

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ALINA ARENAS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2010-1855
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On January 21, 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, Alina Arenas, 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 February 4, 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.

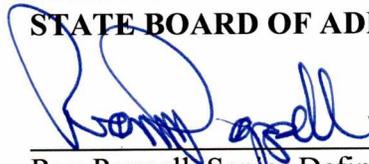
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that the State Board of Administration honor Petitioner's second election request to enroll in the Investment Plan hereby is denied, because the undisputed material facts fail to demonstrate that Petitioner submitted a second election form while Petitioner still was earning service credit.

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.

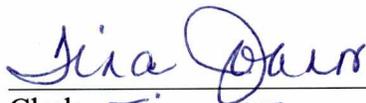
DONE AND ORDERED this 8th day of February, 2011, in Tallahassee, Florida.

**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

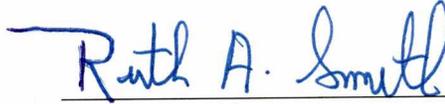
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Alina Arenas, 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 8th day of February, 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

ALINA ARENAS,

Petitioner,

vs.

Case No.: 2010-1855

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 October 5, 2010, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Alina Arenas


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 Petitioner submitted a valid second election form to move from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan (the Public Employee Optional Retirement Plan).

PRELIMINARY STATEMENT

On July 13, 2010, Petitioner submitted a Request for Intervention asking to be allowed to enroll in the Investment Plan. By letter of July 29, 2010 from Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, this request was denied because only FRS covered employees who are earning service credit may move between FRS programs, and Petitioner did not submit a second election form while she was earning service credit. Petitioner then filed a Petition for Hearing raising the same issues, and the instant proceeding ensued.

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Mr. Beard. Respondent's Exhibits R-1 through R-4 were admitted into evidence without objection. Petitioner presented Exhibit P-1, an unsworn affidavit of Roberto Andres Guerra. At the conclusion of the hearing, the Petitioner was afforded the opportunity to supplement the record within 30 days. Petitioner's Exhibits P-2 and P-3, consisting of an additional letter relating her unsuccessful attempts to obtain verification of fax transmission of a second election form from an Office Depot, and another affidavit from Mr. Guerra which this time included a notary seal, were served and filed on November 8, 2010. Respondent objected to admission of the two versions of the affidavit of Mr. Guerra as hearsay. Following up on testimony at the hearing, I requested that Respondent search again for records of any calls by Petitioner in March, 2010. Respondent filed supplemental Exhibit R-5, which is a

log of calls between the Division of Retirement (which unlike Respondent, does not record its calls) and Petitioner.

A transcript of the hearing was filed with the agency and provided to the parties, who were invited to submit proposed recommended orders. Respondent filed a proposed recommended order; Petitioner made no further filings. My recommendation is based upon all materials submitted in this case.

UNDISPUTED MATERIAL FACTS

1. The Petitioner was employed off and on over the years by different Florida Retirement System participating employers.
2. Her first such employment began in 1977 and her latest such employment was with the State of Florida, Department of Corrections commencing in January 2007.
3. The Petitioner was given until June 29, 2007 to elect between the FRS Pension Plan and the FRS Investment Plan.
4. Because the Petitioner failed to elect between those two plans prior to the expiration of the initial election window, she defaulted into the Pension Plan.
5. The last salary Petitioner earned for work performed for the Department of Corrections was for work done through January 13, 2010, so she was earning service credit in the month of January 2010, and could have made a valid second election before January 13, 2010. Petitioner asserts that she faxed an election form to the FRS Plan Administrator to switch to the Investment Plan on January 6, 2010. Respondent has searched all records available to it and has no record of receiving this form.
6. A log of calls from the Petitioner to the Division of Retirement shows Petitioner

called on March 12, 2010 and asked for information. Under comments, it states: "TERMINATED MEMBER. PLEASE PROVIDE 4/1/1010 ESTIMATE (SEND FR-11 & GIVE 30 DAYS) AND DEFERRED TO AGES 57 AND 62." Attached to this log are retirement benefit estimates reflecting annual Pension Plan benefit amounts based on retirement at three different ages, including Petitioner's age at that time, 52 years. Also included is a comment that states: "You must complete and return the enclosed Form FR-11, Application for Service Retirement, within thirty days of the date this estimate was mailed to retain the above retirement date."

