

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MARIA FUENTES,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2019-0172
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On September 4, 2019, 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, Maria Fuentes, 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 by September 19, 2019, 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

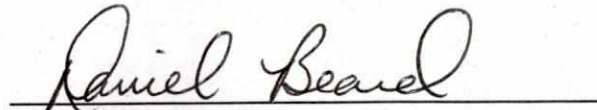
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that she be granted a "third election" so that she could switch back from the Florida Retirement System ("FRS") Investment Plan to the FRS Pension Plan so that she could have the option of joining the DROP program upon attaining age 62 hereby is denied. Petitioner first had claimed that she had been inadvertently switched to

the FRS Investment Plan without her knowledge and consent. Later she claimed that she was manipulated into switching retirement plans. However, Respondent's records established that Petitioner had received quarterly statements indicating that she was an FRS Investment Plan member and further indicating that she had allocated her account among various multiple asset classes at various times. Petitioner could not produce any documentary evidence to demonstrate that her second election was taken without her knowledge and consent. Further, even if Petitioner had been provided erroneous information by a financial advisor hired by her employer, 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.

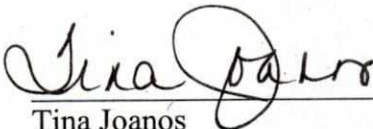
DONE AND ORDERED this 9th day of October, 2019, in Tallahassee, Florida.

**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

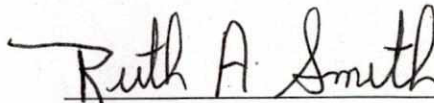
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Maria Fuentes, pro se, both by email transmission at [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 9th day of October, 2019.



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

MARIA FUENTES,

Petitioner,

vs.

CASE NO. 2019-0172

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 July 9, 2019, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Maria Fuentes, pro se
For Respondent: Ruth Vafek
Ausley McMullen, P.A.
PO Box 391
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner may switch from the Florida Retirement System (FRS) Investment Plan back into the FRS Pension Plan, despite having already utilized her second election.

PRELIMINARY STATEMENT

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

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties 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.

UNDISPUTED MATERIAL FACTS

1. The Petitioner began employment with the Broward County School Board, an FRS-participating employer, in January 1996. At this time, the defined benefit Pension Plan was the only retirement program available for eligible employees, thus Petitioner was enrolled in the Pension Plan.

2. In 2002, the defined contribution Investment Plan became effective for employees participating in the Florida Retirement System. Petitioner had a choice window from September 1, 2002, through November 30, 2002, to remain in the Pension Plan or switch to the Investment Plan. The Plan Choice Administrator received Petitioner's Plan Choice Form on November 4, 2002, electing to remain in the Pension Plan.

3. On October 25, 2006, the Plan Choice Administrator received and processed a 2nd Election Retirement Plan Enrollment Form, Form ELE-2, bearing Petitioner's handwritten signature and electing to change from the Pension Plan to the Investment Plan. This form established an effective date in the Investment Plan of November 1, 2006.

4. Petitioner's second election became final and irrevocable at 4:00 PM (Eastern) on October 25, 2006, although SBA rules provide a grace period to rescind an election, in this case by notifying the FRS no later than November 30, 2006, as Form ELE-2 informed her. But Respondent has no record of Petitioner notifying the FRS of any request to rescind her second election.

5. On November 30, 2006, the present value of Petitioner's Pension Plan benefit was transferred to her Investment Plan account.

6. At hearing, Petitioner acknowledged that the above facts are correct. ("...it is correct what she's saying."). She also admitted that she did make the Investment Plan election in 2006.

7. On April 18, 2019, Petitioner completed a Request for Intervention requesting that she be switched back to the Pension Plan because she "was inadvertently switched from the defined benefit pension plan to the investment plan." Petitioner asserted she was requesting assistance because she "want[s] to be on the pension plan side in the event [she] want[s] to join the DROP program when [she] turn[s] 62 [years] of age." This request was denied.

8. On May 11, 2019, Petitioner filed a Petition for Hearing requesting the same relief and asserting instead that she was "manipulated into using [her] second election," because a "financial advisor from the contracted entity by the School Board[] misled [her] and gave [her] false information for his personal growth." Petitioner asserts this financial advisor, "Marshall Hadden," came to her employer and "scared employees into switching over from the pension plan to the investment plan, because we would lose benefits upon our death. . . . Also there were no specifics given, nor comparison for both plans, and what was eligible and not eligible in each plan." This administrative proceeding followed.

9. "Marshall Hadden" was not and is not an employee of Respondent, nor was he an employee of any Respondent vendor.

