

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ARCOLIA CLARK,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2015-3464
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On March 17, 2016, 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, Arcolia Clark, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on April 1, 2016. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending, for final agency action, before the Senior Defined Contribution Programs Officer.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that she be allowed to switch from the Florida Retirement System ("FRS") Investment Plan to the FRS Pension Plan when she failed to submit her second election form prior to termination of employment hereby is denied. Petitioner had been informed twice by the MYFRS Financial Guidance Line that she would be entitled to request a distribution from her FRS account when she terminated employment only if she

switched from the FRS Pension Plan to the FRS Investment Plan and filed a second election form prior to termination. While she had submitted a form to the Division of Retirement prior to termination, it was a form to claim her employee contributions and was not a valid, second election form.

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 5th day of April, 2016, in Tallahassee, Florida.

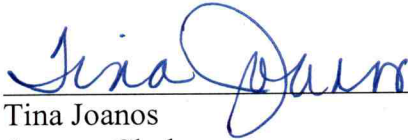
**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan B. Haseman

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 to Arcolia Clark, pro se, both by email transmission, [REDACTED] and by U.P.S. [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 5th day of April, 2016..



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

ARCOLIA CLARK,

Petitioner,

v.

CASE NO.: 2015-3464

STATE BOARD OF ADMINISTRATION,

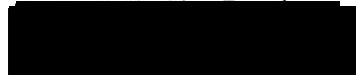
Respondent.

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 13, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Arcolia Clark, pro se



For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether the Petitioner's request to switch from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan should be granted.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her 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 1 through 15 were admitted into evidence at the hearing without objection.

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 thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner enrolled in the Florida Retirement System in July of 2006.
2. Petitioner had until December 29, 2006 to make an initial election between the defined contribution Investment Plan and the defined benefit Pension Plan.
3. She did not make an affirmative election and so defaulted to Pension Plan membership effective January 1, 2007.
4. On December 5, 2014, Petitioner called the MyFRS Financial Guidance Line to determine how much she would receive if she left employment and withdrew money from her retirement account. During the call Petitioner was informed that she could request a refund of her employee contributions if she remained in the Pension Plan but that doing so would decrease her years of service. Petitioner was also informed that if she switched from the Pension Plan to the Investment Plan she could request a lump sum distribution from the Investment Plan but would have to file a second election form before she terminated employment.
5. Petitioner called the MyFRS Financial Guidance Line again on July 23, 2015 to inquire about what she needed to do in order to "take my money out of the Florida retirement

system." Petitioner was informed that she would need to switch from the Pension Plan to the Investment Plan in order to take a lump-sum distribution from her FRS account.

6. On August 11, 2015 Petitioner called the Division of Retirement. The record is not clear as to how Petitioner came to call the Division of Retirement, when she had previously called the MyFRS Financial Guidance Line. She testified that she did not remember the number she called or if it was the same number that she had called before. Ms. Watson testified that Petitioner would have had to call the Division of Retirement directly to reach this agency, as the Division of Retirement cannot be accessed directly through any of the prompts on the MyFRS Financial Guidance Line. During the very brief call of August 11, Petitioner stated that she was calling because she "was trying to figure out how [to] go about cashing out." The Division of Retirement representative told Petitioner that there was a form she would need to fill out, and agreed to email it to her.

7. On August 11, 2015, Petitioner completed a form entitled "Florida Retirement System Pension Plan Request for Refund of Employee Contributions." This form states that "[y]ou must terminate all Florida Retirement System (FRS) employment and remain off all FRS payrolls for 3 complete calendar months following your employment termination to be eligible to receive a refund of your employee contributions." It does not reference a second election or in any way indicate that it would effect a change of FRS plans. The bottom of the form states "[b]y signing this form, I am requesting a refund of all employee contributions and I acknowledge that I have read and understand the above information."

8. Petitioner resigned from Polk Correctional Facility, effective August 25, 2015, thus ending her FRS-covered employment.

9. Petitioner submitted the above-referenced Request for Refund form to the Division of Retirement but later called and told the Division of Retirement to cancel it once she realized that she had requested a distribution of her employee contributions, not the full value of her Pension Plan benefit.

