

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

PATRICIA RAY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2012-2391
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On July 18, 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, Patricia Ray, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner made no further submissions. Neither party filed exceptions, which were due on August 2, 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.

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, that Petitioner submitted when she was on unpaid leave of absence and no longer earning service credit, 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 8th day of August, 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

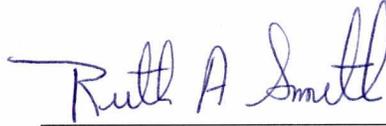
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Patricia Ray, pro se, 14700 SW 150 Street, Miami, Florida 33196, 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 8th day of August, 2012.



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

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STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

PATRICIA RAY,
Petitioner,

vs.

Case No. 2012-2391

STATE BOARD OF ADMINISTRATION,
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.27, Florida Statutes, before the undersigned Presiding Officer for the State of Florida, State Board of Administration (SBA) on May 2, 2012, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Patricia Ray, *pro se*
14700 SW 150 Street
Miami, Florida 33196

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

STATEMENT OF THE ISSUE

The issue is whether Respondent SBA correctly reversed Petitioner's November 2, 2011 attempt to switch from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on her own behalf. She also presented the testimony of Daniel Barboni, her financial advisor, by telephone. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-9 were admitted into evidence at the hearing.

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. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner was a tenured teacher with the Miami-Dade County Public Schools, an FRS participating employer, from July 22, 1988 through October 2011. She was a member of the FRS Pension Plan.

2. In May of 2011, Petitioner became seriously ill and could not return to work. Her last day of work for the Miami-Dade County school system was in May 2011, and she resigned her employment in November, 2011.

3. Petitioner called the MyFRS Financial Guidance Line on October 21, 2011 with her financial advisor on the line. The purpose of the call was to determine whether Petitioner could switch from the Pension Plan to the Investment Plan, which would allow her to access funds that she needed because of her illness. But at this time Petitioner was on unpaid leave from her employment. The MyFRS Financial Guidance Line representative informed Petitioner that she could not submit the form during an unpaid leave.

4. On October 31, 2011 Petitioner submitted a 2nd Election EZ Retirement Enrollment Form to the Respondent's third party administrator for processing, attempting to switch from the Pension Plan to the Investment Plan.

5. That form stated, in pertinent part:

DEADLINE: Your 2nd Election retirement plan change becomes effective on the first day of the month after the FRS Plan Choice Administrator receives your form, provided it is complete and signed (see Section 4). You must be actively employed earning salary when your form is received by the Plan Choice Administrator. If you are leaving FRS-covered employment, this form must be received by the FRS Plan Choice Administrator no later than 4:00 p.m. ET on the last business day you are earning salary and service 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. 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. ...**

(emphasis added).

6. Petitioner has not worked for any FRS participating employer since May 2011; she resigned her FRS-covered employment in November 2011.

7. Petitioner's second election was reversed by the Respondent after it determined that she was not actively employed and earning service credit when Respondent's third party administrator received her second election form. Petitioner has 25.25 years of service in the Pension Plan and appears to be eligible for a benefit from that plan, but that plan does not enable her to obtain a lump sum distribution of funds.

CONCLUSIONS OF LAW

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

(g) 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 the requirements under 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 from the Internal Revenue Service.

§ 121.4501(4)(g), Fla.Stat. (emphasis added).

9. Rule 19-11.007, Florida Administrative Code, governs the timing of the receipt of the second election form and repeats the substance of the statutory requirement stated above: "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 actively employed and earning salary and service credit in an employer-employee relationship consistent with the requirements of Section 121.021(17)(b), F.S. Members on an unpaid leave of absence ... cannot use their 2nd election until they return to covered FRS employment." § 19-11.007(2) F.A.C.

10. Petitioner's last day of work was in May 2011, and she was then on unpaid leave status until she retired in November 2011 -- therefore the last time she earned service credit was in May 2011. She submitted the second election form in question on October 31, 2011, some five months after she last earned service credit and during an unpaid leave of absence. Under the terms of the applicable statute and rule, the form Petitioner submitted was invalid.

11. Respondent SBA cannot deviate from the Florida Statutes creating and governing the Florida Retirement System, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of

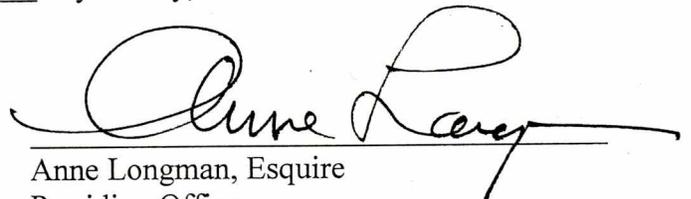
Chapter 121, Florida Statutes, the statute it is charged to implement, will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA 1998).

12. It is unfortunate that Petitioner cannot convert her retirement account to the Investment Plan and then take a lump sum distribution, as she has determined this would best serve her needs, but the Florida Statutes governing the FRS do not provide for a hardship exception of any kind, and the SBA must adhere to the law as written.

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 18th day of July, 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.

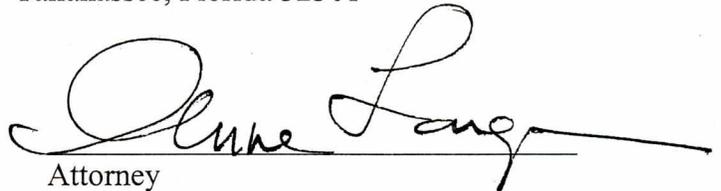
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 18th day of July, 2012.

Copies furnished to:

Patricia Ray
14700 SW 150 Street
Miami, Florida 33196

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


Attorney