

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DELENA JOEDICKE)
)
 Petitioner,)
)
vs.)
)
STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
)
_____)

2007
Case No. 2006-969

FINAL ORDER

On April 8, 2008, 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, Delena Joedicke, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on April 23, 2008. 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 to use her second election to be placed in the FRS Investment Plan, even though Petitioner terminated employment with an FRS-covered employer in April 2002, and is no longer employed by an FRS-covered employer, 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.

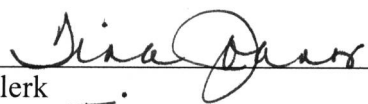
DONE AND ORDERED this 24th day of April, 2008, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



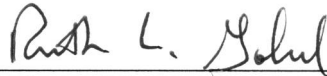
Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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 U.S. mail to Delena Joedicke, 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 24th day of April, 2008.



Ruth L. Gokel
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DELENA JOEDICKE,

Petitioner,

v.

CASE NO.: 2007-969

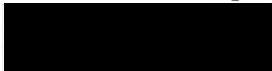
STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer for the STATE BOARD OF ADMINISTRATION (SBA) on December 10, 2007, in Tallahassee, Florida. The Petitioner appeared by telephone and the Respondent in person as follows:

APPEARANCES

For Petitioner: Delena Joedicke, pro se

Petitioner

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 is whether the SBA should reverse its determination that the Petitioner is currently ineligible to use a second election in order to switch membership from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan.

Exh. A

PRELIMINARY STATEMENT

On September 17, 2007, Petitioner filed a Petition for Hearing on Respondent's determination that she was currently ineligible to make an election into the FRS Investment Plan. This Petition was transmitted to the undersigned for informal hearing. Petitioner testified on her own behalf. The Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Petitioner's Exhibit P-1 and Respondent's Exhibits R-1 through R-8 were admitted into evidence without objection. A transcript of the informal hearing was made, filed with the agency on December 21, 2007, and made available to the parties. The parties were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. The Petitioner was employed by the Florida Department of Transportation, an FRS-participating employer, from 1990 through April 2002.
2. During her employment, she was a member of the FRS Pension Plan.
3. At all times during Petitioner's employment, the Pension Plan was the only plan available to her through the FRS, as the Public Employee Optional Retirement Program (the Investment Plan) either did not exist or had not yet opened for membership.
4. The Petitioner terminated her employment in April 2002 and relocated to [REDACTED]. [REDACTED] She has not returned to work with any FRS-participating employer since that time.
5. In accordance with statute, the Investment Plan was rolled out on July 1, 2002, after Petitioner terminated employment in Florida in April, 2002. In October 25, 2002, the Petitioner was sent a Plan Choice Default Confirmation Statement (Statement) by FRS which stated that she had defaulted to the Pension Plan because she had not made an active choice otherwise, and that she

retained a one-time "second election" that she could use "at any time in the future" to switch from the Pension Plan into either the Investment Plan or the Hybrid Option Plan (for purposes of this case, these will be referred to collectively below as the Investment Plan).

6. In July and August, 2007 Petitioner contacted the State of Florida, Division of Retirement via telephone and letter, seeking to change from the Pension Plan to the Investment Plan. In her letters, she stated that she was making her request pursuant to the Statement she had received advising that she retained a second election which could be used to make this switch.

7. In response, the Division of Retirement forwarded the Petitioner's request to the Respondent, the agency charged with administration of the FRS Investment Plan.

8. The Respondent reviewed Petitioner's case and advised by letter that her request could not be honored. This August 22, 2007, letter states that Petitioner was not employed when the Investment Plan opened for membership, that only actively employed FRS members could change to the Investment Plan, and that because Petitioner's FRS-covered employment ended in April, 2002, before the new Investment Plan was even made available, she could not now elect into that plan. This letter further explained that Petitioner could still make an election and change plans if she returned to FRS covered employment and made a valid election.

9. Dan Beard, the Respondent's Director of Policy, Risk Management & Compliance, testified at hearing that active state employees were given the option of selecting between the Pension Plan and the new Investment Plan provided they made such election during a statutorily prescribed window of time, and while they were still employed.

10. Mr. Beard further testified that when the Investment Plan was rolled out in 2002,

there were approximately 600,000 participants who were eligible to make a choice between the existing Pension Plan and the new Investment Plan.

