

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DOREATHA BROWN,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2012-2334
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On May 17, 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, Doreatha Brown, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Petitioner timely filed an exception to the Recommended Order on May 23, 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.

RULING ON PETITIONER'S EXCEPTION TO THE RECOMMENDED ORDER

Petitioner has filed what she deems as a "written statement" in response to the Recommended Order. Since this document was filed within 15 days after the

Recommended Order was issued, Petitioner's written statement will be treated as an exception to the Recommended Order. Petitioner states that certain information was "not true or included in" the Recommended Order. In particular, Petitioner claims that there was a telephone call that she made to the MyFRS Financial Guidance Line prior to the telephone calls that were transcribed and made part of the record of the hearing. Petitioner made the same allegation at the hearing, but the Respondent had no record of any such call. Further, Petitioner did not produce any evidence either at the hearing or at any time thereafter to show the existence or content of such call. In her exception, Petitioner also argues that had she been timely sent the necessary retirement paperwork, she would have been able to transfer to the Investment Plan while she still was actively employed.

Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

The Petitioner's exception does identify the disputed portions of the Recommended Order, does not identify any legal basis for the exception, and does not include appropriate and specific citations to the record. Petitioner's exceptions are merely a reiteration of her arguments made during the hearing. Further, Petitioner already had the opportunity to fully present her arguments during the hearing, and was given the opportunity by the presiding officer to provide, within 30 days after the hearing, any additional arguments or documents that Petitioner felt could further support her case.

Accordingly, Petitioner's exception hereby is rejected.

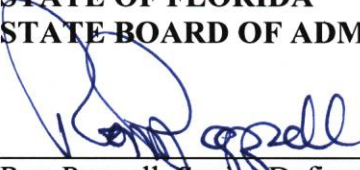
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be transferred from the Pension Plan to the Investment Plan even though she is not currently employed by an Florida Retirement System ("FRS") covered agency 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 7th day of June, 2012, 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Doreatha Brown, 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 7th day of June, 2012.



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

May 23, 2012

**Agency Clerk, Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd. Suite 100
Tallahassee, FL 32308**

RECEIVED
STATE BOARD OF ADMIN
12 MAY 26 PM 10:49
GENERAL COUNSEL'S OFFICE

To Whom it May Concern:

I received a copy of the recommended order from the undersigned officer for the State of Florida, State Board of Administration on March 1, 2012 in Tallahassee, Florida. As the petitioner, I do not disagree with the laws of Florida, but my concerns are that some information was not true or included in the report. I strongly believe if the paper had been properly sent to me as I requested, everything would have been completed accordingly to the law. As I have stated before, I told the agent that I wanted a total settlement and to send me the necessary paper. He stated that I should receive the papers in 7 to 10 days. He never stated that I had to switch plans. He also stated that I should receive the funds at the end of January, 2012. This all began while I was fully employed by an agency that contributed to the FRS. I did not receive the necessary papers. However, nowhere in the recommendation report was it stated that the first call I made was not presented at the hearing. This statement was totally ignored. If the agent had done as he stated, sent me the necessary papers, all the laws would have been followed. I have worked as an educator in Hillsborough County for forty-six years and I have no desire to break any laws at 70 years of age.

I have inquired within the school system of Hillsborough to obtain employment to be able to make the switch however, I have been unsuccessful due to my qualifications and the changes in hiring retirees in Hillsborough County. As stated in the log of the hearing procedure of March 1, 2012, page 25, lines 16-24 that Mr. Beard provide me with other FRS-covered agencies that could potentially hire me for a day or a week or some other short-term period to allow me to submit a second election form and switch from the Pension Plan to the investment plan.

This is my written statement that must be submitted within 15 days to the Agency Clerk of the State Board Administration.

Yours truly,

Doreatha Holloman Brown

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

RECEIVED
STATE BOARD OF ADMIN
12 MAY 16 AM 11:04
GENERAL COUNSEL'S OFFICE

DOREATHA BROWN,

Petitioner,

vs.

Case No. 2012-2334

STATE BOARD OF ADMINISTRATION,

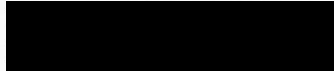
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on March 1, 2012, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Doreatha Brown



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

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner can switch from the Pension Plan to the Investment Plan even though she is not currently employed by a Florida Retirement System (FRS) covered agency.

PRELIMINARY STATEMENT

Petitioner attended the hearing in person with her husband. Petitioner testified on her own behalf and offered the testimony of her husband, Aaron Brown. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, Defined Contribution Programs. Petitioner's Exhibit 1 was admitted into evidence without objection. Respondent's Exhibits 1 through 8 were admitted into evidence without objection. After hearing, Respondent submitted a copy of a transcript of Petitioner's call to the MyFRS Financial Guidance Line on January 5, 2012. This transcript was received into evidence as Respondent's Exhibit 9.