7. Petitioner attempted to switch to the FRS Investment Plan twice in March 2010: on March 17, 2010 and on March 26, 2010. One of the forms submitted in March resulted in Petitioner being sent an FRS Account Statement showing activity in an Investment Plan account from April 1, 2010 through June 31, 2010. Petitioner's March, 2010 attempts to switch to the Investment Plan were deemed to be invalid because she had not been earning service credit in March 2010, and thus was not eligible to move between plans at that time.

8. Petitioner asserted in her Petition for Hearing that she was in possession of a fax confirmation sheet that would show that she had faxed a second election form to the Respondent's third party administrator on January 6, 2010. As part of its investigation of Petitioner's complaint, Respondent requested that Petitioner forward a copy of that fax confirmation sheet. Petitioner did not produce a copy of that fax confirmation sheet and stated at hearing that Mr. Guerra had been unable to find it, and that he therefore executed the affidavit which was submitted as Exhibit P 1. She stated: "Roberto Guerra – we had a copy, like I said, of the fax journal report or whatever it is that we get. I gave it to him. He thought he had it in his home and didn't. He can't locate it. And that is why he provided the affidavit."

9. In Exhibit P-1, Mr. Guerra states that he personally witnessed Petitioner, at an Office Depot on Hwy. 190 in Melbourne, Florida, send a fax to "1-888-310-559" [an incomplete fax number] on January 6, 2010, of what he called an FRS "Plan Conversion" form. Mr. Guerra further states in that document that this form was faxed to Hewitt Associates/FRS Plan Administrator and that "confirmation was received to above mentioned number."

10. At the hearing, I asked Petitioner if she could obtain a fax record from the Home Depot from which she had sent the fax in January 2010. Both Petitioner and Respondent were given 30 days after the hearing to supplement the record with any additional materials that might bear on Petitioner's assertion of having faxed a second election form on January 6, 2010.

11. Petitioner has submitted two items in response: (1) a letter recounting her inquiry to Office Depot personnel, who told her that they kept no records of fax journal reports; and (2) the same affidavit of Roberto Guerra previously submitted, but this time bearing a notary acknowledgement.

12. Neither the Respondent nor the Respondent's third party administrator has any record of the Petitioner submitting a second election form in January 2010, and Petitioner has submitted neither the original second election form allegedly sent in that month (which she would have retained if it was faxed), the fax cover sheet or any confirmation or journal report of the fax.

CONCLUSIONS OF LAW

13. After an FRS participating employee has defaulted into the Pension Plan, he or she can switch to the Investment Plan only by filing an irrevocable second election form while earning service credit. See § 121.4501(4)(e) Fla.Stat.

14. Although the Petitioner indicated that the requisite second election form was sent on January 6, 2010, there is no evidence that the third party administrator ever received it, despite a comprehensive search of SBA and third party administrator records. In early March, 2010, she requested estimates of retirement benefits from the Florida Division of Retirement, based on her participation in the Pension Plan. Later in March, 2010, she filed two different, invalid, second elections.

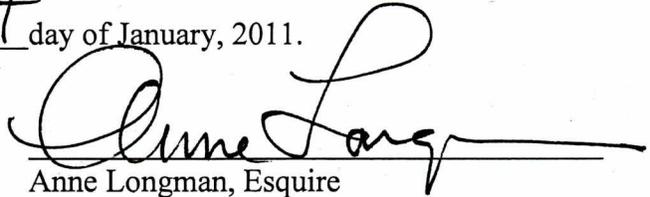
15. Section 121.4501, Florida Statutes obligates the SBA to administer the Investment Plan, and it is not authorized to depart from the requirements of this statute when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). 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).

16. No authority has been cited that would authorize Respondent to depart from the statutory requirements for participation in the Investment Plan. The SBA lacks the statutory authority to place the Petitioner in the Investment Plan without her having submitted a valid second election. The undisputed material facts demonstrate that Petitioner has not carried her burden of showing that she made a valid second election. Because Petitioner has not yet made a valid second election, if she returns to FRS-covered employment, she will still have an opportunity to switch to the Investment Plan, as long as this is done in accordance with the applicable statutes and rules.

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 21st day of January, 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 21st day of January, 2011.

Copies furnished to:



Petitioner

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