

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ALaura HART,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2022-0036
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On July 28, 2022, the Presiding Officer submitted his Recommended Order to the State Board of Administration in this proceeding. The Recommended Order indicates that copies were served upon the *pro se* Petitioner, Alaura Hart, and upon counsel for the Respondent. No exceptions to the Recommended Order, which were due by August 12, 2022, 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 she be allowed to switch from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to utilize her second election and to pay any required buy in amount hereby is denied. Petitioner claimed that, due to outdated or confusing information provided by her employer, she was mistakenly under the impression that she did not affirmatively have to make a plan election in order to be in the FRS Pension Plan. However, even if Petitioner had been provided erroneous

information by her employer, Section 121.021(10), Florida Statutes, specifically provides that employers are not agents of the SBA and that, therefore, the SBA by law is not responsible for any erroneous information that may have been provided by Petitioner's employer. Petitioner was provided with numerous communications from the SBA reminding her of the necessity of making a plan election if she wanted to remain in the FRS Pension Plan. Since Petitioner failed to make a plan election, she defaulted to the FRS Investment Plan as required by law. Petitioner is not entitled to the relief requested.

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 17 day of October, 2022, 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 Alaura Hart, *pro se*, both by email transmission to alauradmcelyea@gmail.com and by U.P.S. to 335 Forest Estate Drive, West Palm Beach, Florida 33415; and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 17 day of October, 2022.



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**

ALaura HART,

Petitioner,

vs.

Case No.: 2022-0036

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on April 26, 2022, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner: Alaura Hart, *pro se*
335 Forest Estate Dr.
West Palm Beach, FL 33415

For Respondent: Deborah S. Minnis
Ausley & McMullen, P.A.
Post Office Box 391
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be allowed to switch from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to buy in to the plan by utilizing her second election.

PRELIMINARY STATEMENT

During the telephone hearing, Petitioner testified on her own behalf and Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-3 and Petitioner's Exhibits P-1 through P-3 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on May 23, 2022. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based upon the undersigned's consideration of the complete record in this case and all materials submitted by the parties.

MATERIAL UNDISPUTED FACTS

1. The Petitioner was originally employed in an FRS eligible position with the Clerk of the Circuit Court and Comptroller, Palm Beach County, an FRS-participating employer, on May 20, 2019.
2. In accordance with Section 121.4501(4)(b)1, Florida Statutes, Petitioner was temporarily reported under the Pension Plan and was given an initial choice period deadline of January 31, 2020, to make an initial election between the Pension Plan or the Investment Plan. Petitioner ended her employment with the Clerk of the Circuit Court and Comptroller, Palm Beach County, on September 27, 2019, before the expiration of this initial choice period.
3. On February 16, 2021, Petitioner began employment with the Palm Beach Metropolitan Planning Organization in an FRS eligible position. She was given a new choice period deadline of November 30, 2021. The Plan Choice Administrator has no record of receiving an initial choice form from the Petitioner either on or before the November 30, 2021, deadline.

4. Because Petitioner made no election by the end of the new choice period deadline, pursuant to section 121.4501(4)(b), Florida Statutes, she defaulted to membership in the Investment Plan effective December 1, 2021. This was deemed her initial election.

5. Prior to the expiration of Petitioner's new choice period, a benefit comparison statement was sent to Petitioner at 335 Forest Estate Drive, West Palm Beach, Florida 33415, on April 21, 2021. The same address appears on Petitioner's Request for Intervention and Petition for Hearing.

6. The Benefit Comparison Statement advised Petitioner of her choice period deadline of November 30, 2021. It also advised Petitioner that if she failed to make an election by the choice period deadline, the Investment Plan would be considered her first election by default.

7. The Benefit Comparison Statement also provided Petitioner with information on the various ways in which she could contact FRS to obtain additional information and included her personal identification number (PIN). The mailing said Petitioner could obtain information from among the following options:

- i. 1st Election Choice Service on [MyFRS.com](https://www.myfrs.com);
- ii. Toll-free MyFRS Guidance Line at 1-866-446-9377, Option 4; or
- iii. ELE-1-EZ Retirement Plan Enrollment Form.

