

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

TABITHA FLAHERTY)	
)	
Petitioner,)	
)	
vs.)	Case No. 2006-736
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	

FINAL ORDER

On April 4, 2008, 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, Tabitha Flaherty, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on April 21, 2008. 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.

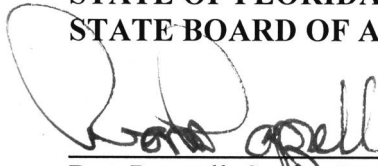
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be placed in the FRS Investment Plan, even though Respondent's third party administrator did not receive the election form to this effect executed by Petitioner, is denied.

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 22nd day of April, 2008, 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.


Clerk
TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Tabitha Flaherty, pro se, [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 22nd day of April, 2008.

Ruth L. Gokel

Ruth L. Gokel
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

TABITHA FLAHERTY,

CASE NO. 2006-736

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer for the STATE BOARD OF ADMINISTRATION (SBA) on November 8, 2007 in Tallahassee, Florida.

The Petitioner appeared by telephone and the Respondent appeared in person as follows:

APPEARANCES

For Petitioner: Tabitha Flaherty, pro se


Petitioner

For Respondent: Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

Exh. A

RECEIVED
STATE BOARD OF ADMIN
08 APR -7 AM 10:22
GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether the SBA should grant Petitioner's request to be placed into the Investment Plan retroactive to March 2005, despite the lack of receipt by the Respondent's third party administrator of an election to this effect executed by the Petitioner.

PRELIMINARY STATEMENT

On October 30, 2006, Petitioner filed a Request for Intervention seeking to be deemed enrolled in the Investment Plan of the Florida Retirement System (FRS) retroactive to March 2005. The SBA investigated and denied this request. Petitioner then filed a Petition for Hearing requesting the same relief, which was transmitted to the undersigned for informal hearing.

Petitioner attended the informal hearing by telephone and, along with her husband, Daniel James Flaherty, testified on her own behalf. The Respondent presented the testimony of Dan Beard, SBA Director of Policy, Risk Management and Compliance. Respondent's Exhibits R-1 through R-6 were admitted into evidence without objection. In its prehearing notice, Respondent also identified Exhibits R-7 through R-10 as potential exhibits, but did not move for their admission at the hearing. These exhibits were not admitted and were not considered by the undersigned. Petitioner did not submit any exhibits.

A transcript of the informal hearing was made, filed with the agency on December 20, 2007, and made available to the parties. The parties were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner began working for the Palm Beach County School District in August 2004.
2. As a new employee of an FRS-participating employer, the Petitioner had until February 28, 2005 at 4:00 p.m. (Eastern Time) to file an initial election between the Pension Plan and the Investment Plan.
3. The Petitioner admits that this deadline passed without her making any election, and as a result, she defaulted into the Pension Plan.
4. On March 1, 2005, the Petitioner discovered she had defaulted into the Pension Plan.
5. The Petitioner and/or her husband, Daniel Flaherty, telephoned the Respondent's MyFRS Financial Guidance Line on March 1, 2005 after learning that she had been placed in the Pension Plan.
6. The Petitioner and/or her husband indicated during that March 1, 2005 telephone call that the Petitioner intended to use her second election to switch from the FRS Pension Plan and enroll in the FRS Investment Plan.
7. In response, the MyFRS Financial Guidance Line counselor advised the Petitioner and/or her husband that the second election had to be made by using a form and that he would e-mail forms for their use in making the switch to the Investment Plan.
8. The Petitioner received the forms sent by the telephone counselor.
9. The Petitioner's husband testified that he sent the completed forms, but has no record of where he sent them, whether he faxed or mailed them or the date he sent them.

10. On July 19, 2006, the Petitioner and her husband again telephoned the MyFRS Financial Guidance Line and spoke with a telephone counselor.

11. During that telephone call, the following exchange occurred:

MS. FLAHERTY: I'm sitting here with my husband trying to switch my retirement benefits from the pension plan to the investment plan.

MR. FLAHERTY: Well, we don't know if we want to switch, we just want to know, I guess, the differences.

...

MyFRS ADVISOR: If you go with the investment plan it works differently, they use – your employer actually contributes a percentage of your salary, nine percent of your salary, so –

MR. FLAHERTY: Right. Okay, so, that's not deducted from her.

MyFRS ADVISOR: No.

MR. FLAHERTY: Net pay, it's just nine percent of her salary. And when does that start, that starts the day we elect to go into the investment plan?

MyFRS ADVISOR: No, usually it'll (sic) some time to process, probably the next month.

