

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

EMILY RODGERS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2006-545
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On September 7, 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 pro se Petitioner, Emily Rodgers, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Respondent filed Exceptions, which were due on September 24, 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.

RULINGS ON EXCEPTIONS

Respondent submitted four exceptions. They are all accepted. These exceptions are solely to correct typographical errors. They do not at all affect the substance of the Recommended Order. Petitioner did not submit any exceptions.

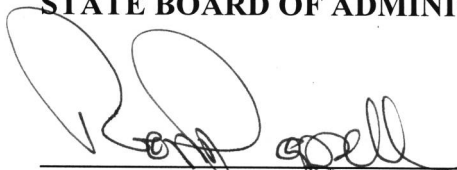
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to have her election into the FRS Investment Plan count from the date she was eligible to join, rather than having to use her Second Election to transfer from the FRS Pension Plan to the FRS Investment Plan, 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 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 27th day of September, 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

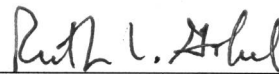
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Emily Rodgers, [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 27th day of September, 2007.



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

EMILY RODGERS,

CASE NO.: 2006-545

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

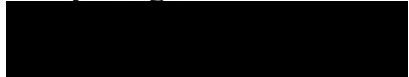
This case was heard in an informal proceeding before the undersigned Presiding Officer for the STATE BOARD OF ADMINISTRATION ("SBA") on May 8, 2007, in Tallahassee, Florida.

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

APPEARANCES

For Petitioner:

Emily Rodgers


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

RECEIVED
STATE BOARD OF ADMIN
07 SEP 10 PM 4:06
GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue presented is whether Petitioner should be permitted to join the Investment Plan without having to use her second election to do so, when the evidence of record indicates that

Exhibit "A"

notification of the Petitioner's election period was mailed in the regular course of business, but not received by the Petitioner.

PRELIMINARY STATEMENT

On April 5, 2006, Petitioner submitted a Request for Intervention asking that she be allowed to make a first election into the Investment Plan, despite the prescribed period for making that election having passed. Petitioner asserts that she did not timely make an initial election into the Investment Plan because she never received notification that she had to make this election before November 30, 2002. Respondent SBA investigated this request and determined that it could not be honored. On September 18, 2006, Petitioner executed a Petition for Administrative Hearing contesting 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-1-7, 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; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

The parties have stipulated that the following facts are undisputed:

1. Petitioner was born in [REDACTED]. She was hired by the Alachua County School Board ("School Board") as a part-time employee on January 1, 2002. During her 2002 orientation, she was informed by the School Board that part time employees were not entitled to retirement benefits,

including participation in the Florida Retirement System ("FRS"), and she left the orientation prior to discussion of the FRS based on that representation.

2. Unbeknownst to the Petitioner, she was eligible for participation in the Florida Retirement System in 2002 and was automatically enrolled in the FRS Pension Plan, the only plan offered by the Respondent at the time of Petitioner's hire.

3. On May 24, 2002, the Division of Retirement mailed the Petitioner a choice kit which informed her that the FRS was adding a new retirement plan, the Investment Plan, and that the Petitioner had until November 30, 2002 to make an election of that new plan. Failure to elect the Investment Plan within that time period resulted in a default into the Pension Plan. The choice kit was mailed to the Petitioner's address of record.

4. No election was received from the Petitioner prior to the November 30, 2002 deadline, and she defaulted into the Pension Plan.

5. In December 2005, Petitioner was hired by the School Board as a full-time employee. When she attended the School Board's orientation at this time, she was informed she was entitled to retirement benefits through the FRS. She then attempted to make a first election of the Investment Plan, but her election was denied, as her initial default election into the Pension Plan was already on file.

6. Petitioner Rodgers states that she did not receive any mailings from either the Division of Retirement or the SBA, including the initial choice kit and the annual member statements reflecting her participation in the FRS Pension Plan, although the [REDACTED] address to which the record documents show mailings to her was correct for the pertinent timeframes. Petitioner does

not contend that the materials were never mailed, but that she never received them. She is aware that she can still use her one time second choice to elect the Investment Plan, but does not want to utilize it so early in her career.

