

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ANTHONY R. NESBITT)	
)	
Petitioner,)	
)	
vs.)	Case No. 2010-1691
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On June 14, 2010, 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, Anthony R. Nesbitt, 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 June 29, 2010. 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.

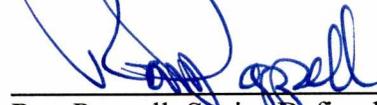
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that the State Board of Administration honor Petitioner's second election request to enroll in the Investment Plan, submitted after Petitioner had resigned and was no longer earning service credit, 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 9th day of July, 2010, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



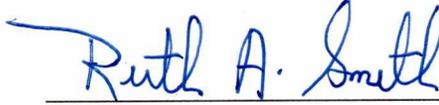
Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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, Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to [REDACTED] [REDACTED] [REDACTED] 3, 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 9th day of July, 2010.



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

ANTHONY R. NESBITT,

Petitioner,

v.

CASE NO. 2010-1691

STATE BOARD OF ADMINISTRATION,

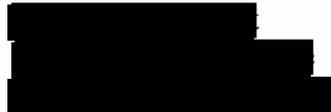
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer on March 16, 2010, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:


Petitioner

For Respondent:

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue whether Petitioner's second election was correctly deemed invalid by Respondent.

PRELIMINARY STATEMENT

By letter of February 1, 2010, Respondent State Board of Administration (SBA) notified Petitioner that his attempt to make a second election into the Investment Plan (known formally as

EXHIBIT A

the Public Employee Optional Retirement Plan) had been investigated by SBA and rejected. Petitioner then filed a Petition for Hearing contesting this decision and the instant hearing ensued.

Petitioner attended the hearing by telephone and testified on his own behalf along with his wife, Carmella Newman, who also appeared by telephone. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management and Compliance. Respondent's Exhibits R-1 through R-5 were admitted into evidence during the hearing. On April 13, 2010, Respondent filed and served supplemental exhibits R-6 through R-9 which are transcripts of telephone calls between the Petitioner and the MyFRS Financial Guidance Line.

A transcript of the hearing was filed with the agency and made available 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 and Petitioner filed a response to it; both of these pleadings have been considered in making this recommendation.

UNDISPUTED MATERIAL FACTS

1. Petitioner worked as a maintenance operator for Broward County and was a member of the Florida Retirement System (FRS) Pension Plan.
2. On August 4 and August 13, 2008, he telephoned the MyFRS Financial Guidance Line to inquire about switching from the FRS Pension Plan to the FRS Investment Plan, because he suspected he might lose his job due to layoffs, and wanted to be able to access his retirement assets in a lump sum if this happened.
3. Petitioner decided not to switch plans at that time. He was specifically warned by the MyFRS Financial Guidance Line representative during the August 4th call that he could not switch plans unless he was actively working:

REPRESENTATIVE: Okay. But you understand that by making the switch that's going to be final and you also would need to make the switch when you're actively employed as well. That's the only time you can do it; okay:

MR. NESBITT: Huh?

REPRESENTATIVE: I said you need to make this switch while you're actively employed, and if you –

MR. NESBITT: That's what I'm doing right now. I understand all of that.

[Ex. R-6, pp. 3-4].

REPRESENTATIVE: Yeah. Mr. Nesbitt, I'm going to have this information e-mailed to you. You want to complete it and get it into the fax number as soon as possible; okay? Because the day – you have to be in the Investment Plan no later than your last day of work, and since you don't know when that is, you know, you'd rather be safe than sorry. Does that make sense?

MR. NESBITT: That makes a lot of sense.

REPRESENTATIVE: If they lay you off and you don't come in, then your election is not effective if you haven't sent in the form. So you want to get that form in as soon as possible.

MR. NESBITT: Okay.

REPRESENTATIVE: If you have any questions about that, please don't hesitate to give me a call.

MR. NESBITT: I'll do that.

4. During the call of August 13, 2008, Petitioner was again specifically warned that he could not switch to the Investment Plan unless he was actively employed. He also was told

that he could not get money out of an Investment Plan account unless he had terminated all FRS employment and waited three calendar months. He had not realized that he would have to be laid off or quit before he could get any retirement assets, and asked, “[W]ell what’s the point of switching over to the Investment Plan then?” The counselor also clarified that the Florida Investment Plan contained no provision for withdrawing money in the event of hardship. Petitioner decided at this time to leave his money where it was, in the Pension Plan.

5. Over a year later, on October 29, 2009, the Petitioner resigned or was forced to resign his employment. On that day, he called the MyFRS Financial Guidance Line twice.

6. During the first telephone call on October 29, 2009, Petitioner stated that he had left his job that day and that he wanted to switch plans so he could get his money out in three months. He was told by the Guidance Line counselor that to switch plans, he had to be on the payroll receiving service credit, not on an unpaid leave of absence or and not already terminated, and that there was no guarantee a second election would go through since he had already resigned.

