

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

LESLEY DUMAS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2010-1960
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On April 5, 2011, 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, Lesley Dumas, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner made no further filings. Neither party filed exceptions, which were due on April 20, 2011. 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.

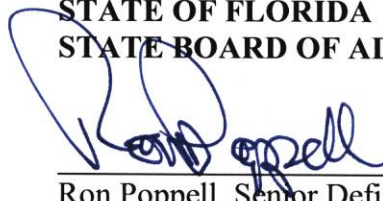
ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that the State Board of Administration honor her second election to enroll in the Florida Retirement System Investment Plan, submitted after Petitioner had terminated employment and no longer was earning service credit, 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 25th day of April, 2011, 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.


Agency 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 Lesley Dumas, 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 25th day of April, 2011.



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

LESLEY DUMAS,

Petitioner,

vs.

Case No. 2010-1960

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on January 25, 2011, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Lesley Dumas


Petitioner

For Respondent: Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether the Respondent correctly reversed Petitioner's August 2010 attempt to switch from the Pension Plan to the Investment Plan.

PRELIMINARY STATEMENT

Petitioner submitted a Request for Intervention asking that she be allowed to access the funds in her Florida Retirement System (FRS) account. The SBA denied this request and Petitioner filed a Petition for Hearing making the same request; this administrative proceeding followed.

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, Office of Defined Contribution Programs, State Board of Administration. Respondent's Exhibits R-1 through R-7 were admitted into evidence without objection at the hearing, and Petitioner's Exhibit P-1 was submitted post-hearing after testimony on same. Respondent did not object to admission of that document as evidence, and it is hereby admitted.

A transcript of the hearing was filed with the agency and copies provided to the parties, who were given thirty days from receipt to submit proposed recommended orders. Respondent submitted a proposed recommended order; Petitioner made no further submissions.

UNDISPUTED MATERIAL FACTS

1. Petitioner was an employee of the Leon County School Board, an FRS-covered employer, from August 2004 through June 2010. She was a tenured high school teacher on a ten month contract.

2. In June 2010, Petitioner expected to return to her position at the high school for the 2010-2011 school year. Before that happened, however, her husband lost his job and they had to move out of state. Petitioner therefore did not return to her position during the 2010-2011 school year.

3. On August 6, 2010, during the time she was on summer break, Petitioner called the MyFRS Financial Guidance Line and stated that she needed to cash in her account and was probably terminating employment on the following Monday. She was told that she could access her retirement funds only by first using her second election to move to the Investment Plan, waiting three months, then cashing out her account and paying a penalty and taxes. The Guidance Line counselor asked, "Now, are you – so you are physically working today? Are you physically working earning salary and service credit?" Petitioner answered, "Yes." The counselor advised that she would need to be earning service credit and salary and that the plan administrator would have to receive her second election form prior to her termination in order to move to the Investment Plan.

4. Petitioner submitted a 2nd Election EZ Retirement Enrollment Form to Respondent's third party administrator on August 6, 2010.

5. That form stated, in pertinent part:

IMPORTANT INFORMATION – Review Carefully

Your 2nd Election retirement plan change becomes effective on the first day of the month after the Plan Administrator receives your form, provided it is complete and signed. You must be actively employed earning salary and service credit when your form is received by the FRS Plan Choice Administrator. If you are leaving FRS-covered employment, this form must be received prior to your termination date. **If you are on an unpaid leave of absence or you are an employee of an educational institution on summer break, you cannot use your 2nd Election until you return to work.** If it is subsequently determined that you were not eligible to make a plan choice, your election will be considered invalid and will be reversed. ...

(emphasis added).

6. Petitioner stated that she did not read the above portion of the form before submitting it.

7. Petitioner submitted her resignation to the Leon County School Board on August 10, 2011.

8. Petitioner's employer, Leon County School Board, reported the Petitioner's termination date as June 8, 2010, and the last paycheck received by the Petitioner from Leon County was in July 2010.

9. Petitioner's employer classified the Petitioner as either "OPS" or a "10 month" employee. In response to an email inquiry from Respondent, Leon County Schools Employee Related Services stated: "It is our policy to use the last day of work as the termination date for 10 month employees. It is my understanding that our system will not recognize a termination date during the summer for someone who is classified as a teacher."

10. Petitioner's second election was reversed by Respondent because she was not actively employed and earning service credit when the Respondent's third party administrator received her second election form.

11. Petitioner was given additional time after the hearing to submit evidence that she was earning service credit in August 2010. In her letter submitted after hearing, Petitioner reiterated that she had actually been at the school and performed some work over the summer break, as many teachers do.