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 after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner was hired by the Hillsborough County School Board, an FRS participating employer, as a rehired retiree on August 10, 2005. She defaulted into Pension Plan membership because she did not make an affirmative initial plan election by the prescribed deadline of February 28, 2006.

2. Petitioner called the MyFRS Financial Guidance Line on October 24, 2011 and spoke to an Ernst & Young Financial Planner. During that call, she told the financial planner that she wanted to retire effective January 1, 2012. She also confirmed that she was a member of the Pension Plan. She requested an estimate of her benefits at retirement and was referred to the Division of Retirement. She also was told that if she wanted to obtain a lump sum distribution at retirement, she would need to switch to the Investment Plan. She was told that she would be required to fax a second election form indicating her desire to switch plans by 4:00 p.m. on the last day that she worked for the school board to effect this change. When the Ernst & Young Financial Planner asked whether the Petitioner wanted more information on the Investment Plan option, she replied "not really."

3. Petitioner called the MyFRS Financial Guidance Line again on December 1, 2011, and stated that she had not received the estimate of benefits she requested during her call of October 24, 2011. She was connected on the call with a Division of Retirement representative who stated that her estimate had been completed, but not issued. He said that the estimate would be provided to her, along with an application for retirement.

4. Petitioner's last day of work for the Hillsborough County School Board was December 16, 2011.

5. Petitioner did not request any information on how to change plans, did not ask to change plans, and did not submit a second election form to change plans before she terminated employment on December 16, 2011.

6. The requirement that a participant be employed to use the one-time second election is set forth in Florida Statutes and readily available materials including the second election form that is available on the MyFRS.com website; Rule 10-11.007, Florida Administrative Code; frequently asked question No. 24 on the MyFRS.com website; and the October 1, 2011 FRS Investment Plan Summary Plan Description, pp. 35-39, also available on the MyFRS.com website.

7. Petitioner states that she did not receive the estimate of benefits prepared by the Division of Retirement dated November 28, 2011, and that the first estimate of benefits she received from the Division of Retirement was on or after January 17, 2012, after she terminated FRS-covered employment with the school board.

CONCLUSIONS OF LAW

8. 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)(e), Florida Statutes (2011). Section 121.4501(4)(g) provides that:

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.

(Emphasis added). This requirement is also set out in Rule 10-11.007(3)(d), Florida Administrative Code, which provides in pertinent part that “[t]he 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...” Accordingly, the law does not allow Petitioner to make a valid second election after terminating FRS-covered employment.

9. Petitioner was told during her October 24th call to the MyFRS Financial Guidance Line that she would have to submit the form to change plans by 4:00 p.m. the last day of her FRS-covered employment. She was offered more information about making this decision but declined the offer.

10. The SBA is not authorized 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.). Its construction and application of Chapter 121 are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See, 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).

11. Petitioner has 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

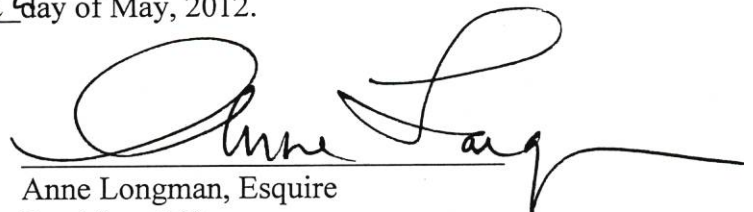
So.2d 778 (Fla. 1st DCA 1981). Petitioner did not meet the statutory criteria to submit a valid second election, and therefore cannot carry this burden.

12. It seems clear that Petitioner knew she wanted to get a lump sum payout when she retired and took steps to effectuate her wishes far in advance of her last day of work, but didn't accurately communicate her wishes. She apparently believed that she did not need to act to switch plans and thereby be able to get a lump sum until she received an estimate of benefits from the Division of Retirement, and she states that she did not receive the estimate dated November 28, 2011. I accept Petitioner's statement, but cannot find that she was misled or lulled into inaction even if that estimate was not received. I have carefully reviewed the October 24, 2011 telephone call with the Guidance Line and note that Petitioner initially stated just that she wanted to start collecting her pension benefit and said nothing about switching plans until told by the representative that there was an option to switch from the Pension Plan to the Investment Plan. Unfortunately, Petitioner did not take the necessary actions before stopping work, and cannot now submit a valid second election.

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 17th day of May, 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 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 17th day of May, 2012.

Copies furnished to:

Doreatha Holloman Brown



Petitioner

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