

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ELIZABETH LYNCH)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1272
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On February 5, 2009, 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, Elizabeth Lynch, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on February 20, 2009. 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 fully vested in her Florida Retirement System benefits, both the Pension Plan assets and the Investment Plan assets, 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.

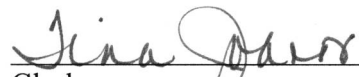
DONE AND ORDERED this 24th day of February, 2009, in Tallahassee, Florida.

**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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Elizabeth Lynch, 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 24th day of February, 2009.



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

ELIZABETH LYNCH,

CASE NO.: 2008-1272

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on September 4, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Elizabeth Lynch


Petitioner

For Respondent:

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

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue to be resolved is whether Petitioner is fully vested in her Florida Retirement System (FRS) Investment Plan account, including amounts accrued in her Pension Plan account prior to her second election.

PRELIMINARY STATEMENT

Petitioner executed a request for intervention on June 4, 2008, which was investigated and denied by Respondent, State Board of Administration (SBA), in a letter of June 13, 2008. Petitioner then filed the subject Petition for Hearing.

Petitioner attended the informal hearing by telephone and testified on her own behalf. Respondent presented the testimony of Dan Beard, SBA Director of Policy, Risk Management & Compliance. Respondent's Exhibits R-1 through R-3 were admitted into evidence without objection. Respondent's Exhibit R-4 was submitted post-hearing by stipulation of the parties.

A transcript of the informal hearing was made, 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.

UNDISPUTED MATERIAL FACTS

1. Petitioner was hired by the Pinellas County School Board on July 27, 2005.
2. New 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).
3. New FRS eligible employees have until 4:00 p.m. ET on the last business day of the fifth month following the month of hire to enroll in the Investment Plan.
4. Petitioner had until January 31, 2006 to make her initial election between the FRS Pension Plan and the FRS Investment Plan.
5. Failure to make a valid initial election into the Investment Plan prior to the

deadline results in the employee defaulting into the Pension Plan.

6. Petitioner did not make an initial election before the January 31, 2006 deadline, and so defaulted into the FRS Pension Plan. Petitioner's decision to default into the Pension Plan was made after having visited the Respondent's website, asking questions, and listening to presentations at a Pinellas County orientation for new teachers in August, 2005. The Pension Plan has a six year vesting requirement; the Investment Plan has a one year vesting requirement. Petitioner asserts that she received the clear impression from the materials and presentations that her initial election was not a critical decision because she could always use her one-time second election to switch plans, and that she was not told that amounts accrued in the Pension Plan would not be vested when switched to the Investment Plan, unless already vested under the Pension Plan. She deliberately defaulted into the Pension Plan.

7. On April 16, 2008, the Petitioner used her second election to switch from the Pension Plan to the Investment Plan, and this election was effective May 1, 2008. At the time of the transfer, Petitioner had a total of three years of service with FRS participating employers.

8. On May 30, 2008, the present value of the Petitioner's Pension Plan account transferred to her new FRS Investment Plan account, resulting in a vested balance of \$ [REDACTED] and an unvested balance of \$ [REDACTED], because none of the amounts accrued prior to her second election had vested pursuant to the Pension Plan six year requirement..

9. After she used her Second Election, Petitioner terminated her FRS covered employment.

10. At the time of hearing, the \$ [REDACTED] amount cited above (the value of her Pension Plan account accumulated between July 2005 and May 2008) was being held in a

suspense account as the unvested portion of her Investment Plan account.

11. Petitioner asserts that, had she realized she could not simply switch all of her monies from the Pension Plan to the Investment Plan at any time beyond a one year vesting period, she would never have defaulted into the Pension Plan, as she was nearing 60 years of age and didn't know how long she would work. She states further that she was misled as to the nature of the second election.

12. The Summary Plan Description FRS Investment Plan for 2005, submitted by Respondent as Exhibit 4, states at page six, under the heading, **When am I vested in the FRS Investment Plan and what is normal retirement age?:** "If you have previous FRS Pension Plan service that you may transfer to the FRS Investment Plan, that service will vest under the FRS Pension Plan 6-year vesting schedule."

CONCLUSIONS OF LAW

13. The statutory section governing initial elections into the Investment Plan states, in pertinent part:

121.4501. Public Employee Optional Retirement Program

(4) Participation; enrollment.—

...

(b)...

