

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DWIGHT FRANCIS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2012-2436
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On October 10, 2012, 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, Dwight Francis, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order within 30 days after the hearing transcript was filed. Petitioner filed some additional materials outside the 30-day time-frame which have been considered as being a timely-filed Proposed Recommended Order. Neither party filed exceptions, which were due on October 25, 2012. 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

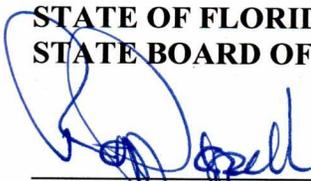
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be transferred back to the Florida Retirement System ("FRS")

Pension Plan even though Petitioner already had used his second election to switch to the FRS Investment Plan hereby 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 8th day of November, 2012, 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.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Dwight Francis, pro se, [REDACTED], [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 8th day of November, 2012.



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

DWIGHT FRANCIS,

Petitioner,

vs.

Case No. 2012-2436

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on June 28, 2012, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Dwight Francis


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

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner's request to be placed back into the Florida Retirement System (FRS) Pension Plan may be granted.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, Defined Contribution Programs. Respondent's Exhibits R-1 through R-6 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a proposed recommended order within this time frame; Petitioner filed additional materials outside this time frame which I will consider as his proposed recommended order and as though timely filed.

MATERIAL UNDISPUTED FACTS

1. Petitioner has been employed as an educator by the Broward County School Board, an FRS-covered agency, for over 14 years.
2. When he first had the opportunity to make an initial election between the FRS Pension Plan (a defined benefit plan with a six year vesting requirement) and the FRS Investment Plan (a defined contribution plan with a one year vesting requirement,) Petitioner made no affirmative initial election and therefore defaulted to Pension Plan membership, as provided by applicable law.

3. On May 25, 2011, Petitioner was placed on a “surplus list” by his principal, which led him to believe that he would be unemployed for the 2011-2012 school year. On May 26, 2011, Petitioner and his friend [REDACTED] contacted the MyFRS Financial Guidance Line, seeking to switch from the Pension Plan to the Investment Plan. Petitioner stated that he had “no choice” and needed to secure funds for his family before he was terminated. He did not plan to access the cash that would be available in an Investment Plan account, but wanted to be sure it was there if he didn’t have a job.

4. During that call, as the MyFRS Financial Guidance Line representative was explaining the ramifications of his requested action, Petitioner stated that he didn’t want to come across as “rude, but [he and [REDACTED] have] been through this” explanation of switching plans (referring to a previous call involving [REDACTED], [REDACTED], [REDACTED] and just wanted to switch “ASAP,” and asked to be directed to the website form.

5. The Guidance Line representative then helped Petitioner fill out the second election form.

6. On May 26, 2011, the Petitioner executed and faxed a 2nd Election Retirement Plan Enrollment Form and elected to switch from the FRS Pension Plan to the FRS Investment Plan. That form advised the Petitioner as follows:

SECTION 4: AUTHORIZATION (All participants must complete this section.)

I understand that my one-time 2nd Election is irrevocable and that I must remain in the plan I chose in Section 1 until my FRS-covered employment ends and I retire.

7. Petitioner's second election was processed, and he was enrolled in the FRS Investment Plan effective June 1, 2011. In July, 2011 he learned that he would continue to be employed by the Broward County School Board, but at a different school.

8. Petitioner submitted a Request for Intervention dated April 17, 2012 that requested he be placed back into the FRS Pension Plan, stating that he was not fully informed as to the effect of moving from the Pension Plan to the Investment Plan.

9. The Petitioner was advised by the Respondent on April 18, 2012 that his request to return to the FRS Pension Plan could not be granted; he then filed a petition for hearing that initiated this administrative proceeding.

CONCLUSIONS OF LAW

10. In 2002, the Florida Legislature amended the FRS retirement plan offerings and gave FRS-covered employees a choice between the traditional Pension Plan and the newly created Investment Plan. Because Petitioner did not make an affirmative initial election to join the Investment Plan, he defaulted to continued Pension Plan membership.

11. After the initial election period expired, Petitioner had a one-time, and irrevocable, second election that could be used to switch from the Pension Plan to the Investment Plan. Section 121.4501(4)(e), Florida Statutes (2007) provides in pertinent part that:

(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 [Pension Plan] to the [Investment Plan] or from the [Investment Plan] to the [Pension Plan]...

§ 121.4501(4)(e), Fla. Stat. (2007) (Emphasis added). As stated in the above-cited statute, participants have only one opportunity to change plans after the initial election period expires.

The Petitioner used his one opportunity to change plans when he submitted his second election form in May of 2011.

12. Petitioner had listened to the detailed analysis of the benefits of remaining in the Pension Plan which was given to his co-worker [REDACTED], before he decided to change to the Investment Plan, and specifically rejected the further explanations offered to him by the MyFRS Financial Guidance Line representative. The second election form he signed warns again that the second election is irrevocable. Petitioner is charged with knowledge of the contents of a document he signed. See Addison v. Carballosa, 48 So. 3d 951, 951 (Fla. 3rd DCA 2010); Wexler v. Rich, 80 So. 3d 1097 (Fla. 4th DCA 2012).

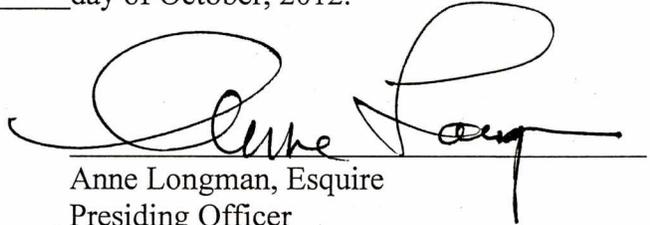
13. The SBA is not authorized to depart from the requirements of the Florida Statutes creating and governing the Florida Retirement System, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of Chapter 121, 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. See 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).

14. It is unfortunate that Petitioner used his second election to switch to the Investment Plan, as he now believes it would have been better for him to remain in the Pension Plan. But I see no deficiencies in the information or guidance he was given before making his second election, and there is no authority for the SBA to allow any participant to make a third election.

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 10th day of October, 2012.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

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.

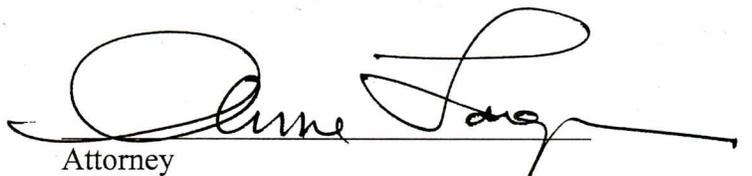
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 10th day of October, 2012.

Copies furnished to:

Dwight Francis


Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson, Bell & Dunbar
215 S. Monroe Street, Suite 200
Tallahassee, Florida 3230



Attorney