

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MICHAEL DIXON,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3754
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On March 2, 2017, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. The Recommended Order indicates that copies were served upon the pro se Petitioner, Michael Dixon, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. No exceptions to the Recommended Order, which were due March 17, 2017, were filed by either party. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s request that he be allowed to use his second election to transfer from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to pay the statutorily-required “buy-in” amount 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 22nd day of March, 2017, in Tallahassee, Florida.

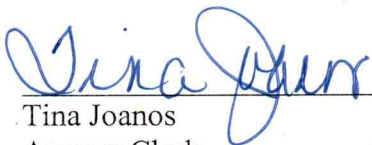
**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan B. Haseman

Chief of Defined Contribution Programs
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 to Michael Dixon, pro se, both by email transmission at

[REDACTED] and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 2nd day of March, 2017.



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

MICHAEL DIXON,

Petitioner,

vs.

CASE NO. 2016-3754

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on January 26, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Michael Dixon, pro se



For Respondent: Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner can use his second election to switch from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan without having to pay the statutorily required "buy in" amount.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R1 through R8 were admitted into evidence without objection. After the hearing, Petitioner submitted supplemental exhibit R-9, which is also admitted.

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a proposed recommended order on February 23, 2017; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with the Lee County Board of County Commissioners, an FRS-covered agency, on June 30, 2000.
2. After the defined contribution Investment Plan became a plan option for FRS members, Petitioner had until February 28, 2003 to make an initial election between the original defined benefit Pension Plan or the Investment Plan.
3. Petitioner called the MyFRS Financial Guidance Line on February 28, 2003 and made his initial election to join the Investment Plan over the telephone. Mr. Dixon can be heard requesting Investment Plan membership on the recording of the February 28th call:

Mr. Dixon: Okay. Let's do that. I'll switch over the investment plan, I'll start out in the conservative and then we'll see what happens with the market and see what happens with this war, all this other crap...

During his deposition, Mr. Dixon acknowledged that he requested the Investment Plan as his initial plan election on the 2003 telephone call.

4. Although he acknowledges his initial plan election was the Investment Plan, Mr. Dixon states he was misled by the MyFRS counselor into selecting the Investment Plan over the Pension Plan during the 2003 call. An Administrative Law Judge determined in Division of Administrative Hearings (DOAH) case number 16-600 concerning this matter, that Petitioner had not identified any misinformation given to induce him to make that decision.

5. Petitioner was told during the 2003 call that the Pension Plan tended to yield a greater benefit for long-term employees. He was also told that the Investment Plan had a shorter vesting requirement and made it clear that shorter vesting was an important plan feature to him:

Mr. Dixon: Because I'm going to switch over to this pension plan or to the investment plan for six years because if something happens where I don't work six years, I won't get any money.

6. Petitioner acknowledged during the same call that he understood he might have to pay additional "out-of-pocket" funds to buy into the Pension Plan if he later decided to change plans:

Mr. Dixon: All right. So say I do the investment thing and then in six years, say I want to switch back to the pension.

Mr. Douglas: Right.

Mr. Dixon: Now, you said depending on how much I have in the investment, I may have to come up with some out-of-pocket money?

Mr. Dixon: To equal what I would have had in the pension had I stayed in the pension?

Mr. Douglas: That's correct.

7. Mr. Dixon agreed during his deposition that the guidance line representative answered all of his questions other than telling him which plan he should enroll in, advice a guidance representative cannot give.

8. After joining the Investment Plan, Petitioner received FRS Account Statements on a quarterly basis clearly identifying his membership in the Investment Plan. Petitioner filed a Request for Intervention on August 14, 2016 – over twelve years after joining the Investment Plan – requesting that he be placed in the Pension Plan without having to pay the additional funds that he would have to pay in addition to the value of his Investment Plan account to meet the statutory buy-in requirement.

9. Respondent informed Petitioner that it had no statutory authority to waive the buy-in requirement and therefore could not grant his request.

10. On September 14, 2016, Petitioner filed a Petition for Hearing requesting that he be placed back into the Pension Plan without using his own money for the buy-in to the Pension Plan.

11. The petition was referred to DOAH because Petitioner initially denied that he made an initial election to join the Investment Plan. After hearing the recording of the February 28, 2003 call at his deposition, Petitioner conceded that he made an initial election to join the Investment Plan, but then claimed he was misled into joining the Investment Plan over the Pension Plan.

