

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

CATHY OTTO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2019-0048
	)	
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On June 6, 2019, the Presiding Officer submitted her Recommended Order to the State Board of Administration (“SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Cathy Otto, and upon counsel for the Respondent. Petitioner and Respondent both timely filed a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on June 21, 2019. 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 to be allowed to “cash out” her retirement funds by switching from the Pension Plan to the Investment Plan, even though she no longer is employed with an

FRS-participating employer and she failed to submit a second election form while she was still actively employed, hereby is denied. While Petitioner stated she did not fully understand the timeline for making a second election into the Investment Plan, record evidence clearly shows that Petitioner was correctly informed by the MyFRS Financial Guidance Line's representative that a second election form always must be submitted prior to separating from FRS employment.

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 22 day of August 2019, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



**Daniel Beard**  
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.



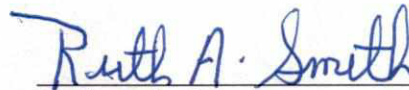
Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order  
was sent to Cathy Otto, pro se, both by [REDACTED]

[REDACTED] and by email transmission to Deborah Minnis, Esq.  
([dminnis@ausley.com](mailto:dminnis@ausley.com)) and Ruth Vafek ([rvafek@ausley.com](mailto:rvafek@ausley.com)), Ausley & McMullen,  
P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this

22 day of August, 2019.



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

CATHY OTTO,

Petitioner,

vs.

CASE NO. 2019-0048

STATE BOARD OF ADMINISTRATION.

Respondent.

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**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 April 1, 2019, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Cathy Otto, pro se

[REDACTED]

For Respondent: Deborah Minnis  
Sarah Logan Beasley  
Ausley McMullen, P.A.  
123 S. Calhoun Street  
Tallahassee, FL 32302

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner may switch from the FRS Pension Plan to the FRS Investment Plan to “cash out” her retirement funds, when she did not submit a second election and is no longer employed by an FRS-participating employer.

### **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-4 were admitted into evidence 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. Both parties filed proposed recommended orders.

### **UNDISPUTED MATERIAL FACTS**

1. Petitioner began employment with the Florida Department of Health, an FRS-participating employer, on September 18, 2009.

2. Petitioner had until March 31, 2010, to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan.

3. Petitioner elected to participate in the Pension Plan on March 19, 2010, with an effective date of April 1, 2010.

4. On December 14, 2018, Petitioner called the MyFRS Financial Guidance Line with questions about cashing out her retirement. During this call, Petitioner was advised twice that in order to cash out her retirement, she first needed to make a second election to transfer from the Pension Plan to the Investment Plan, before her last day of employment with her FRS-participating employer. Petitioner was also advised that the MyFRS Financial Guidance Line representative would e-mail her a copy of the second election form that she needed to submit before her last day of employment to effectuate her switch to the FRS Investment Plan.

5. At the time Petitioner inquired about making her second election to join the Investment Plan, she had access to the full range of educational resources provided by FRS, including the Plan Choice Kit, the [MyFRS.com](http://MyFRS.com) website, and the FRS Investment Plan Summary Plan Description. In addition to the above, Petitioner had access to the toll-free MyFRS Financial Guidance Line, which she utilized.

6. Despite the MyFRS Financial Guidance Line representative's offer to e-mail Petitioner a copy of the second election form, Petitioner apparently received emails from MyFRS, but states that none had a form attached.

7. Petitioner did not call or otherwise follow up with the MyFRS Financial Guidance Line representative regarding a second election form, despite having been correctly informed that she must make her second election before she separated employment with her FRS-participating employer.

8. Petitioner terminated her employment with the Florida Department of Health on January 11, 2019.

9. Neither Respondent nor its third-party administrator has a record of receiving a second election form from Petitioner.

10. Petitioner filed a Request for Intervention following her separation from employment in January 2019 requesting that she be allowed to transfer to the Investment Plan to cash out her retirement. That request was denied.

11. Petitioner filed a Petition for Hearing dated February 14, 2019, again requesting that she be permitted to switch to the FRS Investment Plan even though she was no longer employed with an FRS-participating employer. This administrative proceeding followed.

## CONCLUSIONS OF LAW

12. Movement between the two FRS plans is governed by Section 121.4501(4)(f), Florida Statutes. This section states, in pertinent part:

(f) 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)(f), Fla. Stat. (emphasis added).

