

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ELIZABETH BURKE-BATES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2010-1901
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On March 24, 2011, 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 Burke-Bates, 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 April 8, 2011. 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.

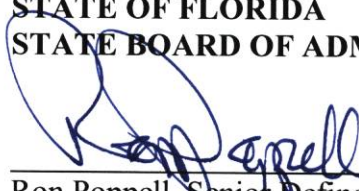
ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. Petitioner's request that her post-termination initial election to join the Florida Retirement System Investment Plan be deemed valid 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 18th day of April, 2011, 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

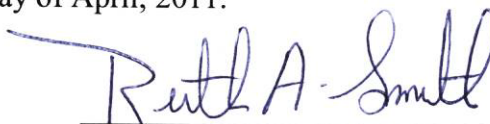
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Agency 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 Elizabeth Burke-Bates, 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 18th day of April, 2011.



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

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Petitioner,

vs.

Case No.: 2010-1901

STATE BOARD OF ADMINISTRATION,

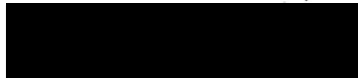
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on November 3, 2010, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Elizabeth Burke-Bates, Pro Se



For Respondent:

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 to be resolved is whether the Petitioner's post-termination request to make an initial election to join the Investment Plan should be granted.

PRELIMINARY STATEMENT

Elizabeth Burke-Bates filed a request for intervention with the SBA on September 15, 2010, requesting that her initial election to join the Investment Plan be deemed valid. The SBA

denied the request. Ms. Burke-Bates filed a Petition for Hearing requesting the same relief and this administrative proceeding followed.

On November 3, 2010, an informal hearing was held in Tallahassee, Florida. Petitioner testified on her own behalf and did not offer any exhibits. Respondent was represented by counsel and presented the testimony of Petitioner and Daniel Beard, Director of Policy, Risk Management, and Compliance for SBA. Respondent's exhibit's R-1 through R-9 were admitted at the hearing with no objection from Petitioner. Thereafter, exhibit R-10 was submitted by Respondent at the request of the undersigned hearing officer.

Respondent was asked to identify and transcribe all of Petitioner's telephone calls to the MyFRS Financial Guidance Line; however, no telephone calls from Petitioner were found. Subsequent to the hearing, an email indicating that no telephone calls from Petitioner could be located was submitted as Exhibit R-11. Also following the hearing, Respondent submitted additional exhibit, R-12, which includes a complete copy of the EZ Retirement Plan Enrollment Form petitioner received in her Plan Choice Kit.

A transcript of the hearing was filed with the agency and the parties were given thirty days to submit proposed recommended orders. Respondent submitted a proposed recommended order.

UNDISPUTED MATERIAL FACTS

1. Petitioner was hired by the Orange County School Board as a rehired retiree to teach for a teacher who had taken maternity leave. Her first day of work was March 8, 2010.
2. Petitioner testified that she was told by an Orange County School Board employee – shortly after she was rehired - that she should not worry about making her retirement plan

election until she received forms in the mail from the Florida Retirement System. Petitioner was told she should receive this mailing in a couple of months.

3. Petitioner left her temporary position on May 27, 2010, after the teacher she replaced returned from maternity leave.

4. A Plan Choice Kit was mailed to Petitioner that contained an EZ Retirement Plan Enrollment form.

5. Petitioner testified that she received the Plan Choice Kit in the mail on June 11, 2010, the same day she filed her EZ form. The Respondent, however, contends that the Plan Choice Kit was mailed to Petitioner on April 30, 2010 – and thus should have reached Petitioner before June 11, 2010.

6. The Plan Choice Kit advises Petitioner of a deadline of August 31, 2010, to make her initial election decision. Petitioner signed the EZ form which includes the provision: “By signing this form, I acknowledge that I have read and understand the information on page 2 and certify all completed information above to be true and correct.” Page 2 of the EZ form includes the statement: “you must be actively employed earning service credit when your form is received by the FRS Plan Choice Administrator.”

