

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

TYRA EVANS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2012-2257
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On February 15, 2013, the Administrative Law Judge 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, Tyra Evans, 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 March 2, 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.

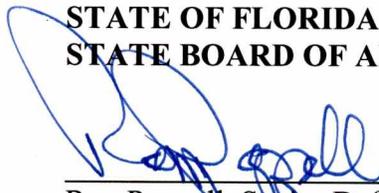
ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that she be allowed to rescind her second election, where she filed her second election form almost one year ago, 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 22nd day of March, 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

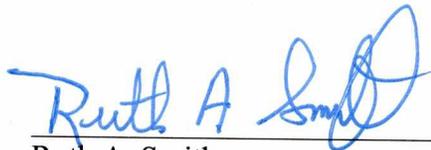
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Tyra Evans, 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 22nd day of March, 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

TYRA EVANS,

Petitioner,

vs.

Case No.: 2012-2557

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: Tyra Evans, *pro se*

[REDACTED]

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner's request to rescind her second election should be granted.

EXHIBIT A

PRELIMINARY STATEMENT

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. Respondent's Exhibits R-1 through R-12 were admitted into evidence at the hearing without objection. On December 17, 2012, Respondent filed Supplemental Exhibits R-13 through R-42, all of which are transcripts of telephone calls by Petitioner to the MyFRS Financial Guidance Line. Having received no objection to these exhibits, they are hereby admitted.

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 has made no further filing.

MATERIAL UNDISPUTED FACTS

1. Petitioner has been an employee of the Palm Beach County Sheriff's Office, a Florida Retirement System (FRS) covered agency, for over 12 years.
2. Petitioner became a member of the FRS Pension Plan, a defined benefit plan, after she started work with the Sheriff's office.
3. In July of 2011, Petitioner submitted a second election form indicating her desire to switch to the defined contribution Investment Plan. This form was processed by Aon Hewitt, the FRS Investment Plan Administrator on July 28, 2011. On August 8, 2011, the Petitioner called Aon Hewitt and expressed her desire to rescind this second election. On August 9, 2011, Petitioner completed a release confirming her desire to rescind the second election form she submitted in July and remain in the Pension Plan.

4. On August 10, 2011, Petitioner's second election was reversed and she was returned to the Pension Plan.

5. On August 24, 2011, Petitioner submitted another second election form to Aon Hewitt indicating her desire to transfer to the Investment Plan. Petitioner wrote at the top of this second election form "Final Decision."

6. A confirmation of second election was issued to Petitioner on August 26, 2011.

7. On or after September 30, 2011, Petitioner received a confirmation of her Investment Plan opening balance of [REDACTED].

8. Petitioner made approximately 25 calls to the MyFRS Financial Guidance Line between April 8, 2011 and July 30, 2012 to inquire as to her retirement options, her Investment Plan account balance, and obtain other investment information.

9. On July 30, 2012, Petitioner called the MyFRS Financial Guidance Line and stated that she had been informed that her contributions to the Investment Plan would increase after she had attained 30 years of service. The telephone counselor told Petitioner that this was not the case.

10. Petitioner submitted a Request for Intervention that was received by the SBA on August 22, 2012 asking that she again be transferred back to the Pension Plan because the benefits of the Investment Plan were misrepresented to her. Specifically, Petitioner contends that she was told that her benefits in the Investment Plan would increase after she attained 30 years of service, but that "everything would stay the same."

11. The SBA issued a denial of Petitioner's request to return to the Pension Plan on August 31, 2012, and Petitioner filed a Petition for Hearing, again requesting that she be allowed to return to the Pension Plan. This administrative proceeding followed.

CONCLUSIONS OF LAW

12. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. 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).

13. Petitioner's request that Respondent allow her to rescind her second election must be denied because the request runs counter to the applicable statutes and rules governing the FRS. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(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.

§ 121.4501(4)(e), Fla. Stat.

14. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans. Because Petitioner has already used her one-time second election, she has exhausted the opportunity to move between plans. Unfortunately, Petitioner cannot rescind the second election at issue here because she failed to do so within the window provided

by the applicable rule. Rule 19-11.007, Florida Administrative Code provides a grace period for rescission of second elections as follows:

(6) Grace Period.

(a) If a member files an election with the TPA and the employee realizes that the election was made in error, the SBA will consider, on a case-by-case basis, whether the election will be voided, subject to the following requirements:

1. Member Elects the FRS Investment Plan. The SBA must be notified, by a telephone call to the toll free number: 1(866)446-9377, or by e-mail, or by written correspondence directly to the SBA, to the TPA, or to the Division of Retirement, before assets are transferred from the FRS Pension Plan to the member's FRS Investment Plan account. This transfer occurs no later than the last business day of the month following the election month.

2. Member Elects the FRS Pension Plan. The SBA must be notified no later than the last business day of the month following the election month.

Rule 19-11.007, F.A.C. Petitioner timely rescinded her first second election that was submitted in July of 2011, as provided by this rule. She did not notify the Respondent of her desire to rescind her second second election until almost a year after it was submitted, well beyond the grace period.

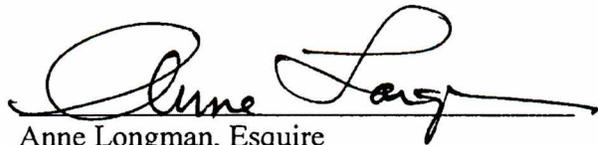
15. Petitioner contends she was told that her benefits would increase after she attained 30 years of service if she changed to the Investment Plan but that her benefits would otherwise remain the same. Benefits available under the Investment Plan are established by statute. See, §§121.4501 - 121.5911, Fla. Stat. (2012). Thus, even if someone did misrepresent the benefits Petitioner would obtain as an Investment Plan member, such a misrepresentation as to the status of the law would not necessarily provide a basis to rescind Petitioner's second election past the grace period. See, Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3rd DCA 1983)(a mistake of law cannot support a claim of estoppel against an agency); citing Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981); and North American Co. v. Green, 120 So. 2d 603 (Fla. 1959).

16. I have carefully reviewed the transcripts of calls Petitioner made to the MyFRS Financial Guidance Line in 2011 and 2012. These number over 500 pages. I have also carefully considered both Mr. Beard's and Petitioner's testimony as to a conversation they had which was not recorded. My review indicates that Petitioner was trying very hard to manage her retirement assets well, and was very concerned that her children get her retirement benefits at some point and that the money not "go back to the state." She repeats this objective numerous times in the transcribed calls. This is possible for her only in the Investment Plan. I also see that the confusing question of whether and how she could benefit from a multiplier based on her years of service was fully and accurately explained to her by the Ernst & Young representatives she reached on the MyFRS Guidance Line. Petitioner also stated repeatedly that she would be getting a monthly check through her ex-husband's retirement funds, and did not want any more monthly income. It is unfortunate that Petitioner cannot be in the Pension Plan, as she apparently now wishes, but I find no dispute as to any fact at issue here and no indication that Petitioner was misled or given erroneous information.

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 15th day of February, 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.beard@sbalfa.com
(850) 488-4406

This 15th day of February, 2013.

Copies furnished to:

Via U.S. Mail:

Tyra Evans



Petitioner

Via electronic delivery:
Brian A. Newman, Esquire
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
slindsey@penningtonlaw.com
Attorneys for Respondent

A handwritten signature in black ink, appearing to read "Aimee Long", written over a horizontal line.