13. Second election procedures are governed by Rule 19-11.007, Florida Administrative Code, which 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 during the month in which 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 or terminated members cannot use their 2nd election until they return to FRS-covered employment. Employees of an educational institution on summer break cannot use their 2nd election during the full calendar months of their summer break. For example, if the last day of the school term is May 21st and the first day of the new school term is August 17th, the employee may not file a 2nd election in the calendar months of June or July. The beginning of the school term is determined by the employer. In general terms, this means that the 2nd election can only be made and processed during the month in which 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 of the month the member is actively employed and earning salary and service credit.

Rule 19-11.007(2), F. A. C. (emphasis added).

14. This rule provides several “examples of scenarios that could result in an invalid 2nd election,” Rule 19-011.007(2)(a), F.A.C., including the following:

3. Example 3: A member terminates FRS-covered employment on March 31. On April 1, the Investment Plan Administrator receives a 2nd election from the member electing to transfer from the Pension Plan to the Investment Plan. The member’s 2nd election is not valid because the second election form was received after the member terminated FRS-covered employment. The member would be required to return to FRS-covered employment and submit a 2nd election form during the month in which he or she is actively employed and earning salary and service credit.

Rule 19-11.007(2)(a)3., F.A.C. (emphasis added).

15. Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. Balezentis v. Dep’t of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency “is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction”).

16. At the hearing, Petitioner asserted that she relied to her detriment on the MyFRS Financial Guidance Line representative’s statement that he would send her the second election form via e-mail. But she also stated that she did not fully understand the timeline for making a second election, despite the MyFRS Financial Guidance Line representative’s clear instruction that she must submit her second election form before separating employment.

17. I requested Respondent’s attorney to look into whether, as a matter of law, Petitioner could be said to have detrimentally relied on the representations made by the MyFRS Guidance Line representatives that he would email forms to her. Respondent briefed the elements of equitable estoppel, and I am satisfied that that concept is not applicable here. Nor am I concerned that promissory estoppel may be invoked here. I assume Petitioner’s assertions that she never received the forms are valid, but this does not show non-receipt to be the necessary cause of her not



timely making a second election, and she could readily have avoided the injustice of which she here complains.

18. The material fact here is that Petitioner was required to submit her second election while she remained employed with an FRS-participating employer. She could have followed up by phone call, and the necessary forms also were available to her on the MyFRS.com website.

19. More importantly, Petitioner stated at hearing that she acted in accordance with her mistaken unilateral misunderstanding that she had three months to make her second election following her separation from employment.

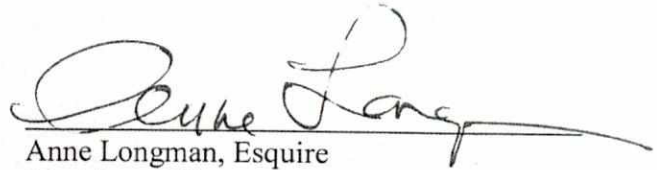
20. Petitioner was never told that she could submit her second election form three months after she separated from employment. The transcript of Petitioner's call to the MyFRS Financial Guidance Line, demonstrates that Petitioner was specifically told twice she had to make her second election before separating employment, and that she would then have to wait three months before she could "cash out" her funds.

21. Ultimately, it was Petitioner's responsibility "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 of the month the member is actively employed and earning salary and service credit." Rule 19-11.007(2), F. A. C. (emphasis added). Here, Petitioner did not follow up with obtaining a second election form, because she admittedly misunderstood the deadline to submit a valid second election. Unfortunately, no statute allows Respondent to permit a second election by a plan member who is no longer employed by an FRS-participating employer.

#### **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 6<sup>th</sup> day of June, 2019.



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

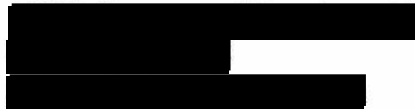
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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](mailto:Tina.joanos@sbafla.com)  
[mini.watson@sbafla.com](mailto:mini.watson@sbafla.com)  
[Nell.Bowers@sbafla.com](mailto:Nell.Bowers@sbafla.com)  
[Ruthie.Bianco@sbafla.com](mailto:Ruthie.Bianco@sbafla.com)  
[Allison.Olson@sbafla.com](mailto:Allison.Olson@sbafla.com)  
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Cathy Otto



Petitioner

and via electronic mail only to:

Deborah Minnis, Esquire  
Sarah Logan Beasley, Esquire  
123 South Calhoun Street  
P.O. Box 391  
Tallahassee, Florida 32301  
[dminnis@ausley.com](mailto:dminnis@ausley.com)  
[Sbeasley@ausley.com](mailto:Sbeasley@ausley.com)

Counsel for Respondent