

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

BRIAN NEDABYLEK,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2013-2859
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On March 21, 2014, 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, Brian Nedabylek, and upon counsel for the Respondent. Petitioner and Respondent both timely filed a Proposed Recommended Order. Neither party filed exceptions, which were due April 7, 2014. 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

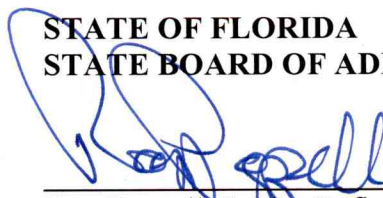
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that he be allowed to switch from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan even though he has terminated employment and is not earning service credit in an FRS-covered position hereby is

denied. Petitioner did not produce evidence that would support his assertion that he was given erroneous or false information by the MyFRS Financial Guidance Line concerning the effect of changing plans.

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 10th day of April, 2014, 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 Brian Nedabylek, [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 10th day of April, 2014.



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

BRIAN NEDABYLEK,

Petitioner,

vs.

Case No. 2013-2859

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 22, 2014 and on February 3, 2014, in Tallahassee, Florida.

The appearances were as follows:

APPEARANCES

For Petitioner: Brian Nedabylek, pro se


Petitioner

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be allowed to join the Investment Plan after he terminated Florida Retirement System (FRS) covered employment, based on allegations that he was given erroneous or misleading information regarding the effect of changing from the

EXHIBIT A

Pension Plan to the Investment Plan.

PRELIMINARY STATEMENT

Petitioner attended the informal hearing by telephone as initially scheduled for January 22, 2014, at which time the hearing was continued at Petitioner's request as he had recently moved, had not received the Respondent's pre-filed exhibits, and a transcript of a critical telephone call was not yet available. The hearing was reconvened on February 3, 2014; the Petitioner appeared by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-9 and Supplemental Exhibit R-10 were admitted into evidence without objection.

A transcript of the informal hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Petitioner and Respondent both timely filed proposed recommended orders. (Petitioner's email to me of March 9, 2014 is accepted as his proposed recommended order.)

UNDISPUTED MATERIAL FACTS

1. Petitioner enrolled in the FRS on September 15, 2003 and was a member of the Special Risk Class.
2. Petitioner defaulted to Pension Plan membership because he did not make an affirmative election to join the Investment Plan before his initial election deadline of February 27, 2004.
3. Petitioner terminated FRS-covered employment on August 30, 2013 and is currently not working for an FRS-covered employer.

4. Petitioner did not make a second election to join the Investment Plan before he terminated FRS-covered employment.

5. Petitioner submitted an EZ Retirement Plan Enrollment Form (an initial election form) on September 10, 2013 – after he terminated FRS-covered employment – indicating his desire to join the Investment Plan. This form was not effective to transfer Petitioner to the Investment Plan because Petitioner was not earning service credit in an FRS-covered position when he submitted the form.

6. Petitioner contends that he did not make a second election before he terminated employment because of false or misleading information he received when he spoke with a counselor on the MyFRS Financial Guidance Line. Specifically, Petitioner alleges he was told, incorrectly, that he would lose 5% times 10 years of the value of his retirement plan account if he chose to take his benefit now, because had not yet attained retirement age. Petitioner reasoned that he would lose approximately one-half of his retirement funds, which did not seem to be a wise choice. He made this inference by applying what the telephone Guidance Line counselor said about his balance if he transferred to the Investment Plan, when the counselor was in fact explaining the effect of early retirement if he stayed in the Pension Plan.

7. As reflected in the transcript of Petitioner's July 30, 2013 call to the Guidance Line, Petitioner was considering quitting his job, moving to North Florida and switching to the Investment Plan. He was told how that switch could be accomplished, that he would have to wait three calendar months to get money from his account, and that he would be considered retired if he took even a dollar from his account. He and the counselor also discussed what would happen if he were to find a job with another FRS employer. He was sent a PIN number so

he could access his account online, and was told his Pension Plan account, if switched to the Investment Plan, would produce a cash balance of about \$160,000. He was specifically reminded that a plan switch could be made only while he was still employed. In the context of this discussion of the many different aspects of switching plans, quitting a job and finding another, retirement, and distribution of money, the following exchange occurred:

MR. NEDABYLEK: . . . So, if I didn't switch, that means I can't touch any of that money and - -

ERNEST & YOUNG REP: Monthly benefit.

MR. NEDABYLEK: Okay.

ERNEST & YOUNG REP: It's a monthly check. That's what the pension is, essentially. It's a monthly check versus a lump sum.