10. On September 21, 2015, Petitioner again called the MyFRS Financial Guidance Line to request a distribution from her Investment Plan account. Petitioner was advised during this call that no 2nd Election Form for her had ever been received. Petitioner explained that the form she submitted was a request for refund of her employee contributions, not a 2nd Election Form, and was told the only way she could still submit a valid 2nd Election Form would be to return to FRS-covered employment and submit the form. Petitioner is now working for the federal government and has no plans to return to FRS-covered employment.

11. Petitioner filed a request for intervention on October 5, 2015 requesting entry into the Investment Plan.

12. Petitioner's request for intervention was denied by Respondent on November 10, 2015, and a timely Petition for Hearing was filed that initiated this administrative proceeding.

CONCLUSIONS OF LAW

13. Participation and enrollment in the Investment Plan are governed by Section 121.4501(4)(g), Florida Statutes. That section states:

(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.

§121.4501(4)(g), Fla. Stat. (2015)

14. The procedure for making a second election is governed by Rule 19-11.007,

Florida Administrative Code. That rule states, in pertinent part:

(2) 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, 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 service credit.

Rule 19-11.007(2), Fla. Admin. Code (emphasis added).

15. It is undisputed that Petitioner did not submit a 2nd Election Form to the SBA's Plan Choice Administrator while still in FRS-covered employment. The record reflects that after a series of phone calls with MyFRS Financial Guidance Line representatives, conveying her wishes to access a lump sum distribution and receiving instruction on how to do this, she then contacted the Division of Retirement and requested to "cash out," which prompted the Division of Retirement to send her a Request for Refund form. I have carefully reviewed the transcript of her August 11, 2015 call with the Division of Retirement, and conclude that while it is evident that she was still speaking in the context of her previous conversations with the MyFRS Financial Guidance Line about cashing out, there is no way the Division of Retirement representative could have known that. Petitioner therefore was sent a form for return of her Pension Plan employee contributions. Although that form was clearly not the right form, she either did not read it, or assumed she had been understood and had been sent the right

form regardless of what it said, so she executed and returned it. Petitioner never received inaccurate information from Respondent or the Division of Retirement, and was told the steps she would need to take to obtain a lump-sum distribution from her retirement account on two occasions before she terminated FRS-covered employment.

16. Petitioner contends, credibly, that she intended to submit a 2nd Election Form instead of a Request for Refund before she terminated employment with the Department of Corrections.

17. Petitioner's intent to switch plans before she terminated FRS-covered employment is not enough to effect a plan change. See Serpas v. State Board of Administration, DOAH Case No. 2012-3250 (Recommended Order January 30, 2013; Final Order February 20, 2013). In Serpas, entry into the Investment Plan was denied to a Pension Plan member — who clearly intended to change plans — because his 2nd Election Form was not received by the Plan Choice Administrator before he terminated FRS-covered employment. Entry into the Investment Plan was denied despite the fact that he completed a 2nd Election Form and watched a secretary personally fax it to the Plan Choice Administrator.

18. Petitioner has the burden in this proceeding to show that she is entitled by law to the result she seeks, and despite having clearly shown what her intentions were, she has not shown that she did what was required by law to allow her to cash out her retirement funds at this time. Petitioner's unfortunate miscommunication with the Division of Retirement is regrettable, but does not convert a request for a refund of her employee contributions into a request to change plans and cannot be treated as such.

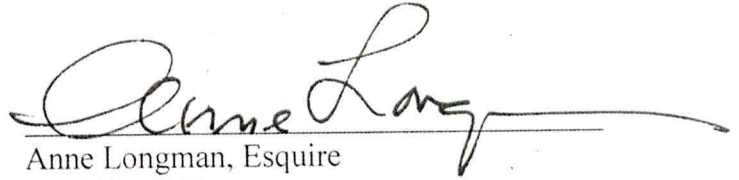
19. Petitioner must demonstrate compliance with all applicable statutory and rule requirements to make a valid election into the Investment Plan. See Young v. Department of

Community Affairs, 625 So.2d 837 (Fla. 1993); Department of Transportation v. J.W.C., 396 So.2d 778 (Fla. 1st DCA 1981). Respondent has no statutory authority to place the Petitioner into the Investment Plan without a timely election having been made.

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 17th day of March, 2016.



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
mini.watson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Arcolia Clark



Petitioner

and via electronic mail only to:

Brian A. Newman, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent