

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

JUAN M. CORDOVA	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2010-1687
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On June 3, 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, Juan M. Cordova, 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 18, 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 while Petitioner was on medical leave of absence and no longer earning service credit, is denied.

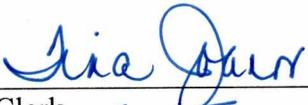
Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the 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 9<sup>th</sup> 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], 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.



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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

JUAN M. CORDOVA,

CASE NO. 2010-1687

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned presiding officer on March 1, 2010, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner:



For Respondent:

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

RECEIVED  
STATE BOARD OF ADMIN  
10 JUN -4, PM 3:56  
GENERAL COUNSEL'S OFFICE

**STATEMENT OF THE ISSUE**

The issue is whether the Respondent should deem Petitioner's second election to join the FRS Investment Plan to be valid.

## PRELIMINARY STATEMENT

By letter of January 26, 2010, Respondent State Board of Administration (SBA) notified Petitioner that his request to be allowed to enroll in the Florida Retirement System (FRS) Investment Plan could not be granted because he did not earn service credit in the month his second election was received. Mr. Cordova then filed a Petition for Hearing contesting this determination.

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented testimony from the Petitioner and Daniel Beard, Director of Policy, Risk Management & Compliance, Office of Defined Contribution Program, SBA. Respondent's Exhibits R-1 through R-5 and Petitioner's Exhibits P-1 through P-3 were received in evidence without objection. The exhibits include transcripts of four telephone calls between Petitioner and the MyFRS Financial Guidance Line which were transcribed and filed after the hearing, and a letter from a Seminole County School District Retirement/Payroll employee to Dan Beard dated March 1, 2010. I reviewed these materials and concluded that they presented no issues of material fact (Order of March 19, 2010) which would preclude my further consideration of this case.

A transcript of the hearing was filed with the agency and made available to the parties, who were invited to submit proposed recommended orders. Respondent filed a proposed recommended order; Petitioner made no further filings.

## MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by Seminole County School Board on August 2, 2004 and had until January 31, 2005 to make an initial election between the Pension Plan and the Investment Plan.

2. Petitioner took no action to make an initial election and defaulted into Pension Plan membership.

3. Petitioner called the MyFRS Financial Guidance Line on April 17, 2008 and stated that he had been working for 5.7 years and wanted to “put everything in investments for mutual funds.” Petitioner was told that he needed to make sure he would work for at least six years so the funds transferred from the Pension Plan to the Investment Plan would be fully vested before he left employment. Petitioner asked the Ernst and Young representative to mail him a second election form, was told that a form would be mailed to him, that he could call back for assistance in selecting among the mutual fund investments identified on the form, and that he would be assigned a six-digit pin number for future transactions in the account.

4. Petitioner called the MyFRS Financial Guidance Line again on December 1, 2008. Petitioner stated that he wanted to switch to “option four” because he might need a lump sum of cash to pay for surgery due to a military-related problem. The Ernst & Young representative explained to Petitioner that “option four” was a payout option of the Pension Plan and that he would need to transfer to the Investment Plan if he wanted a lump sum distribution. Petitioner asked the Ernst and Young representative to mail him a second election form, was told that this form would be mailed to his home address and that he should call back if he needed assistance completing the form. Petitioner said that he had received a pin number, but had not used it yet.

5. Petitioner was injured while driving a school bus on May 22, 2009. He has been unable to work after this incident and is now totally disabled.

6. Petitioner called the MyFRS Financial Guidance Line again on September 25,

2009, about three months after he stopped active work for the Seminole County School Board. Petitioner stated that he had called about switching plans in December of last year, but that he forgot to sign the form to switch plans. Petitioner was told that he needed to be on active payroll to submit the second election form. Petitioner said he was on medical leave but that his employer gave him paperwork and the number to call the MyFRS Financial Guidance Line about switching plans.

7. Petitioner completed a second election form on September 25, 2009 indicating a desire to switch to the Investment Plan. The second election form was received by the SBA Plan Administrator on September 28, 2009.

8. Petitioner was formally terminated by the Seminole County School Board on September 29, 2009, but he did not actively work during the month of September, 2009 and did not earn any service credit in the month of September, 2009.

9. Petitioner testified at hearing that he was told by an employee of the Seminole County School Board that he could make his second election to join the Investment Plan at any time prior to his official termination.

10. Petitioner presented a letter from Janice Hickson, Retirement/Payroll Supervisor with the Seminole County School Board, which was admitted into evidence without objection. This letter states in pertinent part that Petitioner came to her office on September 25, 2009, several days before he was terminated. Ms. Hickson called Dan Beard at the SBA to tell him that a second election form would be filed on behalf of Mr. Cordova before he terminated employment. Ms. Hickson's letter states that she was not aware that a second election form could not be processed while an employee was on a leave of absence and that she failed to

inform Mr. Beard that Petitioner was not an active employee when she called him.