MR. NEDABYLEK: I see. Okay. Now, you said that's drawable when I'm 55?

ERNEST & YOUNG REP: You can collect it at any point. 55 is going to be normal retirement age.

MR. NEDABYLEK: Okay.

ERNEST & YOUNG REP: If it comes before that time, there's going to be a 5% percent reduction for each year before 55.

MR. NEDABYLEK: It's going to be 50% basically?

ERNEST & YOUNG REP: If you collect - -

MR. NEDABYLEK: For me if I'm - - I'll be 45 this year.

ERNEST & YOUNG REP: That is correct.

MR. NEDABYLEK: Wow. Okay.

ERNEST & YOUNG REP: So, you don't want to do that. It's designed for retirement.

MR. NEDABYLEK: Right. Right. Okay. And if I did not go into the investment and I did not pick up another county job or FRS job, then I would just wait until 55. And then you guys would start paying me, right?

ERNEST & YOUNG REP: You would have to apply for it, but yes, that's correct.

MR. NEDABYLEK: And if I did pick up another FRS job, it would just continue - -

ERNEST & YOUNG REP: - - pick up where you left off, yes.

(R-10, pp. 10-11)

8. At the final hearing, Petitioner conceded that the information he received during the MyFRS Financial Guidance line call was correct, but alleged that it still created the perception that he would lose 50% of his money if he switched plans.

9. The information Petitioner received during his recorded call with the MyFRS Financial Guidance Line on July 30, 2013 is an accurate explanation of the discount that would be applied to Petitioner's benefit if he elected to take early retirement as a Pension Plan member, and was not conveyed in a a misleading way. This information also was made available to Petitioner in the FRS's Retirement Guide for Special Risk Class (2011 Ed.).

CONCLUSIONS OF LAW

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

(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. Effective July 1, 2005, such elections shall be 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 that the employee must meet the conditions of the previous sentence **when the election is received by the third-party administrator**. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

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

11. Rule 19-11.007, Florida Administrative Code, governs the timing of the receipt of the Second Election form and it states, in pertinent part:

19-11.007. Second Election Enrollment Procedures for the FRS Retirement

Programs.

(1) Purpose. The purpose of this rule is to establish procedures for making the second election permitted by Section 121.4501(4)(e), F.S. This rule includes procedures for members who initially chose the FRS Investment Plan or the FRS Investment Plan Hybrid Option to use their 2nd. election to transfer to the FRS Pension Plan; or for members who chose or defaulted into the FRS Pension Plan to use their 2nd election to transfer to the FRS Investment Plan or the FRS Investment Plan Hybrid Option. 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 earning service credit in an employer-employee relationship consistent with the requirements of 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. In general terms, this means that the 2nd election must be made and processed while the member is actively working and being paid for that work. **It is the responsibility of the member to assure that the 2nd 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.**

...

(3) General Procedures.

...

(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, Fla. Admin. Code

12. It is undisputed that Petitioner's last day of work was August 30, 2013, that he did not submit a form indicating his desire to switch to the Investment Plan until September 18, 2013, and that Florida law therefore requires his attempt to join the Investment Plan be deemed ineffective.

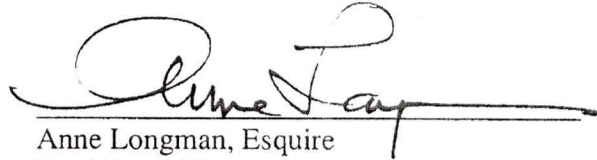
13. Petitioner's assertion that he was given false information by the MyFRS Financial Guidance Line is not supported by the facts, although it is clear that he could have and did misunderstand what was said to him. Petitioner was told, correctly, that his Pension Plan benefit would be reduced by approximately 50% if he elected to start receiving his Pension Plan benefits at age 45.

14. 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. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla. Div. Admin. Hrgs.), and the SBA's 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). Petitioner's attempt to make a second election after he was no longer employed was not in accord with statutory requirements, and I see nothing in the facts of this case that approaches the showing needed to prove estoppel against Respondent. See, Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3rd DCA 1983).

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 21st day of March, 2014.



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 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
Daniel.beard@sbafla.com
(850) 488-4406

This 21st day of March, 2014.

Copies furnished to:
Via U.S. Mail:
Brian Nedabylek



Petitioner

Via electronic delivery:
Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
slindsey@penningtonlaw.com
Attorneys for Respondent

A handwritten signature in cursive script, appearing to read "Chris Long", written over a horizontal line.