CONCLUSIONS OF LAW

12. Movement between the FRS plans is governed by Section 121.4501(4)(e), Florida Statutes. That statute states:

(e) After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, 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 defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. Eligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be 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 that the employee must meet the conditions of the previous sentence **when the election is received by the third-party administrator**. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

§ 121.4501(4)(e), Fla.Stat. (emphasis added).

13. Rule 19-11.007, Florida Administrative Code, governs the timing of the receipt of the second election form and states, in pertinent part:

19-11.007. Second Election Enrollment Procedures for the FRS Retirement Programs.

(1) Purpose. The purpose of this rule is to establish procedures for making the second election permitted by Section 121.4501(4)(e), F.S. This rule includes procedures for members who initially chose the FRS Investment Plan or the FRS Investment Plan Hybrid Option to use their 2nd. election to transfer to the FRS Pension Plan; or for members who chose or defaulted into the FRS Pension Plan to use their 2nd election to transfer to the FRS Investment Plan or the FRS Investment Plan Hybrid Option. 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 earning service credit in an employer-employee relationship consistent with the requirements of Section 121.021(17)(b), F.S. FRS members must be actively employed earning salary and service credit to be eligible to make

a valid 2nd election. **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 earning service credit.**

...

(3) General Procedures.

...

(d) The member may elect to move between the Florida Retirement System retirement programs only if the member is earning service credit in an employer-employee relationship consistent with the requirements under Section 121.021(17)(b), F.S. FRS members must be actively employed earning salary and service credit to be eligible to make a valid 2nd. election. **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. The election must be received and processed by the FRS Plan Choice Administrator before the member terminates covered FRS employment. It is the responsibility of the member to ensure the 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 earning service credit.**

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

14. The last time Petitioner earned service credit was in June 2010; her second election form was submitted on August 6, 2010, after the last business day she earned service credit. Under the above statutes and rules, the SBA therefore properly found her second election to be invalid, because it was not received and processed prior to 4:00 p.m. Eastern Time on the last day of her employment. The wording of the second election form that Petitioner signed and submitted is consistent with these statutes and rules and explained to her that employees of educational institutions cannot make a second election during summer break and must wait until they return to work (and are earning service credit) to make a second election.

15. Petitioner has asserted that the counselors on the MyFRS Financial Guidance Line failed to inform her that she had to submit a second election while still earning service credit, but transcripts of the August 2010 call show that the Petitioner was asked specifically whether she was then actively working. When she responded that she was, the MyFRS representative gave her further information regarding the timing of the second election, based on her response. In any event, by the time Petitioner called the Guidance Line, she was no longer actively working, and nothing any Guidance Line representative could have said would have changed that fact.

16. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and the SBA's construction and application of those statutes are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA1998). Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements to make a valid election into the Investment Plan. 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).

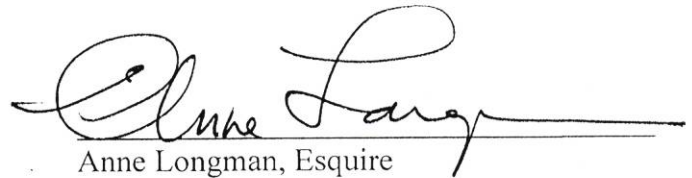
17. It is unfortunate that the statutes and rules applicable in this case did not permit Petitioner to effectuate her wishes with regard to her retirement funds. By the time she made the decision to move and not return to her Leon County School Board position, it was already too late for her to file a valid second election transferring to the Investment Plan. Particularly in light of the explicit prohibition in Rule 19-11.07, Florida Administrative Code with regard to filings

filings by employees of educational institutions on summer break, Respondent has no discretion here and must deem Petitioner's second election invalid.

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 5th day of April, 2011.



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

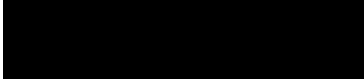
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed 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 5th day of April, 2011.

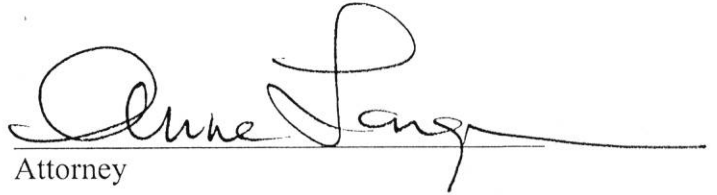
Copies furnished to:

Lesley Dumas



Petitioner

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Attorney