

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

PEDRO LEYVA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2007-859
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On January 18, 2008, 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, Pedro Leyva, and his daughter, Monica Paris, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order on December 12, 2007. Respondent filed exceptions which were due on February 4, 2008. 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.

## RULINGS ON EXCEPTIONS

*Respondent's Exceptions 1 and 2, relating to Rule 19-11.007, regarding a Grace Period.*

Both exceptions relate to subsection (6) of Rule 19-11.007(6) which provides a grace period for members who either choose the FRS Pension Plan in error or the FRS Investment Plan in error. By its terms, subsection (6) of Rule 19-11.007 does not discuss or make any requirements for the FRS Investment Plan Hybrid Option. Therefore, Respondent must make a decision regarding this Petition for Hearing on some other ground. These two exceptions are rejected as not applicable to this Petitioner and this hearing.

*Respondent's Exceptions 3 and 4*

Both exceptions discuss the contradiction between what Mrs. Leyva, calling on behalf of her husband to CitiStreet and Ernst & Young, communicated to those companies' representatives on the phone and what the actual second election form indicated. Mrs. Leyva was clear that she wanted to transfer her husband's retirement benefits from the FRS Pension Plan into the FRS Investment Plan so that he could take a lump sum distribution when he terminated employment with his FRS-covered employer. The second election form received and processed by CitiStreet indicated that Mr. Leyva had selected not the FRS Investment Plan but the FRS Investment Plan Hybrid Option. Respondent points out that the SBA cannot be made to guess what the Petitioner's intent was and therefore has to be guided by the form received. These exceptions are accepted.

*Respondent's Exception 5*

This exception relates to contract law, and since the definition of the Hybrid Option on the second election form is unambiguous, the exception is accepted.

*Respondent's Exception 6*

This exception uses the reasons in Exceptions 1, 2, 3, and 5 to discuss the conclusion of law in Paragraph 20 of the Recommended Order. Since Exception 3 has been accepted, this Exception 6 is also accepted. Note, however, that the Conclusion of Law is correct in pointing out that “a Spanish speaking advisor would have been a real help to the exchange of information. . . .” Statutorily, however, the SBA is not charged with making Spanish translators available at all times on the MyFRS Financial Guidance Line.

**ORDERED**

The Petitioner's request to void his second election into the FRS Investment Plan Hybrid Option and to allow him to file a corrected second election to transfer all his Pension Plan assets in the FRS Investment Plan 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 11th day of February, 2008, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



\_\_\_\_\_  
Ron Poppel, 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.

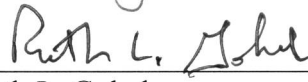


\_\_\_\_\_  
Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by U.S. mail (confirmation requested) to Pedro Leyva, 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 11th day of February, 2008.



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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

PEDRO LEYVA,

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

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CASE NO. 2007-859

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned Presiding Officer for the STATE BOARD OF ADMINISTRATION (SBA) on September 24, 2007, in Tallahassee, Florida. The Petitioner and Respondent appeared in person as follows:

For Petitioner:

Pedro Leyva, Pro Se  


For Respondent:

Brian A. Newman, Esquire  
Brandice D. Dickson, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
Post Office Box 10095  
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether the SBA should grant the Petitioner's request to void his second election into the FRS Investment Plan Hybrid Option and allow him to file a corrected second election form to transfer all of his Pension Plan assets to the Investment Plan.

Exh. A

## PRELIMINARY STATEMENT

On March 25, 2007, Petitioner filed a Request for Intervention seeking to have his second election rescinded and have all of his Pension Plan assets placed in the Investment Plan. Respondent conducted an investigation and provided notice to Petitioner of its intent to deny this request. Petitioner then filed a Petition for Hearing which was transmitted to the undersigned for informal hearing.