7. He was also told that the form had to be in that day. When Petitioner stated that he was not at a computer but could be later, the counselor stated: “Well, we’re here until eight o’clock tonight, so you have plenty of time.” It does not appear that Petitioner was ever told that the second election form had to be received by four p.m. that day.

8. Petitioner called the MyFRS Financial Guidance Line again later on that same day, and at this time, his wife was on the phone with him. He was again advised that he could try to submit the second election, but it might later be reversed if it was found to have been “submitted on the same date of termination.”

9. The second election form submitted by the Petitioner states:

DEADLINE: *** You must be actively employed earning salary when your form is received by the FRS Plan Choice Administrator. If you are leaving FRS-covered employment, this form must be received prior to your termination date. *** If it is subsequently determined that you were not eligible to make a plan choice, your election will be considered invalid and will be reversed. For your plan change to occur in a specific month, the form must be received the month before, no later than 4 PM ET, on the last business day of the month. (Emphasis added)

...

SECTION 4: AUTHORIZATION

3. Your 2nd Election will become final at 4:00 p.m. (Eastern time) on the day it is received. If you are terminating FRS-covered employment, this form must be received by the FRS Plan Choice Administrator prior to your date of termination or it will be invalid.

10. Petitioner or his wife faxed his second election form to the Respondent's third party administrator October 29, 2009, the same day he resigned his FRS-covered employment, and it was received by the FRS Plan Choice Administrator at 8:53 p.m.

11. Petitioner testified that his work days ended at 5:00 p.m.

12. Respondent invalidated Petitioner's second election, stating that in order for the election to be considered valid, it had to have been received by the Plan Choice Administrator prior to his termination date and not later than 4:00 p.m. EST on October 29, 2009.

13. Petitioner asserts that the MyFRS Financial Guidance Line counselors were not clear with respect to the time deadline for filing the second election form.

14. Petitioner asserts that he was wrongfully terminated, and his termination is now in dispute in another tribunal.

CONCLUSIONS OF LAW

15. Movement between the FRS plans is governed by Section 121.4501(4)(e), Florida Statutes:

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. (emphasis added).

16. Rule 19-11.007, Florida Administrative Code, governs the timing of the receipt of the second election form and states, in pertinent part:

19-11.007. Second Election Enrollment Procedures for the FRS Retirement Programs.

(1) Purpose. The purpose of this rule is to establish procedures for making the second election permitted by Section 121.4501(4)(e), F.S. This rule includes procedures for members who initially chose the FRS Investment Plan or the FRS Investment Plan Hybrid Option to use their 2nd. election to transfer to the FRS Pension Plan; or for members who chose or defaulted into the FRS Pension Plan to use their 2nd. election to transfer to the FRS Investment Plan or the FRS Investment Plan Hybrid Option. A member may make a valid 2nd. election only if the 2nd. election is made and processed by the Plan Choice Administrator while the member is earning service credit in an employer-employee relationship consistent with the requirements of Section 121.021(17)(b), F.S. FRS members must be actively employed earning salary and service credit to be eligible to make a valid 2nd. election. Members on an unpaid leave of absence, terminated members, or employees of an educational institution on summer break cannot use their 2nd. election until they return to covered FRS employment. In general terms, this means that the 2nd. election must be made and processed while the member is actively working and being paid for that work. **It is the responsibility of the**

member to assure that the 2nd. election is received by the Plan Choice Administrator no later than 4:00 p.m. Eastern Time on the last business day the member is earning salary and earning service credit.

...

(3) General Procedures.

...

(d) The 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 consistent with the requirements under Section 121.021(17)(b), F.S. FRS members must be actively employed earning salary and service credit to be eligible to make a valid 2nd. election. Members on an unpaid leave of absence, terminated members, or employees of an educational institution on summer break cannot use their 2nd. election until they return to covered FRS employment. **The election must be received and processed by the FRS Plan Choice Administrator before the member terminates covered FRS employment. It is the responsibility of the member to ensure the election is received by the Plan Choice Administrator no later than 4:00 p.m. Eastern Time on the last business day the member is earning salary and earning service credit.**

Rule 19-11.007, F.A.C.

17. Section 121.4501(4)(e), Florida Statutes requires that a member be earning service credit both when the second election is made and when it is received by the third party administrator. Respondent's Rule 19-11.007(1) and (3)(d), Florida Administrative Code clarifies that it is the member's responsibility to ensure the election form is received "no later than 4 p.m. Eastern Time on the last business day the member is earning salary and earning service credit." So it is possible that a member could leave his job, for example, at noon, and not submit the second election form until two hours later, and Respondent would deem the election to be valid if the form was received no later than four that afternoon, even though the form would have been received when the member was no longer actively working.

18. The second election form that Petitioner was required to submit to change plans does not contain the same language as the above rule. It states instead that the form must be received by four p.m. on the last business day of the previous month if the participant wants the change to be effective in a specific month (first paragraph of the form), and that the second election will become final by four p.m. on the day it is received (Section 4:3 of the form). Neither of these statements appears applicable to Petitioner's situation, and neither amounts to an explicit statement that the form must be submitted by four p.m. on the last day a member is actively working.

