

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DAVID W. GOUDY)	
)	
Petitioner,)	
)	
vs.)	Case No. 2006-521
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
)	
)	

FINAL ORDER

On June 27, 2007, 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 Petitioner, David W. Goudy, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on July 12, 2007. 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 his date of enrollment in the FRS Investment Plan be retroactive to December 1, 2002, is denied. However, his date of enrollment is not July 1, 2003, as Respondent originally argued, but instead, his date of enrollment is March 1, 2003.

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 200, 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.

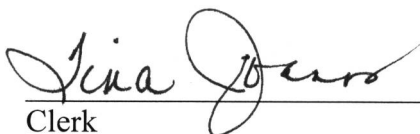
DONE AND ORDERED this 16th day of July, 2007, in Tallahassee, Florida.

**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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to David W. Goudy, [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, and Anne Longman, Esq., Lewis, Longman & Walker, P.A., P.O. Box 10788, Tallahassee, FL 32302, this 16th day of July, 2007.

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

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GENERAL COUNSEL'S OFFICE

DAVID W. GOUDY,

CASE NO.: 2006-521

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

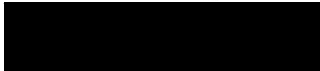
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer for the State Board of Administration (SBA) on March 12, 2007, in Tallahassee, Florida. The Petitioner appeared by telephone and the Respondent in person as follows:

APPEARANCES

For Petitioner: David W. Goudy


Petitioner

For Respondent: Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

On what date should Petitioner be deemed enrolled in the Investment Plan, given that he,

along with a group of others, did not timely receive the proper Florida Retirement System (FRS) educational materials with which to make his election?

PRELIMINARY STATEMENT

On February 27, 2006, Petitioner submitted a Request for Intervention requesting that the effective date of his election into the Investment Plan be December, 2002 (the date he verbally notified his employer of his intention to participate in the Investment Plan) instead of the date he filed his election form, June 27, 2003. Respondent SBA investigated this request and determined it could not be honored. Petitioner filed a Petition for Hearing dated May 19, 2006, to contest the intended agency action, which was ultimately transmitted to the undersigned for informal hearing.

Petitioner testified at the hearing. Respondent presented the testimony of Dan Beard of the SBA. Petitioner did not file any exhibits; Respondent's exhibits R-1-6, consisting of official agency records and communications by and to the Petitioner were admitted into evidence without objection. A transcript of the proceedings was made, filed and made available to the parties. Respondent timely filed a Proposed Recommended Order, and Petitioner timely filed a post-hearing statement.

UNDISPUTED MATERIAL FACTS

1. Petitioner was born on [REDACTED]. He was hired by the Sarasota County Board of County Commissioners ("Board") on September 9, 2002. The Sarasota County Board of County Commissioners is now, and for all periods relevant to this case has been, a participating employer in the Florida Retirement System ("FRS"). As a Board employee, Mr. Goudy could participate in the FRS.

2. The Florida Legislature established the Public Employee Optional Retirement Program (the "Investment Plan") in 2002. For purposes of enrollment, the statute creating the Investment Plan divided FRS-participating employers into three groups: (1) state employers; (2) school board employers; and (3) local government employers. §121.4501, Fla. Stat. (2002) Petitioner's employer was among the local government group. Local government employees were again divided into two groups for Investment Plan enrollment purposes: those who were existing employees as of December 1, 2002 and those who commenced their employment after October 1, 2002. Id. Petitioner was an existing employee as of December 1, 2002.

3. Section 121.4501(4)(c)1., Florida Statutes gave eligible local employees who were employed as of December 1, 2002, until February 28, 2003 to file an election with the FRS third party administrator indicating their intent to join the Investment Plan.

4. In December 2002, the Petitioner was asked by a county employee whether he was choosing the Investment Plan or the defined benefit program (the "Pension Plan"), and he said he was electing the Investment Plan. Section 121.4501(4)(c)1., Florida Statutes required an election of the Investment Plan to be made in writing or by electronic means and filed with the third-party administrator. If this election was not made, the employee remained in the Pension Plan. Because a participant had to notify the Respondent's administrator, as opposed to his employer, of an election into the Investment Plan, the Petitioner's December 2002 attempt to elect the Investment Plan did not result in his enrollment in the Investment Plan, and he defaulted into the Pension Plan. The Pension Plan has a six year vesting requirement.

5. In early March 2003, Mr. Goudy received a communication that indicated he had

defaulted into the Pension Plan because no election from him had been received by the Respondent's administrator by the February 28, 2003 deadline.

6. In May, 2003, Respondent determined that the Petitioner, along with others, had not received an FRS educational choice kit due to an error by a third party vendor. Those individuals were given a choice kit and an extension until June 30, 2003 to make an election into the Investment Plan.

7. The first written election form submitted by the Petitioner to the Respondent's administrator was filed on June 27, 2003, and he was enrolled effective July 1, 2003.

