

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

RISHA WORLEY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2007-1014
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On May 16, 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, Risha Worley, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on June 2, 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.

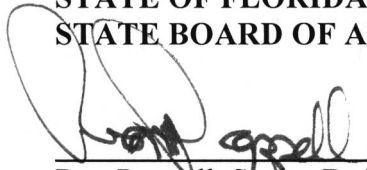
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to have her Second Election honored since she submitted her election at a time when she was not earning service credit with a Florida Retirement System 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 200, 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.

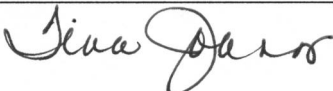
DONE AND ORDERED this 3rd day of June, 2008, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



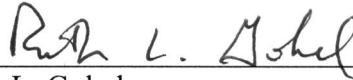
Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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.

TINA JOANOS
Clerk 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Risha Worley, 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 3rd day of June, 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

RISHA L. WORLEY,

2007
CASE NO. 2006-1014

Petitioner,

v.


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 appearances were as follows:

APPEARANCES

For Petitioner: Risha Worley, pro se

Petitioner

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

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether the SBA should reverse its determination that the Petitioner's Second Election was invalid because she submitted her 2nd Election Retirement Plan Enrollment Form to

the Respondent's third party administrator at a time when she was not earning service credit with a Florida Retirement System participating employer.

PRELIMINARY STATEMENT

On October 1, 2007, Petitioner filed a Request for Intervention seeking reconsideration of the Respondent's determination that her Second Election was invalid. The SBA investigated and denied this request. Petitioner then filed a Petition for Hearing requesting the same relief, which was transmitted to the undersigned for informal hearing.

Petitioner attended the informal hearing by telephone and testified on her own behalf. The Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance, and Respondent's exhibits R-1 through R-8, consisting of official agency records and communications by and to the Petitioner, which were admitted into evidence without objection. Petitioner did not submit any exhibits.

A transcript of the informal hearing was made, filed with the agency on December 21, 2007, and made available to all parties. The parties were invited to submit proposed recommended orders within 30 days after the transcript was filed. The Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. The Petitioner was employed by the School Board of Polk County, an FRS-participating employer, beginning in August 1987.
2. As an employee of the School Board of Polk County, she was given the opportunity to join the FRS Investment Plan between September 2002 and November 2002 when that plan was rolled out by the Legislature.
3. Because she did not elect to join the Investment Plan during that window, she defaulted back to the Pension Plan.

4. Petitioner currently has in excess of 16 years in the Pension Plan.
5. Petitioner submitted a letter of resignation on April 27, 2007 with an effective resignation date of April 30, 2007.
6. Petitioner's employer certified that her employment terminated May 22, 2007.
7. Petitioner executed a 2nd Election Retirement Plan Enrollment Form on May 22, 2007, seeking to switch from the FRS Pension Plan to the Investment Plan. That form advised participants:

If leaving FRS-covered employment, this form must be received by the Plan Choice Administrator prior to your date of termination or it will be invalid. You must earn service credit in the month the form is received to be valid.

8. Petitioner mailed the executed second election form from Haines City, Florida to the Respondent's third party administrator in Jacksonville, Florida on May 22, 2007.
9. When asked at the hearing about her employer's certification that her employment terminated May 22, 2007, instead of the resignation effective date of April 30, 2007, the following exchange was had between Respondent's attorney and Petitioner:

Q. Do you see, about halfway down, there's a black box, and inside that black box, it says Certification of Termination by FRS Employer?

A. Right.

Q. Okay. And do you see that a Ms. Sharon Bowers signed that form?

A. Yes. She was the one that was advising me on what to do.

Q. Okay. And it appears that she is saying in this form that you terminated employment on May 22nd, 2007. Do you see that?

A. Yes.

Q. Okay. And can you tell us how you -- how this form came to be? In other words, did you request Ms. Bowers to fill out this form?

A. Let me stop and think. I -- yes, I think I did. I think I did. I think -- like I said, she was advising me on what to do on everything.