At the hearing both Petitioner and his wife, Sandra Leyva, testified on his behalf and presented exhibit P-1, a second election form that was never submitted. The Petitioner's adult daughter, Monica Paris, also was present. The SBA presented the testimony of Dan Beard, Director of Policy Risk Management and Compliance and exhibits R1-5, consisting of official agency records and communications by and to the Petitioner. Recorded telephone calls between Mrs. Leyva and the MyFRS Financial Guidance Line made on June 2 and 12, 2006 were played at the hearing. A transcript of the informal hearing was made, filed and made available to the parties; Respondent filed a Proposed Recommended Order, Petitioner made no further filings.

## UNDISPUTED MATERIAL FACTS

1. Petitioner is a bus driver employed by the Orange County School District and was fully vested in the Florida Retirement System (FRS) Pension Plan before his second election form was filed because he had worked for an FRS-covered agency for more than six years.
2. Participants in the Pension Plan may make a one-time second election in which they may move from the Pension Plan into the Investment Plan or the Investment Plan Hybrid Option.

3. Prior to making a second election, Petitioner and his wife sought advice through the toll free MyFRS Financial Guidance Line. Through this line, participants may speak with advisors from Ernst & Young and Citistreet, third-party vendors with whom the Respondent has contracted to provide education and information, and also with Division of Retirement (DOR) personnel. Calls to the MyFRS Financial Guidance Line which are routed to Ernst & Young or Citistreet are recorded, calls routed to the Division of Retirement (DOR) are not recorded. Sometimes calls to DOR are noted on a log, sometimes they are not.

4. Both Petitioner and his wife speak English as their second language. Mrs. Leyva testified that she understands spoken English but is not able to confidently read or understand English language documents.

5. Mrs. Leyva called the MyFRS Financial Guidance Line on June 2, 2006 requesting assistance in completing the second election form for her husband, and spoke to an Ernst & Young investment advisor named "Mark." During this call Petitioner's wife stated that Mr. Leyva wanted to switch from the Pension Plan to the Investment Plan. Mark also learned that Mr. Leyva wished to invest the Investment Plan assets in the Conservative Balanced Fund, and this fund selection could not be made using the 2<sup>nd</sup> Election EZ Retirement Plan Enrollment Form that she had before her (which permits only transfer of assets to the Select Moderate Balanced Fund). The call ended with a commitment to mail the correct second election form to Petitioner.

6. On June 12, 2006, after Petitioner received the correct form, Mrs. Leyva again called the MyFRS Financial Guidance Line. She initially spoke to a female CitiStreet representative who transferred her to Ernst & Young for further assistance. Mrs. Leyva then



spoke to a female Ernst & Young customer service representative named “Dawn” who attempted to find a Spanish speaking investment advisor for her. No Spanish speaking representative was available, and Mrs. Leyva apparently was transferred to an English speaking Ernst & Young investment advisor named “Hugh.”

7. During the recorded telephone call with Hugh, Mrs. Leyva indicated that her husband desired a lump sum distribution upon retirement, but did not specifically ask Hugh which box she should check on the first page second election form (i.e. Pension Plan, Investment Plan, or Hybrid) in order to accomplish this objective. Hugh explained the investment options available to Petitioner in the Investment Plan at great length, but did not focus on Mrs. Leyva’s overall request, which was for assistance in making whatever change would allow her husband to receive a lump sum distribution when he retired. It is clear from the recorded conversation that Ms Leyva is struggling to understand what Hugh is telling her, and she repeatedly conveys that she wants only for her husband to be able to get a lump sum when he retires.

8. Mrs. Leyva testified that she had another conversation with a female counselor on June 12, 2006 after she finished her call with Hugh, and that this female counselor instructed her to check box 3 on the form.

9. Petitioner signed a second election form dated June 12, 2006 which in Section 1: Retirement Plan 2<sup>nd</sup> Election, shows selection of box 3, titled “Change from the FRS Pension Plan to the FRS Investment Plan Hybrid Option,” and submitted this form.

10. Box 3 had the following description printed next to the box:

**Change from the FRS Pension Plan to the FRS Investment Plan Hybrid Option.** (Please complete Sections 3 and 4) I am retaining any accrued benefit in the FRS Pension Plan with future employer contributions deposited in my FRS

Investment Plan account. I understand that I must have 5 years of Pension Plan service to select this option.

