

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

NEIL BURTON,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2014-3202
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On April 9, 2015, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. The Recommended Order indicates that copies were served upon the pro se Petitioner, Neil Burton, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. No exceptions to the Recommended Order, which were due April 24, 2015, were filed by either party. 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 he be allowed to use his second election to transfer from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to pay the statutorily-required “buy-in” amount, or, in the alternative, that he be allowed to transfer to the FRS Hybrid Option, 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 30th day of April, 2015, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan B. Haseman
Senior Defined Contribution Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

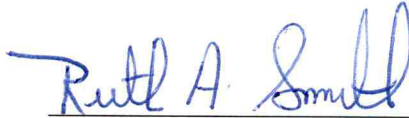
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Neil Burton, pro se, both by email transmission, [REDACTED] and by U.P.S. [REDACTED] and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 30th day of April, 2015.



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

NEIL BURTON,

Petitioner,

vs.

CASE NO. 2014-3202

STATE BOARD OF ADMINISTRATION,

Respondent.

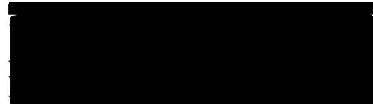
RECOMMENDED ORDER

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 February 20, 2015, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Neil Burton



Petitioner

For Respondent:

Brian Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner, a member of the Florida Retirement System (“FRS”) Investment Plan, can move to the FRS Pension Plan without paying the Pension Plan “buy-in” payment calculated by the Division of Retirement, or, alternatively, whether he can enroll in the FRS Hybrid Option.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and was cross-examined by counsel for Respondent. Respondent's exhibits R-1 through R-3 were admitted into evidence without objection.

A transcript of the hearing was filed with the agency on March 3, 2015 and provided to all parties. The parties were invited to submit proposed recommended orders within 30 days after the transcript was filed. The following recommendation is based upon the undersigned’s consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with Sarasota County Public Schools, an FRS-covered agency, on August 2, 2005.
2. Petitioner had a deadline of January 31, 2006 to elect membership in either the defined contribution Investment Plan or the defined benefit Pension Plan.
3. Petitioner filed an EZ Plan Enrollment Form, which he signed on January 5, 2006, selecting enrollment in the Investment Plan. This form advised Petitioner that there could be a cost to buy into the Pension Plan if he made a second election to become a member of the Pension Plan at a later date. That form stated:

I understand that I have a one-time future opportunity to switch to the FRS Pension Plan at any time during my FRS career, and that there will be a cost for doing so.

4. A MyFRS Benefit Comparison Statement ("Choice Kit") was mailed to Petitioner before he made the election to join the Investment Plan.

5. In the Choice Kit, the Petitioner was advised that he would have to buy into the Pension Plan if he chose to exercise his one-time option to switch plans and that if he did not have enough money in his Investment Plan account at that time to pay the full calculated buy-in amount, that he would have to make up the difference with other funds.

6. The September 2005 FRS Summary Plan Description, available for viewing on the MyFRS.com website at the time Petitioner made his election to enroll in the Investment Plan, advised participants of the cost associated with buying into the Pension Plan.

7. The Petitioner filed a Request for Intervention on December 14, 2014 requesting that he be able to use his second election and be put into the Pension Plan, but without having to pay the estimated \$13,000 required buy-in, the amount by which the buy-in exceeded the value of his Investment Plan account. Alternatively, he requested he be able to join the FRS Hybrid Option. Petitioner stated he had made a mistake in choosing the FRS Investment Plan as it had "performed poorly."

8. Respondent informed Petitioner it had no statutory authority to waive the buy-in cost to change to the Pension Plan.

9. On January 13, 2015 Petitioner filed a Petition for Hearing requesting that Respondent allow him to use his second election to join the Pension Plan without paying the buy-in amount or, alternatively, to join the Hybrid Option. This administrative proceeding followed.