MR. FLAHERTY: Okay.

MyFRS ADVISOR: Depending on when you do it.

MR. FLAHERTY: So, it's not retroactive, so her nine percent over the last two years.

MyFRS ADVISOR: Well, in the pension plan it grows differently.

MR. FLAHERTY: Right.

...

MyFRS ADVISOR: So, if she switches over to the investment plan, she needs to

come back within five years, otherwise she will forfeit the balance.

MR. FLAHERTY: Yeah, okay. So, actually it's smarter to stay in the pension plan right now.

MyFRS ADVISOR: Yeah, if you feel that you are going to come back and get past the six years.

MR. FLAHERTY: Right.

MyFRS ADVISOR: It makes sense to do that.

MR. FLAHERTY: Okay.

MyFRS ADVISOR: The only scenario where it wouldn't, if you felt—if you switched over today and you were going to work another years, enough time to make it.

MR. FLAHERTY: Right.

MyFRS ADVISOR: The contributions add up to something and you were never coming back or something.

MR. FLAHERTY: Exactly.

MyFRS ADVISOR: If you are coming back, you might want to have it sit there.

MR. FLAHERTY: Right. I mean, I think right now she's definitely not going to work over the next year, so that is a factor. So, yeah, **we will stay in the pension plan.**

MyFRS ADVISOR: Right. Okay, very good.

MR. FLAHERTY: All right. Thanks for all of your help. You have been great, thanks.

MyFRS ADVISOR: You are welcome. Thanks.

MR. FLAHERTY: Bye bye.

12. During the hearing, Respondent played the audio version of the July 19, 2006 telephone call between the Petitioner, her husband, and the MyFRS counselor.

13. The Petitioner's husband agreed that he stated during the July 19, 2006 call that they wanted to stay in the Pension Plan.

14. The Petitioner's husband agreed also that the July 19, 2006 call reveals no indication that the Flaherty's had an earlier intention to enroll in the Investment Plan or that they had previously attempted to switch from the Pension Plan into the Investment Plan.

15. The Respondent's third party administrator, CitiStreet, has never received any second election form from the Petitioner requesting a switch from the Pension Plan into the Investment Plan.

16. Accordingly, the Petitioner has remained in the Pension Plan.

17. The Petitioner still has available to her the use of her one-time second election, if she is otherwise eligible to make such an election, to change plans.

CONCLUSIONS OF LAW

18. New employees hired by FRS-participating employers are eligible to participate in either the FRS defined benefit program (the Pension Plan) or the Public Employee Optional Retirement Program, (the Investment Plan). Participation in the Investment Plan by a new employee is achieved by the employee filing an election form prior to expiration of the five month statutory enrollment period. See § 121.4501(4)(b)2.a., Fla.Stat. (2004). Failure to file a timely election results in a default into the Pension Plan. See § 121.4501(4)(b)2.c., Fla.Stat. (2004).

19. An employee who fails to file a timely election during the five month statutory window has a one time irrevocable "second election" that can be used to switch from the Pension

Plan into the Investment Plan if that employee is otherwise eligible for participation in the Investment Plan. See § 121.4501(4)(e) Fla.Stat. (2004).

20. The evidence presented at hearing showed that the Petitioner was aware, as early as March 2005, that she could use her second election and that the Respondent required the election be made in writing through the use of the forms provided to her.

21. Although the Petitioner indicated that the requisite second election form was sent, there is no evidence to that effect, and the evidence presented by the Respondent showed that the third party administrator never received a March 2005 second election and has not, to this day, received such an election.

22. Absent a timely first election or the use of the second election, there is no other statutory vehicle providing for a switch from the Pension Plan to the Investment Plan. See § 121.4501, *et. seq.* Therefore, if the Petitioner still wishes to switch from the Pension Plan into the Investment Plan, she may do so – if she is otherwise eligible – only by using her remaining second election.

23. No authority has been cited that would authorize the Respondent to depart from the statutory requirements for participation in the Investment Plan. Because the Respondent lacks the statutory authority to place the Petitioner into the Investment Plan without an election having been made with the third party administrator, the Petition must be denied.

RECOMMENDATION

Having considered the law and the undisputed facts in this matter, I recommend that a final order be entered by Respondent, State Board of Administration, denying the relief requested.

RESPECTFULLY SUBMITTED this 4th day of April, 2008.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

NOTICE: 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, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 4th day of April, 2008.

Copies furnished to:

Tabitha Flaherty



Petitioner

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Brandice D. Dickson, Esquire
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