitioner could still attain membership in the Investment Plan as outlined in paragraph 17 above.

RESPECTFULLY SUBMITTED this 28th day of November, 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

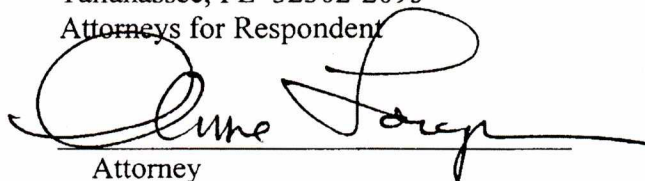
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will 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 28th day of November, 2012.

Copies furnished to:
Via Regular Mail
Zhawn Denise Enos
[REDACTED]
Petitioner

Via electronic mail:
Brian A. Newman, Esquire
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Pennington, Moore, Wilkinson Bell & Dunbar
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Attorney