10. Respondent produced records of Petitioner's quarterly statements that date from 2006 to the present. At the top of each quarterly statement from the fourth quarter of 2006 onwards, is the heading, "Florida Retirement System Investment Plan."

11. Petitioner's second election enrollment form and relevant quarterly statements demonstrate that she has allocated her investment account among multiple different asset classes at various times, and has changed those allocations from time to time.

CONCLUSIONS OF LAW

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

(f) 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.

§ 121.4501(4)(f), Fla. Stat. (emphasis added).

13. Petitioner has not come forward with any documentary evidence or audio recording demonstrating that the switch from the Pension Plan to the Investment Plan in 2006 was done without her knowledge and consent. Rather, all of the evidence, including her testimony at the hearing, her handwritten signature on her second election form, and years worth of quarterly statements from the Investment Plan, demonstrate that Petitioner elected the

Investment Plan, knew she was in the Investment Plan, and never took timely action to switch or undo her second election.

14. Petitioner made a valid and binding second election, and Florida law does not permit her to change her election at this time, almost thirteen years later.

15. There is no statutory provision authorizing Respondent to grant Petitioner a third election to switch back to the Pension Plan, and such an action would violate the applicable statutory restrictions.

16. Petitioner cannot rescind her second election at this point because she failed to do so before the deadline established by the grace period provided under Rule 19-11.007, Florida Administrative Code:

(4) Grace Period.

- (a) If a member files an election with the Plan Choice Administrator and the member realizes that the election was made in error, or if the member has considered his or her plan choice, the SBA will consider, on a case-by-case basis, whether the election will be reversed, subject to the following: The member must notify the SBA by a telephone call to the toll free MyFRS Financial Guidance Line at: 1(866) 446-9377, or by written correspondence directly to the SBA, to the Plan Choice Administrator, to the Financial Guidance Line, or to the Division, no later than 4:00 p.m. Eastern Time on the last business day of the election effective month.
- (b) If the request to reverse the election is made timely and the SBA finds the election was made in error, the member will be required to sign a release and return it to the SBA no later than 4:00 p.m., Eastern Time, on the last business day of the election effective month prior to the election's being officially reversed. Upon receipt of the release, the Division and the Plan Choice Administrator will be directed to take the necessary steps to reverse the election and to correct the member's records to reflect the election reversal.
- (c) A confirmation that the election was reversed will be sent to the member by the FRS Plan Choice Administrator.
- (d) The member retains the right to file a subsequent second election consistent with subsections (2) and (3), above.

(e) Nothing contained in this subsection will interfere with a member's right to file a complaint, as permitted by Section 121.4501(8)(g), F.S. and discussed in Rule 19-11.005, F.A.C.

Rule 19-11.007(4), F.A.C. (emphasis added).

17. Under this rule, Petitioner had until the time the present value of her Pension Plan benefit was transferred to her Investment Plan account (November 30, 2006) to rescind her second election.

18. Petitioner contends that she was manipulated into switching to the Investment Plan in 2006 based on assertions made by a certain "Marshall Hadden," whom Petitioner describes as "[a] financial advisor from the contracted entity by the School Board." However, Mr. Hadden is not an employee of Respondent or any of its vendors. Even if Mr. Hadden were an employee or agent of Petitioner's employer, 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."

19. Respondent, as an administrative entity of the State of Florida, has only those powers conferred upon it by the legislature. See, e.g., Pesta v. Dep't of Corrections, 63 So.3d 788 (Fla. 1st DCA 2011). The Florida Administrative Procedure Act expressly provides that statutory language describing the powers and functions of such an entity are to be construed to extend "no further than...the specific powers and duties conferred by the enabling statute." §§ 120.52(8) and 120.536(1), Fla. Stat.

20. Respondent is charged with implementing Chapter 121, Florida Statutes, and is not authorized to depart from the requirements of these statutes when exercising its jurisdiction and has

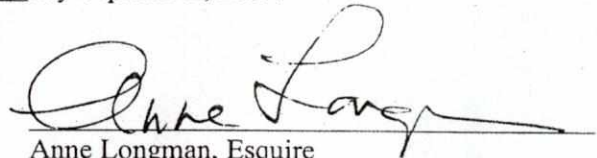
no power to enlarge, modify, or contravene the authority granted to it by the legislature. State, Dept. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco v. Salvation Ltd., Inc., 452 So. 2d 65, 66 (Fla. 1st DCA 1984); Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 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").

21. Accordingly, Respondent does not have the authority to provide Petitioner with a third election or undo her second election, and therefore cannot grant the relief requested in the Petition for Hearing.

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.

RESPECTFULLY SUBMITTED this 4th day September, 2019.



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
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Maria Fuentes



Petitioner

and via electronic mail only to:

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Ruth E. Vafek, Esquire
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