12. Respondent filed a motion to relinquish jurisdiction at DOAH due to Petitioner's acknowledgement that he made a telephone initial election to join the Investment Plan and acknowledged the accuracy of statements made to him about plan selection during his February 28, 2003 call to the MyFRS Financial Guidance Line.

13. The motion to relinquish jurisdiction was granted by the Administrative Law Judge assigned to DOAH case number 16-600. This order states in pertinent part:

To begin with, initial plan elections can be made orally on a telephone call. There is no requirement that the member sign a form

indicating his initial plan election. See State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1146 (Fla. 1st DCA 2010). See also § 121.4501(4)(a)1.a., Fla. Stat. (an election to switch from the pension plan to the investment plan may be made in writing or by electronic means). Therefore, it is not necessary to "sign up" for a plan option. That issue is not in dispute.

Mr. Dixon does not dispute the accuracy of the transcript of the recorded telephone call. It reflects clearly that the Ernst & Young financial advisor did not advise or encourage Mr. Dixon to choose one option over the other. Rather, he explained the difference between the two, and their respective advantages and disadvantages. At the end of the call, Mr. Dixon voluntarily chose the Investment Plan. He has not identified any misstatement of fact by the advisor that led him to choose the Investment Plan as his initial plan election.

Petitioner has not presented any new evidence to demonstrate the existence of a disputed issue of material fact, and this finding of the Administrative Law Judge is accepted in this proceeding.

CONCLUSIONS OF LAW

14. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to the relief requested in his petition. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

15. Movement between the two FRS plans is governed by Section 121.4501(4)(g), Florida Statutes. This statute requires Investment Plan members to contribute additional funds over the amount of the value of their Investment Plan account if necessary to meet the Pension Plan buy-in requirement:

(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 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 by the Internal Revenue Service.

1. If the employee chooses to move to the investment plan, the provisions of subsection (3) govern the transfer.

2. If the employee chooses to move to the pension plan, the employee must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan. Benefit commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. The division must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

§ 121.4501(4)(g), Fla. Stat. (2016)(emphasis added). There is no provision for the SBA to waive this statutory requirement.

16. Although Petitioner contends he was misled into joining the Investment Plan, he has not identified any misstatement of fact that led him to choose the Investment Plan as his initial election. As the Administrative Law Judge recognized in DOAH case number 16-600, the transcript of Petitioner's initial election call to the MyFRS Financial Guidance Line demonstrates that there were no misstatements that induced Petitioner to select the Investment Plan, only an explanation of the advantages and disadvantages of the two plans. I see no facts here which would

support estoppel against the SBA or otherwise justify waiver of the Pension Plan buy-in requirement imposed by statute. See Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3rd DCA 1983) citing North American Co. v. Green, 120 So. 2d 603 (Fla. 1959)(estoppel is not favored against state agencies and cannot be applied for a mistake of law); see also Huberty, 46 So. 3d at 144, upholding the SBA's final order denying an Investment Plan member's request to return to the Pension Plan without buying-back after her decision to join the Investment Plan proved unwise with the passage of time.

17. Although Petitioner indicated his desire to join the Investment Plan during the February 28, 2003 call to the MyFRS financial advisor, the SBA does not have a contemporaneous physical record of the initial election Petitioner made with the third party administrator immediately thereafter.

18. Section 121.4501(8)(g) Florida Statutes provides in pertinent part:

The third-party administrator shall retain all member records for at least 5 years for use in resolving any member conflicts. The state board, the third-party administrator, or a provider is not required to produce documentation or an audio recording to justify action taken with regard to a member if the action occurred 5 or more years before the complaint is submitted to the state board. It is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member and with the member's full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.

§ 121.4501(8)(g), Fla. Stat. (2016).

I am convinced that Petitioner sincerely believes that he was misled, but he has not come forward with any evidence to overcome the presumption that he did select the Investment Plan in 2003 and has in fact, conceded that the Investment Plan was his initial election.

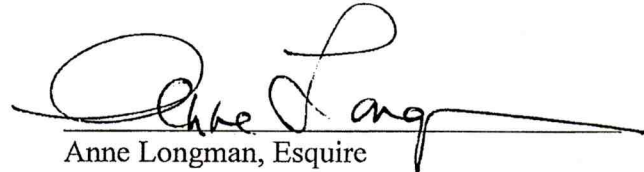
19. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezantis v.

Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of those statutes 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 DCA1998).

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 2d day of March, 2017.



Anne Longman, Esquire
Anne Longman
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: 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. Any exceptions 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 via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
nell.bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Michael Dixon



Petitioner

and via electronic mail only to:

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