10. At hearing, Petitioner testified that he made the decision to join the Investment Plan instead of the Pension Plan when he first began teaching in 2005, in part because he was not

sure whether teaching would be his permanent career. The Investment Plan has a one year vesting requirement while the vesting requirement for the Pension Plan is much longer (six years of creditable service for Petitioner). See §§ 121.021(45)(a) and 121.4501(6)(b), Fla. Stat. (2014).

11. Petitioner testified that he knew there would be a cost to join the Pension Plan if he later exercised his second election to do so, he just did not expect it to be as much as \$13,000 and stated that this was too large an amount to expect a teacher to pay all at once.

CONCLUSIONS OF LAW

12. Movement between the two FRS plans is governed by Section 121.4501(4)(g), Florida Statutes. That section states, in pertinent part:

(g) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, 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. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are 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 when the election is received by the third-party administrator. This paragraph is contingent upon approval by the Internal Revenue Service.

1. If the employee chooses **to move** to the investment plan, the provisions of subsection (3) govern the transfer.

2. If the employee chooses to move to the pension plan, the employee must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan. Benefit

commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. The division must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

§ 121.4501(4)(g), Fla.Stat. (2014)(emphasis added).

13. Rule 19-11.007(3)(d), Florida Administrative Code, provides:

For members transferring to the FRS Pension Plan, if the member's Investment Plan account balance was less than the calculated amount required to buy back into the FRS Pension Plan, the election will require a personal payment. The member will receive notification and proper instructions from the Division detailing where and in what form to send any personal payments. Such payment, if necessary, must be received by the date determined by the Division. If the required amount is not received by the Division by the date due, the election will be voided.

14. At the time Petitioner made his election to join the Investment Plan, he had access to several educational resources including the Plan Choice Kit, toll-free MyFRS Financial Guidance Line and the MyFRS.com website, and the FRS Investment Plan Summary Plan Description. These educational resources inform members that they have a one-time opportunity to switch from the Investment Plan to the Pension Plan, but that they must buy into the Pension Plan using the money in their Investment Plan account, and that if the buy-in cost exceeds the value of their Investment Plan Account, they must make up the difference with other financial resources in order to complete the transaction.

15. Petitioner admits he was fully aware at the time he signed up for the Investment Plan that he would have to buy into the Pension Plan should he elect to use his second election.

His complaint is that he cannot afford the buy-in amount at present; he points to the Hybrid Option as an alternative and example that some method other than a lump sum payment should be available to him.

16. Petitioner has not disputed the accuracy of his buy-in calculation, and in any event, that calculation is made by a different agency, the Division of Retirement, and therefore cannot be challenged in this administrative proceeding before the State Board of Administration. See § 121.4501(4)(g)2, Fla. Stat. (2014).

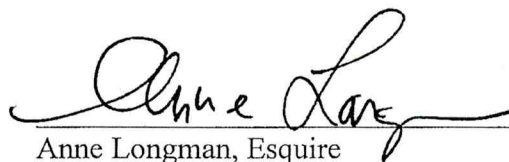
17. Respondent offers a Hybrid Option to members of the FRS who have at least five or eight years of creditable service in the Pension Plan who want to freeze their Pension Plan benefit and switch to the Investment Plan for the remainder of their FRS career. § 121.4501(3)(a), Fla. Stat. (2014). Because the Hybrid Option is available only to those FRS members who are moving from the Pension Plan to the Investment Plan – and not the other way around as Petitioner is attempting – the Hybrid Option is not available to him.

18. It is unfortunate that Petitioner finds himself in a situation where he cannot effectuate his wishes regarding his FRS retirement plan, but Respondent has no statutory authority which would allow it to grant the relief requested in the Petition for Hearing.

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 9th day of April, 2015.



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
alongman@llw-law.com

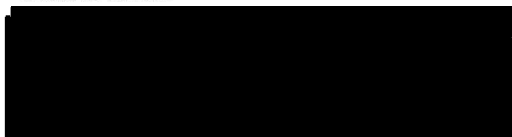
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions 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 via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
mini.watson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Neil Burton



and via electronic mail only to:

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Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
slindsey@penningtonlaw.com
Counsel for Respondent