8. In addition, Petitioner was sent two reminder letters on August 10, 2021, and November 10, 2021, to the address on file.

9. According to Respondent, if Petitioner was unsure of her rights and obligations with respect to plan election under FRS, educational materials were also available, including:

- i. Toll-free access to the MyFRS Financial Guidance Line;

- ii. Access to public information on MyFRS.com (including detailed information on the choice process, copies of all publications provided in the Choice Kit and FAQ's;
- iii. Employee workshops;
- iv. Employer Human Resources offices, which were afforded workshop training on the choice, supplied with printed materials, and received email updates on the choice; and
- v. July 1, 2019, FRS Investment Plan Summary Plan Description, pages 18-20, on the MyFRS.com website.

10. While those educational options would have provided Petitioner with the information necessary to make an informed decision, it does not appear, based on her testimony, that she was seeking guidance, as she was under the impression – although incorrectly – that she was not required to make an initial election. It appears that her current employer may have provided outdated – or at least, confusing – information to the Petitioner, as to whether she would remain in the Pension Plan for the duration of her employment, without affirmatively electing to do so. According to the testimony of Petitioner, which I find credible, she understood that she would remain in the Pension Plan. Petitioner's misunderstanding with respect to the FRS plan election process is the result of either incorrect information provided by her current employer, or Petitioner's misinterpretation of information from her employer.

11. Petitioner was also sent reminders by email to the most recent email address on file on June 21, 2021, July 15, 2021, September 7, 2021, October 1, 2021, and November 29, 2021. Unfortunately, the email on file at FRS was for Petitioner's previous employment with the Clerk of Court, and no longer accessible by Petitioner. Consequently, Petitioner did not receive any of the emails. According to Respondent, Petitioner's employer is responsible for providing an up-to-date email address when a new employee is reported to the Division of Retirement.

11. The evidence supports a conclusion that Petitioner did not submit an election by the established deadline date.

12. Though Petitioner understood from information provided by her employer's Plan Administrator that she would remain in the Pension Plan if she made no election, multiple notices were sent to Petitioner's home address that mentioned the deadline for her initial election and stated that failure to make a choice before the choice period deadline would result in a transfer to the Investment Plan.

13. Respondent points out that there were no calls from Petitioner to the MyFRS Financial Guidance Line prior to the expiration of the choice period deadline of November 30, 2021. This fact is not surprising, however. If Petitioner was unaware that her understanding of the election process was wrong, she would perceive no need to call FRS for guidance.

14. Though the evidence related to whether Petitioner was provided notice of the expiration of this new choice period is not necessarily "conflicting," it is worth discussion. The evidence supports a conclusion that the Petitioner was sent adequate material from which she could have determined she was required to make an election to remain in the pension plan on or before November 30, 2021. Petitioner disputes whether she ever received the mailed notices from Respondent, but the evidence supports a conclusion that the notices were mailed to her correct home address. Therefore, I find that Respondent made multiple attempts to remind Petitioner of her initial choice deadline.

15. Regardless of whether she misunderstood her employer's instructions, or her employer provided erroneous instructions, the evidence supports the conclusion that any misunderstanding on the part of Petitioner was not the result of any act or failure to act by the Respondent.

16. Because Petitioner's initial choice deadline has passed, the only way for her to transfer from the FRS Investment Plan is to submit a 2nd election form and "buy-in" into the Pension Plan pursuant to section 121.4501(4)(f), Florida Statutes.

17. At the time of this hearing, Petitioner was employed in an FRS eligible position and was an active FRS member.

CONCLUSIONS OF LAW

18. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transn. v. J.W.C. Co.* 396 So. 2d 778 (Fla. 1st DCA 1981). As she is asserting her entitlement to relief, Petitioner has the burden of proof.

19. The Florida Retirement System is comprised primarily of two plans which are defined in Part I of Chapter 121, Florida Statutes, as follows:

(3) "Florida Retirement System" or "system" means the general retirement system established by this chapter, including, but not limited to, the defined benefit program administered under this part, referred to as the "Florida Retirement System Pension Plan" or "pension plan" and the defined contribution program administered under part II of this chapter, referred to as the "Florida Retirement System Investment Plan" or "investment plan."