### CONCLUSIONS OF LAW

11. FRS eligible employees may elect to participate in either the FRS defined benefit program (the Pension Plan) or the Public Employee Optional Retirement Program, (the Investment Plan). In order for an election into the Investment Plan to be valid, the participant must be an "eligible employee." Eligibility is defined by Sections 121.4501(3)(a), 121.4501(2)(f)1., and 121.4501(3), Florida Statutes which state:

**(3) Eligibility; retirement service credit.—**

(a) Participation in the Public Employee Optional Retirement Program is limited to eligible employees. Participation in the optional retirement program is in lieu of participation in the defined benefit program of the Florida Retirement System.

§ 121.4501(3)(a), Fla.Stat.

12. Section 121.4501(2)(f)1., Florida Statutes, defines an "eligible employee" as:

**(2) Definitions.--**As used in this part, the term:

...  
(f) "Eligible employee" means an officer or employee, as defined in s. 121.021(11), who:

1. Is a member of, or is eligible for membership in, the Florida Retirement System, including any renewed member of the Florida Retirement System;

§ 121.4501(2)(f)1., Fla. Stat.

13. Section 121.021(11), Florida Statutes, states:

**121.021. Definitions**

The following words and phrases as used in this chapter have the respective meanings set forth unless a different meaning is plainly required by the context:

(11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a municipality,

a metropolitan planning organization, or a special district, employed in a covered group. \*\*\*

§ 121.021(11), Fla. Stat.

14. Rule 19-11.007, Florida Administrative Code states, in pertinent part:

(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.

15. In addition, the second election form that Petitioner executed states:

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 you are on an unpaid leave of absence or you are an employee of an educational institution on summer break, you cannot use your 2nd Election until you return to work.

Petitioner was not actively employed and earning service credit in an employer-employee relationship when he submitted his second election form and therefore was not eligible to make this second election.

16. The SBA is not authorized to deviate from the Florida Statutes creating and governing the Florida Retirement System and Petitioner's rights and responsibilities under them, and in this case there appears to be no way that Petitioner's second election can be given effect without violating those statutes. Unfortunately the applicable statutes and rules creating the

requirements for filing a valid second election, when applied in the context of a participant being incapacitated, terminated or leaving covered service suddenly are confusing and difficult even for human resources personnel to apply correctly.

17. A representative of the Seminole County School Board told Petitioner that he could switch plans while on medical leave. Unfortunately, this was not true, but this erroneous statement does not change the result here. This communication occurred for the first time after Petitioner was already placed on medical leave and unable to return to work because of his permanent disability, and so Petitioner did not rely on this information to his detriment. Petitioner was provided a second election form on two separate occasions while he was on active payroll, but did not complete and sign the form to make a valid election to switch to the Investment Plan while he was eligible to do so.

18. Section 121.021(10), Florida Statutes was amended in 2009 to provide express protection to the SBA from misstatements made by a member's employer:

(10) "Employer" means any agency, branch, department, institution, university, institution of higher education, or board of the state, or any county agency, branch, department, board, district school board, municipality, metropolitan planning organization, or special district of the state which participates in the system for the benefit of certain of its employees, or a charter school or charter technical career center that participates as provided in s. 121.051(2)(d). Employers are not agents of the department, the state board, or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.

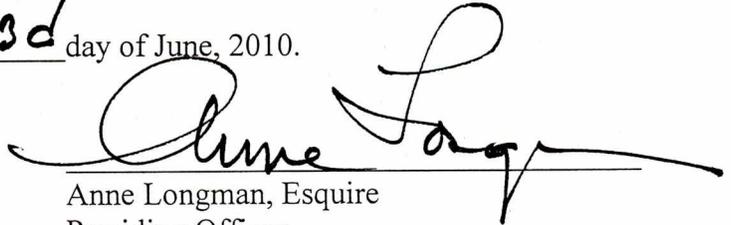
(Emphasis added).

19. Petitioner has undoubtedly experienced financial hardship due to circumstances beyond his control, but that fact does not empower Respondent to grant his request to deem his second election into the Investment Plan to be valid.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, enter a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 3d 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 3d day of June, 2010.

Copies furnished to:



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

  
Attorney

Joanos\_Tina

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**From:** UPS Quantum View [auto-notify@ups.com]  
**Sent:** Monday, July 12, 2010 2:45 PM  
**To:** Joanos\_Tina  
**Subject:** UPS Delivery Notification, Tracking Number 1ZF62F201398040870



\*\*\*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**

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**Tracking Number:** 1ZF62F201398040870

**Delivery Date / Time:** 12-July-2010 / 2:12 PM

**Driver Release Location:** FRONT DOOR

**Shipment Detail**

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**Ship To:**



US

**Number of Packages:** 1

**UPS Service:** NEXT DAY AIR SAVER

**Shipment Type:** Letter

**Reference Number 1:** General Counsel

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