The signature page of the second election form states:

**If you selected Option 3 in Section 1:**

I understand that I have elected to change retirement plans to the FRS Investment Plan and that my FRS Pension Plan benefit already accrued will remain with the FRS Pension Plan and that a FRS Investment Plan account will be established to receive all future employer contributions. I understand that this election will constitute my one-time second election as provided under the FRS and that I must remain in this retirement plan until my retirement. I understand that my one-time second election is irrevocable.

11. If Petitioner had properly filled out the second election form and transferred from the Pension Plan to the Investment Plan in June of 2006 and then retired, his lump sum distribution upon retirement would have been approximately \$ [REDACTED]. If Petitioner retires now, as a FRS Investment Plan Hybrid Option member, he would receive a monthly annuity payment of approximately \$ [REDACTED] per month for the rest of his life and a lump sum payment of approximately \$ [REDACTED].

12. Petitioner received documents confirming his choice of the hybrid option, but did not understand them and did not advise the SBA that he wished to rescind his second election until November 17, 2006.

#### CONCLUSIONS OF LAW

13. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes (2006). That section states, in pertinent part:

(e) 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.

§ 121.4501(4)(e), Fla.Stat. (2006).

14. Rule 19-11.007, Florida Administrative Code, provides a grace period for rescission of second elections as follows:

(6) Grace Period.

(a) If a member files an election with the TPA and the employee realizes that the election was made in error, the SBA will consider, on a case-by-case basis, whether the election will be voided, subject to the following requirements:

1. Member Elects the FRS Investment Plan. The SBA must be notified, by a telephone call to the toll free number: 1(866)446-9377, or by e-mail, or by written correspondence directly to the SBA, to the TPA, or to the Division of Retirement, before assets are transferred from the FRS Pension Plan to the member's FRS Investment Plan account. This transfer occurs no later than the last business day of the month following the election month.

2. Member Elects the FRS Pension Plan. The SBA must be notified no later than the last business day of the month following the election month.

Rule 19-11.007 (6), F.A.C.

15. The literal terms of the above rule allow the SBA to consider, on a case-by-case basis, whether an election will be voided. This case-by-case consideration is to be applied in situations where the employee realizes that an election was made in error, subject to certain other requirements set out in the following subsections. Id. Rule 19-11.007 at subsection (6)(a)1. applies when a member elects the FRS Investment Plan in error; subsection (6)(a)2. applies when the member elects the FRS Pension Plan in error. Neither of these rule subsections applies by its

express terms to the situation in this case, where the member elected the FRS Investment Plan Hybrid Option in error, which therefore leaves the Respondent free to apply case-by-case consideration without the time strictures set out in §19-11.007(6)(a)1 or 2.

16. The rule section describing the time constraint applicable in the situation closest to this one (transfer to Investment Plan) requires notification of the mistake “before assets are transferred from the FRS Pension Plan to the Member’s FRS Investment Plan account.” Id. at 1. In this case, no assets were transferred from Petitioner’s Pension Plan to his Investment Plan account, rather only future employer contributions were deposited in his Investment Plan account, as is contemplated by the Hybrid Option. It appears that the guiding principle behind this part of the rule is not violated by a case specific consideration of this Petitioner’s error, even if outside the general grace period timeframe suggested by the parts of the rule not directly applicable here.

17. It is undisputed that Petitioner wished to and intended to use his second election to transfer his Pension Plan assets to the Investment Plan so that he could receive a lump sum upon retirement. He repeatedly sought advice from resources provided by the SBA, through his wife, who in her communications with them, was clear as to their intentions. Petitioner did not realize until almost six months after his second election that although he had elected a form of the Investment Plan, it was the Investment Plan Hybrid Option, and that all his funds from before the second election would stay in the Pension Plan, with only a very small accumulation in his Investment Plan account, from contributions after his second election.