7. Petitioner submitted the signed form to the FRS Plan Choice Administrator on June 11, 2010. She was not actively employed when she filed this form.

8. Petitioner received an FRS Confirmation of Enrollment notice confirming her election to join the Investment Plan. However, this notice states:

[p]lease note, if you recently terminated your FRS-covered employment, this election will only be considered valid if you were earning service credit in an employer-employee relationship (excluding an unpaid leave of absence) and the Plan Choice Administrator received your election prior to your termination. If it is subsequently determined that you were not eligible to join the Investment Plan, your election will be considered invalid and will be reversed.

9. When it was discovered that Petitioner was not actively employed by an FRS-covered agency when she made her initial election, her election was reversed, and she defaulted into Pension Plan membership. Petitioner received a notice of the reversal of her Investment Plan election on or after September 1, 2010.

10. Petitioner filed a request for intervention with the SBA on September 15, 2010, requesting that her election to join the Investment Plan be deemed valid. That request was denied. Petitioner then filed a Petition for Hearing requesting the same relief, and this administrative proceeding followed.

CONCLUSIONS OF LAW

11. Participation and enrollment in the FRS Investment Plan are governed by Section 121.4501, Florida Statutes. Only an “eligible employee” may participate in the Investment Plan. “Eligible employee,” is defined, in relevant part, under section 121.4501(2)(g), Florida Statutes, as “an officer or employee, as defined in s. 121.021”. Section 121.021 defines “eligible employee” as “any person receiving salary payments for work performed in a regularly established position.” The Respondent interprets this statute as requiring an employee to be actively employed when an initial election is made. *See, Margaret Carter v. State Board of Administration*, SBA Case No. 2006-502, Final Order issued July 16, 2007.

12. The SBA’s construction and application of statutes it administers is 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). The Respondent’s construction of the aforementioned statutes is not clearly erroneous or an abuse of discretion. It is therefore accepted for purposes of this proceeding.

13. Petitioner asserts that she made every effort to comply with the requirements of Florida law as those requirements were explained to her; however she was given erroneous information by an employee of the Orange County School Board. While this may be true, the SBA is not bound by a misrepresentation from Petitioner's employer. Section 121.021(10), Florida Statutes, provides in pertinent part that: [e]mployers are not agents of the... state board" and that the state board is "not responsible for erroneous information provided by representatives of employers." Accordingly, Respondent cannot be bound by and Petitioner cannot rely upon any erroneous information she may have received from her employer as support for her position in this proceeding.

14. Petitioner also argues that she received her Plan Choice Kit after she terminated employment; too late to submit her election in a timely manner. While there appears to be some discrepancy over the date the Kit was mailed and the date it was received by the Petitioner, resolution of this apparent discrepancy is not essential to this proceeding. The Kit was received in sufficient time for Petitioner to submit her election prior to the statutory deadline of August 31, 2010, and Respondent could not have known or be charged with knowing when or whether she might terminate employment.

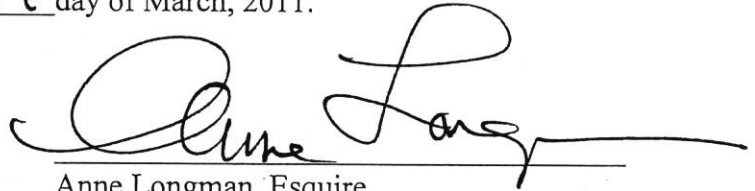
15. Regardless of when the Kit was received, Respondent lacks the authority to depart from the requirements of Chapter 121, Florida Statutes, when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla. Div. Admin. Hrgs). Under Chapter 121, Petitioner was required to make her initial election to join the Investment Plan before she terminated employment to avoid defaulting into Pension Plan membership. Whether she received the Plan Choice Kit before or after she left employment has no impact on the application of this statutory requirement.

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). Having found Petitioner was not actively employed by an FRS-covered agency when she made her initial election to join the Investment Plan, her request must regrettably be denied.

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 24th day of March, 2011.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

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 24th day of March, 2011.

Copies furnished to:

Elizabeth Burke-Bates


Petitioner

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