2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a district school board employer commencing after July 1, 2002:

a. Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement

of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the Public Employee Optional Retirement Program. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. The election to participate in the optional program is irrevocable, except as provided in paragraph (e).

b. If the employee files such election within the prescribed time period, enrollment in the optional program shall be effective on the first day of employment. The employer retirement contributions paid through the month of the employee plan change shall be transferred to the optional program, and, effective the first day of the next month, the employer shall pay the applicable contributions based on the employee membership class in the optional program.

c. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed time period is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

3. For purposes of this paragraph, "district school board employer" means any district school board that participates in the Florida Retirement System for the benefit of certain employees, or a charter school or charter technical career center that participates in the Florida Retirement System as provided in s. 121.051(2)(d).

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

14. Pursuant to the above statute, Petitioner's initial election period closed on January 31, 2006. Because she did not file an initial election to join the Investment Plan, she was defaulted into the Pension Plan.

15. Petitioner did ultimately use her second election to transfer to the Investment Plan, but benefits accumulated while the Petitioner was a member of the Pension Plan and transferred from the Pension Plan are still subject to a six year vesting requirement, pursuant to Section 121.4501(6)(b)(1), Florida Statutes, which states, in pertinent part:

A participant shall be vested in the amount transferred from the defined benefit program, plus interest and earnings thereon and less administrative charges and

investment fees, upon meeting the service requirements for the participant's membership class as set forth in s. 121.021(29).

§ 121.4501(6)(b)1., Fla.Stat.

16. The "service requirements" for Petitioner's membership class (which is the regular class), as set out in Section 121.021(29), Florida Statutes, are "6 or more years of creditable service." Because the Petitioner had less than this six years of creditable service when she terminated employment, she was not vested in the benefits transferred from the Pension Plan to the Investment Plan that accumulated prior to her second election. If Petitioner returns to active FRS employment within five years after termination, she has the opportunity to vest in these amounts. If she does not, the account balance will be subject to forfeiture, as required by Section 121.4501(6)(b)2. and (c), Florida Statutes:

(6) Vesting requirements.—

...
(b) 2. If the participant terminates employment prior to satisfying the vesting requirements, the nonvested accumulation shall be transferred from the participant's accounts to the state board for deposit and investment by the board in the suspense account of the Public Employee Optional Retirement Program Trust Fund of the board. If the terminated participant is reemployed as an eligible employee within 5 years, the state board shall transfer to the participant's account any amount of the moneys previously transferred from the participant's accounts to the suspense account of the Public Employee Optional Retirement Program Trust Fund, plus the actual earnings on such amount while in the suspense account.

(c) Any nonvested accumulations transferred from a participant's account to the suspense account shall be forfeited by the participant if the participant is not reemployed as an eligible employee within 5 years after termination.

§§ 121.4501(6)(b)2. and (c), Fla.Stat.

17. Petitioner requests "[V]esting of the pension balance adjusted for any difference in fund performance that is fair into the FRS investment plan." Had she filed her first election at

any time within the initial six month window, she would have been fully vested in these amounts, because Section §121.4501(4)(b)2.b., Florida Statutes (cited above) provides for retroactive effect to the employee's first day of employment, but only for the initial election. There is no statutory provision authorizing the Respondent to apply membership in the Investment Plan retroactive to the first day of employment if the election is made outside the initial election window.

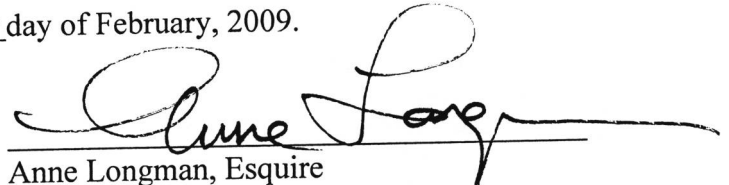
18. The SBA is not authorized to depart from the requirements of the statutes it administers when exercising its jurisdiction, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and Respondent's construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, 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 DCA 1998).

19. It is clear that Petitioner sincerely believed that she could switch from the Pension Plan to the Investment Plan at any time if her employment circumstances changed, and that her account balance would be as if she had been in the Investment Plan from the beginning. She has testified credibly that the second election was portrayed in a way that was misleading to her, but there is no record evidence of the materials she received or the representations made to her at the time of her initial election period, other than the accurate 2005 Summary Plan Description. Under these circumstances, Respondent lacks statutory authority to grant the Petitioner's request.

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 5th day of February, 2009.



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

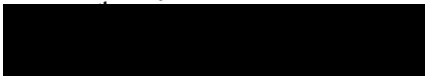
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

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 5th day of February, 2009.

Copies furnished to:

Elizabeth Lynch



Petitioner

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Brandice D. Dickson
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Tallahassee, FL 32302-2095
Attorneys for Respondent


Attorney