18. Respondent does not dispute that Petitioner intended to utilize his second election to transfer his assets to the Investment Plan. Petitioner does not dispute that he filed the

erroneous second election form. He does dispute the accuracy and completeness of the record of the phone calls between his wife and the various service, education and information providers that are accessed by calling the MyFRS Guidance Line. He asserts, through his wife's testimony, that she had a conversation with a female counselor on this line, who specifically and erroneously instructed her to check box 3. It is possible that the conversation Mrs. Leyva recalls was with a DOR employee and therefore not recorded or logged. It is also possible that she has confused the numerous calls she made to the guidance line, but resolution of these potential fact disputes is outside the scope of this proceeding and not material to my recommendation.

19. Respondent has cited the principle of contract law which states that a party may not defend against the enforcement of a contract on the grounds that he signed it without reading it. Allied Van Lines, Inc. v. Bratton, 351 So. 2d 344 (Fla. 1977). Contract law is not strictly applicable in this situation, but to the extent that it provides guidance, the first rule of contract construction is to give effect to the intention of the parties, and courts will try to put themselves in the situation of the parties when the document was executed to determine the objectives sought to be accomplished. Huntington on the Green Condominium v. Lemon Tree I- Condominium, 874 So.2d 1 (Fla. 5<sup>th</sup> DCA 2004).

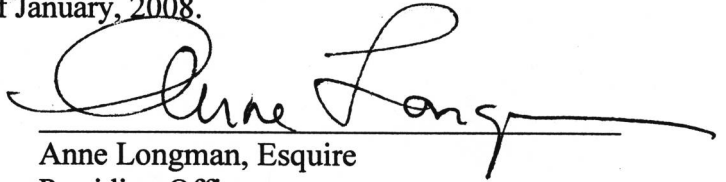
20. Pension statutes are to be construed liberally in favor of the intended recipients. Bd. of Trustees, etc. Firefighters' Pension Plan v. Town of Lake Park, 966 So.2d 448 (Fla. 4<sup>th</sup> DCA 2007), citing Greene v. Gray, 87 So.2d 504, 507 (Fla. 1956). In this case, the statutes and rules guiding the SBA's review of Petitioner's request allow the SBA to consider whether Petitioner's second election was made in error and can be voided, and Rule 19-11.007(6) F.A.C. does not prescribe an outside time limit for making this case-by-case determination, nor does it supply

any standards for making this determination, other than that the member's second election was made in error. Part of a case-by-case consideration in this instance would include the fact that Petitioner and his wife assiduously attempted to assure that they were effectuating on paper the choice they knew they wanted to make, and that their calls to the guidance line reflect this. There is no indication that they simply changed their minds after making a choice they regretted. Mrs. Leyva stated repeatedly that she needed help in filling out the second election form. A further consideration is the fact that it was apparent to counselors on the guidance line that a Spanish speaking advisor would have been a real help to the exchange of information, but there was none available at the time. It is clear to the undersigned that all parties to this situation were trying to do the right thing, but that a significant mistake occurred. As I read the applicable statutes and rules, under these particular circumstances, it is permissible for Respondent to honor Petitioner's request.

### **RECOMMENDATION**

Having considered the undisputed facts in this matter, I recommend that the SBA allow Petitioner to effectuate his intent to transfer his assets to the Investment Plan, if this is still what he desires; that his second election executed June 12, 2006 be voided by SBA Final Order, and that Petitioner be given one calendar month from the date of that order to make a new second election pursuant to Rule 19-11.007 (6)(b), Florida Administrative Code.

Respectfully submitted this 18 day of January, 2008.



Anne Longman, Esquire  
Presiding Officer  
For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
P.O. Box 16098  
Tallahassee, FL 32317

### **NOTICE OF RIGHT TO SUBMIT EXCEPTIONS**

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to the Recommended Order should be filed with the Agency Clerk of the State Board of Administration.

### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been provided via U.S. Mail this 18<sup>th</sup> day of January, 2008 to:

Filed with:

Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308

Copies Furnished to:

Pedro Levva  
[REDACTED]

Monica Paris  
[REDACTED]

Petitioner

Brian A. Newman, Esquire  
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Attorneys for Respondent