11. Plan Choice Default Confirmation Statements, like that sent to the Petitioner, were sent as a matter of course to the participants after the election period ran, if no election had been made.

12. The Respondent subsequently undertook an audit of FRS plan participant defaults which showed that approximately 31,000 employees who were not employed by FRS-participating employers at the time that the Investment Plan was opened for membership, erroneously received Statements like that directed to Petitioner, mistakenly indicating that they had defaulted in making an election which they were not even eligible to make.

13. In 2004 and as a result of the audit, the Respondent reversed the defaults for that group of employees, including the Petitioner, on the basis that the statutes governing the Florida Retirement System mandate that employees are to have two elections during their employment – an initial election and a second election.

14. The reversal had the effect of restoring both elections to the group of 31,000 participants, including Petitioner, on the chance they might someday return to FRS covered service with the State of Florida. The reversal did nothing to change the requirement that an employee be actively working in FRS-covered employment at the time the election was made.

15. The Petitioner testified that because the Plan Choice Default Confirmation Statement was issued well after her termination from FRS-covered employment, she did not rely on the

Statement in making the decision to terminate her employment, but believed that the Statement gave her the opportunity to change to the Investment Plan at any time in the future.

CONCLUSIONS OF LAW

16. 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).

17. The Pension Plan pre-dated the Investment Plan and members of the Pension Plan were given the option of joining the Public Employee Optional Retirement Program (the Investment Plan) when it was implemented in 2002. §121.4501, *et. seq.*, Fla.Stat. (2002). Participation and enrollment in the Investment Plan are governed by Section 121.4501(4), Florida Statutes (2002).

18. At the beginning of the Investment Plan, the Legislature divided FRS-participating employers into three groups for purposes of enrolling their employees in the Investment Plan. §121.4501(4), Fla.Stat.(2002). Those employer groups were: (1) state; (2) school board; and (3) local government. Id. Petitioner's FRS-participating employer was among the state group. §121.4501(4)(a)3., Fla.Stat.(2002)("state employer' means any agency...of the state, which participates in the Florida Retirement System for the benefit of certain employees").

19. State government employees who elected to enroll in the Investment Plan were again divided into two (2) groups: (a) those who were existing employees as of June 1, 2002; and (b) those who commenced their employment after June 1, 2002. § 121.4501(4)(a)1. and 2., Fla.Stat.(2002).

20. Starting in April, 2002, Petitioner was no longer employed by any FRS participating employer, and therefore does not fall within any statutory provision whereby she could have enrolled or can now enroll in the Investment Plan. As such, the Respondent does not have the authority to grant the Petitioner the relief requested.

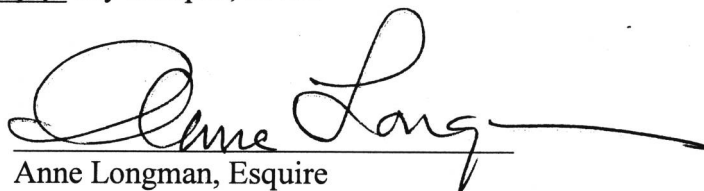
21. Respondent is not required to honor the erroneous Plan Default Confirmation Statement that Petitioner received in October, 2002, stating that she had a second election that could be used "at any time in the future." To the extent that Petitioner is asserting an estoppel argument, she cannot show that she changed her position in reliance on the Statement, as she did not even receive it until after she had terminated FRS employment. See Salz v. Department of Administration, Division of Retirement, 432 So.2d 1376, 1378 (Fla. 3rd DCA 1983) *citing* Department of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981). Petitioner is in no different position for having received the Statement than if she had never received it.

RECOMMENDATION

It is unfortunate that Petitioner was given erroneous information about her FRS account, but it is also not surprising that mistakes occurred during the creation and roll-out of the legislatively mandated Public Employee Optional Retirement Plan in 2002. It does not appear that there is any statutory authority that would allow Petition to change plans now, when she is no longer working for

an FRS-covered employer. Having considered the law and undisputed facts in this matter, I recommend that the Respondent, State Board of Administration issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 8th day of April, 2008.



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

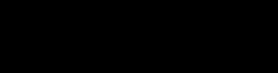
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

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 8th day of April, 2008.

Copies furnished to:

Delena M. Joedicke


Petitioner

Brandice D. Dickson, Esquire
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Tallahassee, Florida 32302-2095
Respondent