

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

| | | |
|--------------------------------|---|------------------------|
| ALFRED INDE, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | SBA Case No. 2018-0236 |
| |) | |
| STATE BOARD OF ADMINISTRATION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

FINAL ORDER

On July 23, 2019, 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, Alfred Inde, 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 August 7, 2019, were filed by either party. 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

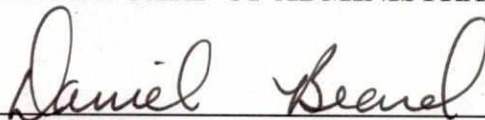
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s request that he be allowed to use his second election to transfer from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to pay the statutorily-required “buy-in” amount, hereby is denied. While Petitioner alleged he never authorized the switch from the Pension Plan to the Investment

Plan, Petitioner has not produced any documentary evidence or audio recording establishing that his enrollment into the Investment Plan in 2003 was effectuated without his knowledge and consent. Instead, all available documentary evidence, including almost ten years' worth of quarterly statements, shows that Petitioner knew or should have known he was a member of the Investment Plan, and he never attempted to take timely action to undo his initial election.

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 26 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

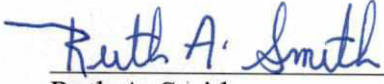
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Alfred Inde, pro se, both by email transmission, [REDACTED] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek, Esq., (rvafek@ausley.com), Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 26 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

ALFRED INDE,

Petitioner,

vs.

CASE NO. 2018-0236


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 May 22, 2019, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Alfred Inde, pro se


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

STATEMENT OF THE ISSUE

The issue is whether Petitioner is properly enrolled in the Florida Retirement System (FRS) Investment Plan, and if so, whether he may switch back to the FRS Pension Plan without having to pay the required “buy-in” amount.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent attended the hearing in person and presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-7 were admitted into evidence without objection.

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; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner was initially enrolled in the FRS in March 1996 and was a member of the FRS Pension Plan. When Respondent rolled out the FRS Investment Plan, Petitioner was given a choice period from April 1, 2003, through September 30, 2003 in which to make an initial election between remaining in the Pension Plan or moving to the Investment Plan.

2. On September 29, 2003, Petitioner used his initial election, via telephone, to enroll in the Investment Plan, giving him an effective enrollment date of October 1, 2003.

3. Petitioner terminated his employment with his FRS-participating employer on October 27, 2004. Petitioner returned to FRS-participating service in November 2013 and was reenrolled in the FRS Investment Plan at this time.

4. In 2009, Respondent reminded Petitioner he was in the Investment Plan when a portion of his service credit was forfeited for an unrelated issue.

5. Respondent also mailed Petitioner quarterly statements indicating that he was in the Investment Plan. The quarterly statements show that Petitioner selected his Investment Plan fund allocation (75% moderate balanced fund and 25% aggressive balanced fund), that he named

a primary and contingent beneficiary, and that he received the statements at the same address that is reflected on the forfeiture notice from 2009, Petitioner's Request for Intervention, Respondent's Response to the Request for Intervention, and Petitioner's Petition for Hearing.

6. Petitioner has remaining a one-time second election he may use to move back to the Pension Plan, but the governing statute requires the Petitioner to pay a "buy-in" amount to do so.

7. Petitioner filed a Request for Intervention dated June 22, 2018, requesting that he be placed back in the Pension Plan so that he could go into DROP and noting that he "never elected to forfeit the secured pension plan [he has] been on for almost 5 years." This request was denied.

8. Petitioner filed a Petition for Hearing dated August 25, 2018, again requesting that he be placed back in the Pension Plan without having to pay the buy-in because he alleges he "never authorized the switch from Pension Plan to Investment." This administrative proceeding followed.