CONCLUSIONS OF LAW

8. Section 121.4501(8)(a) obligates the SBA to administer the Investment Plan. The SBA is not authorized to depart from the requirements of this statute 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 Chapter 121, Florida Statutes, the statute it is charged to implement, 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 DCA 1998). The statute provides little guidance, however, as to how the SBA is to proceed when it attempts to correct an error by a third party administrator which may have adversely affected a participant.

9. The Petitioner has asserted two reasons why he believes the effective date of his election into the Investment Plan should be deemed to be December 1, 2002 instead of July 1, 2003.

First, he asserts that he made a verbal election with a county employee in December 2002, and he believed this was the only action required on his part to effectuate the election. Second, he asserts that the error on behalf of the third party vendor in mailing his "choice kit" should not be visited on him in the form of a later enrollment date. Section 121.4501(4)(c) states, in pertinent part:

(4) Participation; enrollment.--

(c)1. With respect to an eligible employee who is employed in a regularly established position on December 1, 2002, by a local employer:

a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. **The election must be made in writing or by electronic means and must be filed with the third-party administrator** by February 28, 2003, or, in the case of an active employee who is on a leave of absence on October 1, 2002, by the last business day of the 5th month following the month the leave of absence concludes. This election is irrevocable, except as provided in paragraph (e). Upon making such election, the employee shall be enrolled as a participant of the Public Employee Optional Retirement Program, the employee's membership in the Florida Retirement System shall be governed by the provisions of this part, and the employee's membership in the defined benefit program of the Florida Retirement System shall terminate. The employee's enrollment in the Public Employee Optional Retirement Program shall be effective the first day of the month for which a full month's employer contribution is made to the optional program.

b. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed time period is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and **the employee's option to elect to participate in the optional program is forfeited.**

There is no provision in the statutory framework for a participant to make an election by notifying his employer, verbally or otherwise, and once an employee has failed to elect the Investment Plan, that option is forfeited.

10. Section 121.4501(10)(a), Florida Statutes states:

(10) Education Component. –

(a) The board, in coordination with the department, shall provide for an education component for system members in a manner consistent with the provisions of this section. **The education component must be available to eligible employees at least 90 days prior to the beginning date of the election period** for the employees of the respective types of employers.

Because of a third party error, a choice kit had to be re-sent to a group of employees, including the Petitioner, outside the time period mandated by the above statute with respect to the initial February 28, 2003 deadline. Respondent extended the election date for this group, apparently after referring to the 90-day requirement set out above, to June 30, 2003. But it appears that the choice kit sent to the Petitioner was not made available to him 90 days prior to the beginning date of the extended election period. This period ended on June 30, 2003, and Respondent did not know that the election kit had not been sent until May, 2003.

11. Respondent's interpretation of the relevant statutes focuses on the requirement that the Petitioner's election be deemed effective on the first day of the month for which a full month's employer contribution is made to the optional program, §121.4501(4)(c)1.a., but does not take into account the requirement that educational materials (apparently including the choice kit) be available 90 days before the beginning date of the election period. Id. at (10)(a).

12. It is evident that Respondent attempted in good faith to fashion a remedy for a group which had not received all necessary materials prior to its election period, and attempted to do this in accordance with statutory requirements. It is also clear that Petitioner always intended to enroll in the Investment Plan, even though he arguably could have submitted an election earlier than he did. But if Respondent had any ability to fashion a remedy for the omission of its third party provider, if the

choice kit was important enough to be re-sent and the election period extended, and if Petitioner filed his enrollment within this extended period, then Petitioner should be made whole, particularly as there appears to be no statutory authority to extend the deadline beyond February 28, 2003.

RECOMMENDATION

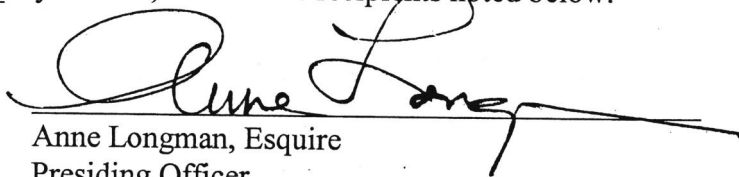
Because there does not appear to be any express statutory authority for the remedy fashioned by Respondent in this case, I recommend that Petitioner's election to participate in the Investment Plan, filed on June 27, 2003, three days before the end of his extended election period, be deemed to have been submitted three days before the end of the statutory election period, or on February 25, 2003, effective March 1, 2003.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to the Recommended Order should be filed with the Agency Clerk of the State Board of Administration.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Recommended Order has been furnished by U.S. Mail this 27 day of June, 2007 to the recipients noted below.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 10788
Tallahassee, FL 32302

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308

David W. Goudy


Petitioner

BRIAN A. NEWMAN
BRANDICE D. DICKSON
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent