

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

CHERYL RIVERA,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3580
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On August 11, 2016, 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, Cheryl Rivera, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on August 27, 2016. 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 request that membership in the Florida Retirement System (“FRS”) Investment Plan be deemed to be her initial plan choice election even though her initial election paperwork was never received hereby is denied. Petitioner claimed that she

submitted the proper paperwork to her employer but neither she nor her employer could produce a copy of the initial election form that she claimed was submitted.

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.

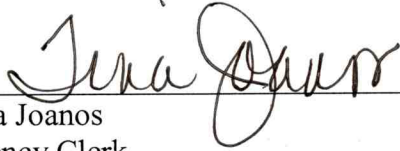
DONE AND ORDERED this 6th day of September, 2016, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

Joan B. Haseman

Joan B. Haseman
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 Cheryl Rivera, pro se, both by email transmission, [REDACTED] and by U.S. Mail to [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 6th day of September, 2016.



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

CHERYL RIVERA,

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Case No.: 2016-3580

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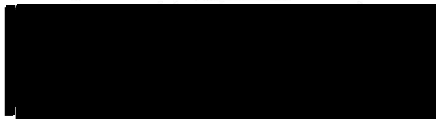
Respondent.

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 May 17, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Cheryl Rivera, pro se



For Respondent: Brian A. Newman
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether the SBA can grant Petitioner's request to select the Florida Retirement System (FRS) Investment Plan as her initial plan election instead of the Pension Plan.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 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 thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner became eligible for FRS participation by virtue of her employment with the Broward College on December 9, 2013.

2. Petitioner's hire date established a deadline of June 30, 2014 to make an initial election to join either the defined benefit Pension Plan or the defined contribution Investment Plan.

3. A notice was mailed to Petitioner at [REDACTED] [REDACTED] advising her of the differences between FRS plans and her deadline to make an initial election to join a plan. The notice to Petitioner advised her – consistent with Florida law – that “[y]ou will default into the FRS Pension Plan unless you enroll by the deadline on page 1” (i.e. June 30, 2014). Petitioner was advised that she could make her initial election by mail, by telephone or by logging onto www.MyFRS.com.

4. Petitioner testified that she attempted to enroll in the Investment Plan as her initial election by sending an initial election form by inter-office mail to the human resources department of Broward College on January 23, 2014.

5. The Plan Choice Administrator for the Investment Plan never received an initial election for Petitioner. Accordingly, she was defaulted to Pension Plan membership on July 1, 2014.

6. Petitioner is unable to produce a copy of the initial election form she gave her employer on January 23, 2014. Petitioner's employer is likewise unable to produce a copy of Petitioner's initial election form. According to Broward College, it does not have Petitioner's FRS paperwork "indicating that [she] did not turn it in." However, Broward College's "Work Day" computer system indicates that Petitioner was enrolled in the FRS Investment Plan as of December 9, 2013, the date of her employment.

7. On July 3, 2014, a notice was mailed to Petitioner advising her of her plan choice default to Pension Plan membership. The notice was addressed to Petitioner but did not include her apartment unit number. Petitioner testified that she did not receive the notice advising her that she defaulted to Pension Plan membership. Petitioner testified that mail that omits her apartment unit number may not be delivered to her.

8. On February 22, 2016 the Plan Choice Administrator received from Petitioner a completed and signed second election form indicating her desire to transfer from the Pension Plan to the Investment Plan. However, Petitioner contacted the SBA within the second election rescission grace period and has been given the option to rescind her second election pending the outcome of this case.

9. Petitioner also submitted a Request for Intervention on February 22, 2016 requesting enrollment into the Investment Plan from her date of hire with Broward College. Her request was denied. Petitioner then filed a Petition for Hearing requesting the same relief, and this administrative proceeding followed.

CONCLUSIONS OF LAW

10. FRS initial plan election is governed by section 121.4501(4)(a)2. which provides:

2. With respect to employees who become eligible to participate in the investment plan by reason of employment in a regularly established position with a state employer commencing after April 1, 2002:

a. Any such employee shall, by default, be enrolled in the pension plan at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the investment plan. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. The election to participate in the investment plan is irrevocable, except as provided in paragraph (g).

b. If the employee files such election within the prescribed time period, enrollment in the investment plan is effective on the first day of employment. The retirement contributions paid through the month of the employee plan change shall be transferred to the investment program, and, effective the first day of the next month, the employer and employee must pay the applicable contributions based on the employee membership class in the program.

c. An employee who fails to elect to participate in the investment plan within the prescribed time period is deemed to have elected to retain membership in the pension plan, and the employee's option to elect to participate in the investment plan is forfeited.

(Emphasis added).

11. Pursuant to this statute, Petitioner had until the last business day of the fifth month following her month of hire, June 30, 2014, to make an initial election. The initial election must be submitted to the SBA Plan Choice Administrator to be effective. Rule 19-11.006(2)(d), Fla. Admin. Code. Section 121.021(10) Florida Statutes provides, "Employers are not agents of the state board . . . and the state board . . . [is] not responsible for erroneous information provided by representatives of employers".

12. For purposes of analysis, I accept as accurate Petitioner's statement that her human resources department failed to submit her initial election form to the SBA Plan Choice Administrator after it was timely given to them by her. Under section 121.021(10), Florida

Statutes, this negligence or misfeasance cannot be attributed to the Respondent SBA, as it is, by law, not responsible for Petitioner's employer's actions by virtue of any agent/principal relationship. Id.

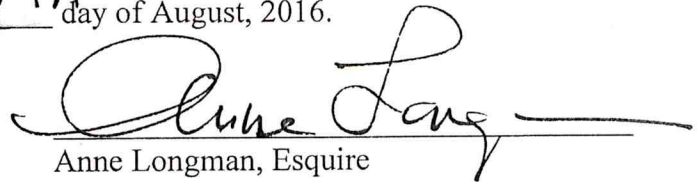
13. Because Petitioner has the burden of demonstrating that she is entitled to the relief she requested, and because no one has been able to produce an actual second election form, despite diligent search, there is no fact basis here for granting the relief Petitioner seeks. This tribunal has no plenary jurisdiction to hear negligence claims. It is unfortunate that Petitioner may be without a viable or practical remedy for inaction that was not her fault. I note that Respondent SBA does have the statutory authority to resolve member complaints against the Investment Plan program and may resolve any other conflicts. §121.4501(8)(g) Fla. Stat. (2015). It is not clear how this particular conflict could be resolved by the SBA, given that the entity alleged by Petitioner to be at fault, Broward College, is not party to this proceeding.

14. The SBA cannot deviate from 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. 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).

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 11th day of August, 2016.



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

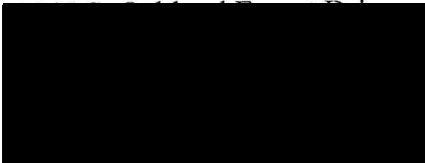
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Cheryl Rivera



Petitioner

and via electronic mail only to:

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

Counsel for Respondent