Q. Okay. In any respect, she --

A. I'm sorry.

Q. That's okay. She's saying in this that you terminated employment May 22nd, 2007; is that right?

A. Right.

Q. Okay.

A. But I didn't work in May.

Q. You didn't work any in May; right?

A. I got paid, but I didn't work. I had -- I couldn't see. I had eye surgery.

Q. Okay. So you performed no work for your school board employer in May 2007?

A. Right.

Q. And --

A. But I got -- but I received paychecks, a paycheck.

Q. Okay. Do you recall if you received a paycheck for your work in April?

A. Yes, I did.

Q. Is that why you got paid in May?

A. It might be.

10. Upon further questioning, Petitioner could not recall having performed work for her employer in May 2007.

11. Petitioner testified at hearing that in and around the time she submitted her second election, she suffered from health issues, mental and physical, which resulted in an inability to work, memory loss, and at least two stays in mental health facilities pursuant to the Baker Act.

CONCLUSIONS OF LAW

12. 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).

13. Section 121.4501(4)(e), Florida Statutes governs a Florida Retirement System (FRS) plan participant's movement between plans:

(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 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. (2006)(emphasis added).

14. The above statute is hardly a model of clarity. It does appear, however, that for a second election to be valid, there is a requirement that an FRS participant be earning service credit in an employer-employee relationship “consistent with the requirements under s. 121.021(17) (b)” both when the election is made and when the second election form is received by the third party administrator (TPA). So the question becomes, when is a participant “earning service credit,” as provided by §121.021(17)(b)? This section at (17)(a) contains a lengthy description of the term “creditable service,” but does not say how this service is earned. The only relevant language is at (17)(b): “For purposes of the definition of ‘creditable service,’ monthly service credit under the Florida Retirement System and existing state systems shall be awarded as follows: * * * 4. On and after July 1, 1985, one month of service credit shall be awarded for each month salary is paid for service performed.” *Id.*(Emphasis added.) For the Public Employee Optional Retirement Program (Investment Plan), “earning service credit in an employer-employee relationship consistent with the requirements under” this section, appears to mean that the participant must be actively performing work for which she will be paid and for which she is being credited in the FRS system.

15. The language from the second election form, cited in paragraph 7 above, states that the participant must “earn service credit in the month the form is received” for it to be valid. It also introduces another idea, not found in the statute, that the form must be received by the TPA prior to the date of termination. There is no mention in §121.4501(4)(e) of the term “date of termination,” although that term and the requirement stated in the form, are found in rule 19-11,007(3)(d), Florida Administrative Code, the SBA rule applicable to second elections. Reading all arguably relevant provisions together produces the general idea is that the second election form must be received by the TPA while the employee is still actively working, but these multiple requirements could lead to

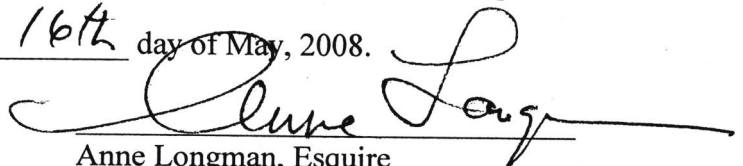
confusion if the employee believed that the employer's certification of a date of termination (in this case May 22, 2007) controlled the timeliness of the second election, rather than the requirement to be actively working. In this case, the Petitioner testified that she did not actively perform any work in the month of May, 2007. She also testified that she executed a second election form on May 22, 2007 and placed it in the mail, so even if the date of her employer-certified termination controlled, the second election could not have been received prior to the date of her termination, as these occurred on the same day, and in any event, she was not actively working then.

16. Petitioner's testimony concerning her mental state at various times surrounding the events at issue here is disconcerting, but Petitioner has not presented any evidence that would establish that she was not legally competent during the relevant periods. Unfortunately, there does not appear to be any reading of the applicable statutes and rules which would allow Respondent to honor a second election not made and received while the Petitioner was actively working.

RECOMMENDATION

Having considered the law and the undisputed facts in this matter, I recommend that a final order be entered by Respondent, State Board of Administration, denying the relief requested.

RESPECTFULLY SUBMITTED this 16th day of May, 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 16th day of May, 2008.

Copies furnished to:

Risha Worley



Petitioner

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