

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

| | | |
|---|---|------------------------|
| MICHAEL RABY, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | SBA Case No. 2022-0453 |
| |) | |
| STATE BOARD OF ADMINISTRATION, |) | |
| |) | |
| Respondent. |) | |
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FINAL ORDER

On February 14, 2023, 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, Michael Raby, and upon counsel for the Respondent. No exceptions to the Recommended Order, which were due by March 1, 2023, were filed by either party. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s attempt to file a second election to switch from the Florida Retirement System (“FRS”) Pension Plan to the FRS Investment Plan at a time in which he was not earning salary and service credit from FRS-eligible employment hereby is denied. While Petitioner’s employer may have provided him with erroneous information, Section

121.021(10), Florida Statutes, specifically provides that employers are not agents of the SBA and that, therefore, the SBA by law is not responsible for any erroneous information that may be provided by employer representatives.

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 29th day of March 2023, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard

Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

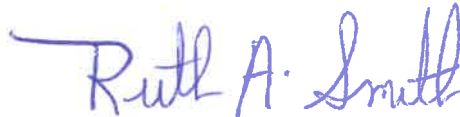
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Michael Raby, *pro se*, both by email transmission to mike@MikeRaby.com and by U.P.S. to 48 CR 520, Corinth, MS 38834; and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 29th day of March, 2023.



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

MICHAEL RABY,

Petitioner,

vs.

CASE NO. 2022-0453

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on December 7, 2022, at 10:00 a.m., with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner: Michael Raby, pro se
For Respondent: Ruth Vafek
Ausley McMullen, P.A.
123 S. Calhoun Street
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner's attempted use of his second election to move from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan was valid, despite the Plan Choice Administrator having received Petitioner's second election form during a month when he was not earning salary and service credit from FRS-eligible employment.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent attended the hearing by telephone and presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-5 and Petitioner's additional submission of December 14, 2022 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on December 29, 2022. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based on 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 the Desoto County School Board (DCSB), an FRS-participating employer, on December 8, 2008.
2. Since the SBA Plan Choice Administrator received no election from Petitioner during his initial choice window, Petitioner was enrolled in the Pension Plan, the legislatively-prescribed default at the relevant time, effective June 1, 2009.
3. Petitioner later was employed by the Sarasota County School Board (SCSB), which is also an FRS-participating employer.
4. On July 7, 2022, the SBA Plan Choice Administrator received a second election form from Petitioner, seeking to transfer from the defined benefit Pension Plan to the defined contribution Investment Plan.
5. The records of the SCSB show that Petitioner was not earning salary from SCSB on July 7, 2022.

6. Petitioner's attempted second election was deemed invalid, and he was returned to the Pension Plan.

7. A human relations specialist for the SCSB later informed Petitioner that he had to be actively employed in order to make a valid second election, and that he could fulfill that requirement by working one day of a new contract, which was arranged to be August 3, 2022.

8. The same individual also erroneously told Petitioner that he did not need to resubmit a second election form.

9. Although Petitioner apparently was again employed as an FRS-eligible employee on August 3, 2022, he did not resubmit a second election form on that day.

10. On or about October 11, 2022, Petitioner submitted a Request for Intervention requesting that his attempted second election be "reinstated" and that he be transferred to the Investment Plan. Petitioner's RFI was denied.

11. On or about November 2, 2022, Petitioner filed a Petition for Hearing requesting the same relief. This administrative proceeding followed.

CONCLUSIONS OF LAW

12. The record shows that Petitioner intended to transfer from the FRS Pension Plan to the Investment Plan prior to his termination from SCSB. In July of 2022 he contacted Ernst and Young representatives via the MyFRS Financial Guidance Line to ask how to proceed. He was guided through the second election process and informed that he had to be earning salary and service credit in the month his second election was made.

13. Ernst and Young representatives do not have access to detailed employment information for FRS members, so members must be aware of whether they are earning salary and service credit at any particular time in order to make a valid, effective election.

14. Petitioner apparently did inquire with a representative of the SCSB, who erroneously informed him that he only needed to work one day in order to be eligible to make an effective second election, and that the election form he had submitted on July 7, 2022 would suffice.

15. Although the evidence shows Petitioner's intent to transfer to the FRS Investment Plan, pursuant to Section 121.4501(4)(f), Florida Statutes, the issue is whether the Plan Choice Administrator received Petitioner's election while he was earning salary and service credit in a qualifying position. When Petitioner submitted his second election form on July 7, 2022, he was not earning salary and service credit with SCSB.

16. The SBA may not grant Petitioner's request to transfer to the Investment Plan at this time. As section 121.4501(4)(f), Florida Statutes, provides in relevant part:

...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.

(Emphasis added.)

17. Because Petitioner terminated his employment in order to retire and is no longer "earning service credit in an employer-employee relationship" the law bars him from moving between plans at this point.

18. Rule 19-11.007(2), F.A.C., reiterates the requirement of current employment:

A member may make a valid 2nd election only if the 2nd election is **made and processed** by the Plan Choice Administrator during the month in which the member is actively employed and earning salary and service credit in an employer-employee relationship consistent with the requirements of section 121.021(17)(b), F.S. Members on an unpaid leave of absence or terminated members cannot use their 2nd election until they return to FRS-covered employment. **Employees of an educational institution on summer break**

cannot use their election during the full calendar months of their summer break. For example, if the last day of the school term is May 21st and the first day of the new school term is August 17th, the employcc may not file a 2nd election in the calendar months of June or July. The beginning of the school term is determined by the employer. **In general terms, this means that the election can only be made and processed during the month in which the member is actively working and being paid for that work.**

(Emphasis added).

19. Section 121.021(10), Florida Statutes, explicitly provides that “[e]mployers are not agents of the [Department of Management Services], the [State Board of Administration], or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.”

20. Correct information was provided to Petitioner by the Respondent’s agents prior to and in the process of his completing a second election form, and again in the Confirmation of 2nd Election.

21. Respondent is not responsible for any incorrect guidance provided to Petitioner by his employer, no matter how regrettable.

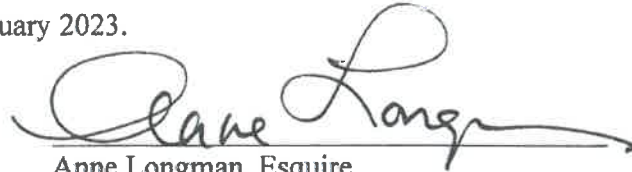
22. The Florida Statutes creating and governing the Florida Retirement System, and Petitioner’s rights and responsibilities under them, are clear and Respondent cannot deviate from them. Balezentis v. Dep’t of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency “is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction”).

23. Respondent does not have the authority to allow Petitioner to enroll in the FRS Investment Plan, either retroactively or at this time, and therefore cannot grant the relief requested.

RECOMMENDATION

Having considered the law and undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

DATED this 14th day of February 2023.



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 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
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
Ruth.smith@sbafla.com
(850) 488-4406

COPIES FURNISHED via email and U.S. mail to:

Michael Raby
48 CR 520
Corinth, MS 38834
mike@MikeRaby.com
Petitioner

and via electronic mail only to:

Deborah Minnis, Esquire
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32301
dminnis@ausley.com
jmcvaney@ausley.com