19. The form does state that it must be received by the FRS Plan Choice Administrator "prior to your date of termination or it will be invalid" (Section 4:3). In this case, if Petitioner's date of termination is the date he resigned his job, October 29, 2009, it would not have mattered if he had gotten his form into the hands of the Plan Choice Administrator before four p.m., because this still would not have been prior to the date of his termination.

20. In addition to the precise language of the rule not appearing on the second election form, it was not conveyed to Petitioner by any Guidance Line counselor. One of the counselors instead stated that "we're here until eight o'clock tonight, so you have plenty of time," and that "[t]he other option would be for you to fax in the second election enrollment form today. It's going to be processed with today's date," making no mention of a 4 p.m. deadline.

21. It is clear that, over a year before the events at issue here, Petitioner had considered moving his retirement assets into the Investment Plan so that he could access funds in the event he lost his job and had an urgent need for the money. He failed to do this timely, even though he had feared he might be laid off and was warned repeatedly by the MyFRS Guidance Line counselors that the form had to be submitted while he was still working in order to be valid.

But the undisputed facts of record also show that while the second election form explicitly states that it becomes final at four p.m. on the day it is received, it does not say that it must be received by four p.m. to be valid, and instead states that it must be received prior to the date of termination.

22. In addition to Petitioner's form not having been received and processed prior to his termination, and before four p.m. Eastern Time on the last day of his employment, it was faxed and received after the normal end of Petitioner's last day working for Broward County: Petitioner's work day ended at five p.m. and the form was received at 8:53 p.m. Respondent asserts that Petitioner therefore was not earning service credit at the time the form was received contrary to Section 121.4501(4)(e), Florida Statutes. Respondent apparently applies its rule to mean that it does not matter if a member quits his job before the form is received, as long as the form is in by four p.m. that day. It is not clear what result would obtain if the form had been received between four and five p.m. on that day -- after Petitioner had resigned, but before the end of his normal work day, and after four p.m.

23. In his response to Respondent's Proposed Recommended Order, which I am treating as his Proposed Recommended Order, Petitioner asserts for the first time that he was paid through October 30, 2009, that he therefore was earning service credit on that day and that his second election is valid because it was submitted prior to four p.m. on October 30. As I understand Respondent's interpretation of the applicable statute and rules, even if this had been timely asserted and were the case, the result would not change because Petitioner would not have been actively working on October 30, 2009.

24. Respondent is required to administer the FRS Investment Plan in accordance with applicable Florida Statutes and its duly adopted rules and cannot depart from these requirements

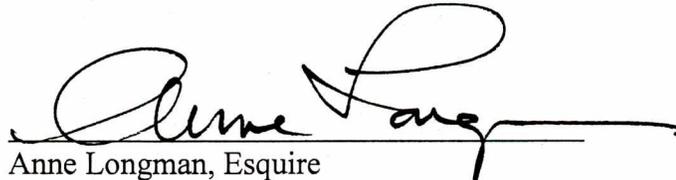
when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). It can be difficult to simplify the Investment Plan requirements so that they are clear to members and potential members. In this case, the multiple MyFRS Guidance Line counselors who spoke with Petitioner tried very diligently to advise him accurately so that he could carry out his intent with regard to his retirement assets. Petitioner delayed in filing a second election and found himself in the very position the counselors had warned him of.

25. This case presents a close question. Even if Petitioner had read and studied the multiple and potentially conflicting requirements and warnings set out on the second election form, he might still have been confused as to his best course of action, and would not have learned that the form had to be submitted by four p.m. The MyFRS counselors told him to get the form in that day and warned him that it might not be accepted, but made no mention of a four p.m. deadline, stated that he had plenty of time and implied that it would be accepted after four p.m. I am concerned that a member in Petitioner's position is not given a completely clear path to allow him, when met with exigent circumstances, to take advantage of a program that Florida law prescribes. But based on the undisputed facts of record, I cannot find that either the imprecise wording of the second election form, or the fact that Petitioner was not told verbally that his form had to be received by four p.m. was enough to affirmatively mislead, induce or cause Petitioner to delay in submitting his form.

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 14th day of June, 2010.



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 14th day of June, 2010.

Copies furnished to:



Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

Joanos Tina

From: UPS Quantum View [auto-notify@ups.com]
Sent: Monday, July 12, 2010 10:18 AM
To: Joanos_Tina
Subject: UPS Delivery Notification, Tracking Number [REDACTED]



***Do not reply to this e-mail. UPS and STATE BOARD OF ADMINISTRATION will not receive your reply.

At the request of STATE BOARD OF ADMINISTRATION, this notice is to confirm that the following shipment has been delivered.

Important Delivery Information

Tracking Number: [REDACTED]
[REDACTED]

Delivery Location: PORCH
Signed by: REL 02F

Shipment Detail

Ship To:
[REDACTED]

Number of Packages: 1
UPS Service: NEXT DAY AIR
Shipment Type: Letter
Reference Number 1: General Counsel