§ 121.021(3), Fla. Stat.

20. With limited exceptions, which are inapplicable here, an individual who is hired by an FRS employer on or after January 1, 2018, is "enrolled in the pension plan at the commencement of employment and may, by the last business day of the eighth month following the employee's month of hire, elect to participate in the pension plan or the investment plan. §121.4501(4)(b)1., Fla. Stat. If the individual fails to make an election during the 8-month period following the month of hire, "the employee is deemed to have elected the investment plan

and shall default into the investment plan retroactively to the employee's date of employment." §121.4501(4)(b)3.a., Fla. Stat. Petitioner began employment with the Palm Beach Metropolitan Planning Organization on February 16, 2021, and therefore, while she was initially placed in the Pension Plan, in order to remain in the Pension Plan, Florida law required that she make an election within 8 months of her hire date.

21. Because Petitioner failed to submit an initial election form to the Plan Choice Administrator prior to the expiration of her choice period, pursuant to Section 121.4501 (4)(b)3a, Florida Statutes, Petitioner was deemed to have elected the FRS Investment Plan with an effective date of December 1, 2021.

22. Movement between the two FRS plans after the initial election period is governed by Section 121.4501(4)(f), Florida Statutes, which 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.

23. Although she failed to make a timely election to remain in the Pension Plan, Petitioner argues that she should be permitted to transfer from the FRS Investment Plan and enroll in the FRS Pension Plan without utilizing her one-time 2nd Election or paying the mandated buy-in amount.

24. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the Respondent cannot deviate from them. *Balezantis 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").

25. The evidence and testimony demonstrate that Petitioner did not exercise an initial election during the statutorily mandated 8-month election period, and by default was transferred to the Investment Plan, retroactive to her date of hire. Petitioner has provided no evidence or offered no legal basis that would overcome Respondent's duty to abide by the terms of section 121.4501.

26. Petitioner was sent a Benefit Comparison Statement and two reminder letters via U.S. Mail to the address on file which is also the address appearing on Petitioner's Request for Intervention and Petitioner for Hearing. Letters properly addressed, stamped, and mailed are deemed to have been received. *Brake v. State of Florida Unemployment Appeals Commission*, 473 So.2d 774 (Fla. 3rd DCA 1985).

27. No evidence has been presented that would support the conclusion Respondent or its agents made material misstatements to Petitioner that would equitably estop Respondent from denying Petitioner's requested relief.

28. While the evidence appears to support a conclusion that Petitioner's employer provided incorrect information to Petitioner, that unfortunately has no bearing on whether Respondent is permitted to ignore a statutory requirement. Florida law is clear that "[e]mployers are not agents of the [Department of Management Services], the [State Board of Administration], or the Division of Retirement, and the department, the state board, and the division are not

responsible for erroneous information provided by representatives of the employers.
§121.021(10), Fla. Stat.

29. Pursuant to section 121.4501(4)(f), Florida Statutes, members of the FRS have one opportunity to switch plans after their initial election period expires. Petitioner remains an active FRS member and her one-time 2nd election is still available to her, while she remains employed and earning creditable service under FRS.

30. Petitioner may use her 2nd election to transfer to the Pension Plan but must comply with the “buy-in” requirements of section 121.4501(4)(f), Florida Statutes.

31. Respondent is without authority to grant Petitioner’s request to transfer from the FRS Investment Plan to the FRS Pension Plan without utilizing her 2nd election and paying the mandated buy-in or otherwise grant Petitioner the relief requested in this matter. Petitioner is unable to demonstrate entitlement to the relief she has requested under the applicable law.

RECOMMENDATION

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

DATED this 28th day of July 2022.

s/Glenn E. Thomas

Glenn E. Thomas
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
Allison.Olson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Alaura Hart
335 Forest Estate Drive
West Palm Beach, FL 33415
alauradmcelvea@gmail.com

and via electronic mail only to:

Deborah Minnis, Esquire
Ruth E. Vafek, Esquire
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32301
dminnis@ausley.com
rvafek@ausley.com
jmcvaney@ausley.com