CONCLUSIONS OF LAW

9. Respondent's records demonstrate that the action complained of, namely Petitioner's placement in the Investment Plan, occurred more than five years prior to the submission of Petitioner's complaint. Pursuant to Section 121.4501(8)(g), Florida Statutes, the Respondent's action is presumed to have been taken at Petitioner's request and with his full knowledge and consent. This section states:

(g) The state board shall receive and resolve member complaints against the program, the third-party administrator, or any program vendor or provider; shall resolve any conflict between the third-party administrator and an approved provider if such conflict threatens the implementation or administration of the program or the quality of services to employees; and may resolve any other conflicts. 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 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. (emphasis added).

10. Ms. Olson confirmed on the record at the hearing that, upon receipt of Petitioner's Request for Intervention, she requested documentation regarding Petitioner's Investment Plan election from the former plan administrator, who indicated they only had a call center note from September 29, 2003, and no longer possessed additional confirmation documents. Respondent does not direct anyone to destroy records that are older than five years.

11. Petitioner has not come forward with any documentary evidence or audio recording demonstrating that the action taken by Respondent in 2003, to effect the initial election of the Investment Plan, was done without his knowledge and consent. Rather, all of the documentary evidence, including years' worth of quarterly statements from the Investment Plan, demonstrates that Petitioner initially elected the Investment Plan in 2003, knew or had adequate notice he was in the Investment Plan, and never took timely action to switch or undo his initial election.

12. Specifically, the Plan Choice Form utilized at the time of Petitioner's initial election in 2003 provided several options for Investment Plan fund allocation. Members could choose from more than three dozen fund options to customize their investment portfolios. In the event a member did not choose to allocate his investments, the member defaulted to investing entirely (100%) in the FRS Select Moderate Balanced Fund. But here, Petitioner's quarterly statements show that his investments were allocated between two different funds, indicating that he or someone he authorized affirmatively chose from dozens of investment options to curate his investment portfolio.

13. Petitioner's quarterly statements also show that he or someone he authorized designated primary and contingent beneficiaries.

14. In light of the former third-party administrator's verification of initial election, the information contained in the years' worth of quarterly statements, and the absence of any documentation or audio recording demonstrating otherwise, Petitioner has not overcome the statutory presumption that his initial election to enroll in the Investment Plan was done at his request and with his full knowledge and consent. Accordingly, Petitioner was and still is correctly placed in the Investment Plan.

15. Movement from the FRS Investment Plan to the Pension Plan is governed by 121.4501(4)(f)3., Florida Statutes. This section states, in pertinent part:

Notwithstanding subparagraph 2., an employee who chooses to move to the pension plan and who became eligible to participate in the investment plan by reason of employment in a regularly established position with a state employer after June 1, 2002; a district school board employer after September 1, 2002; or a local employer after December 1, 2002, must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the employee's actuarial accrued liability. 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)(f)3., Fla. Stat. (emphasis added).

16. There is no statutory provision authorizing a switch from the Investment Plan to the Pension Plan without using a second election and paying the "buy-in" amount. If Petitioner chooses to utilize his second election to switch to the FRS Pension Plan, he must do so in accordance with the statutory requirement that he pay the buy-in amount associated with that switch, as it is Petitioner who carries the burden to demonstrate compliance with all applicable statutory requirements before being granted the relief requested. Young v. Dep't of Community Affairs, 625 So. 2d 831 (Fla. 1993); Dep't of Transp. v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

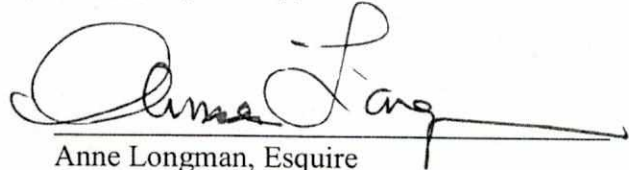
17. Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2,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

18. Respondent does not have the authority to waive the statutorily mandated Pension Plan buy-in amount, and therefore cannot grant the relief requested in the Petition for Hearing.

RECOMMENDATION

Having considered the law and undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 23^d day of July, 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
mini.watson@sbafla.com

Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
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(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Alfred Inde



and via electronic mail only to:

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Counsel for Respondent