7. Dan Beard, a former Division of Retirement employee and the current SBA Director of Policy, Risk Management & Compliance, testified that it was the routine practice of the Division of Retirement to mail the member's annual statement to the employee's address of record, and that if a mailing was returned it was sent to the employer for delivery to the individual employee. He testified that this same procedure was utilized by the Division's contract vendor, CitiStreet, which was responsible for mailing the choice kit. SBA and Division of Retirement records show that both a choice kit and member annual statements were mailed to the Petitioner in the ordinary course of business.

CONCLUSIONS OF LAW

8. FRS eligible employees may elect to participate in either the FRS defined benefit program (the "Pension Plan") or the Public Employee Optional Retirement Program, (the "Investment Plan"). In 2002, participation in the Investment Plan by an employee of a school board was achieved by the employee filing an election form by November 30, 2002. Failure to file a timely election resulted in default into the Pension Plan. Section 121.4501(4)(b)1.a, b., Florida Statutes (2002).

9. An employee who defaulted into the Pension Plan by not filing a timely initial election of the Investment Plan may use the one time irrevocable "second election" to switch from

the Pension Plan into the Investment Plan, if that employee is otherwise eligible for participation in the Investment Plan.

10. The record shows that the Division of Retirement, either itself or through its contract vendor, and the SBA, mailed a number of items to the Petitioner at her address of record, and that this was the correct address for her during the relevant times.

11. The Respondent is statutorily charged with making available to system members (employees) the educational materials they need to make an informed choice between the two FRS plans. This "education component" is to be "made available to eligible employees at least 90 days prior to the beginning date of the election period..." § 121.4501(10)(a), Fla.Stat. (2002).

12. The undisputed facts show that Respondent satisfied its duty to make educational materials available to the Petitioner, including by direct mailings to her address of record. Additional materials were available on line and by telephone. These materials, including a choice kit mailed on May 24, 2002, were made available at least 90 days before her election period began.

13 Respondent's witness Dan Beard testified regarding the normal and routine business practice of the Division of Retirement and of its contract vendors in making mailings to system members and with regard to the business records contained in the Respondent exhibits which were admitted without objection. Section 90.406(1), Florida Statutes, states:

Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

"Evidence of a business's routine office procedure with regard to mailing letters will be admissible to show the letter in question was mailed." C. Ehrhardt, Florida Evidence §406.1, Routine Practice and

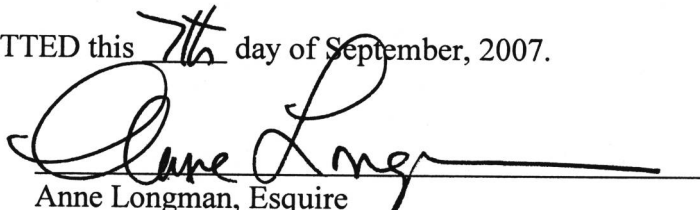
Habit, *citing* Progressive Am. Ins. Co. v. Kurtz, 518 So.2d 1339 (Fla. 5th DCA 1987). Here, there is no evidence to show that the agencies in question did not follow routine practice with regard to the choice kit and other materials, and there is no dispute as to the material fact that the education component was timely made available to Petitioner.

14. Section 121.4501(8)(a), Florida Statutes 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.). 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). It is unfortunate that Petitioner's employer apparently did not take care to describe the availability of the retirement plans accurately in communicating with its employees, or did not conduct its employee orientations in a way that made their options clear. This failure cannot, however, be imputed to the SBA, as it appears that the SBA did everything it was required to do by statute with regard to informing Petitioner about the Investment Plan.

RECOMMENDATION

Based on the foregoing and the record in this proceeding, I recommend that a final order be entered by Respondent denying Petitioner the relief requested in her Petition for Hearing.

RESPECTFULLY SUBMITTED this 7th day of September, 2007.




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

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 this 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 has been furnished by U.S. Mail this 7th day of September, 2007.



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

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

Copies furnished:
Emily Rodgers



(for Petitioner)

Brian A. Newman, Esq.
Brandice D. Dickson
Pennington Moore Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
(for Respondent)