

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

VIRGINIA WILSON,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2019-0291
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On January 21, 2020, 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, Virginia Wilson, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order, but instead filed an Affidavit detailing her assertions. No exceptions to the Recommended Order, which were due by February 5, 2020, 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

hereby is denied. Petitioner claimed that she was manipulated into switching retirement plans by an individual employed by her employer. However, even if Petitioner had been provided erroneous information by someone 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. Petitioner could not produce any documentary evidence or audio recording to demonstrate that her second election was taken without her knowledge and consent. All evidence produced demonstrated that Petitioner was fully aware she was in the FRS Investment Plan and that she failed to take timely action to undo her second election into the FRS Investment Plan.

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 26 day of February, 2020, 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 Virginia Wilson, pro se, both by email transmission to [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 26 day of February, 2020.



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

VIRGINIA WILSON,

Petitioner,

vs.

CASE NO. 2019-0291

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 October 22, 2019, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Virginia Wilson, pro se (by telephone)

For Respondent: Deborah Minnis
Ausley McMullen, P.A.
123 South Calhoun Street (32301)
PO Box 391
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether the SBA should grant Petitioner's request to transfer from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan.

EXHIBIT A

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-4 and were admitted into evidence without objection. On October 29, 2019 Petitioner filed a response to Exhibit R-3.

Pursuant to my Order for Transcript and Proposed Recommended Orders of November 6, 2019, 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 received. Respondent filed a proposed recommended order, and Petitioner filed an Affidavit detailing the assertions made in her case.

UNDISPUTED MATERIAL FACTS

1. The Petitioner began employment with the Department of Children and Families, an FRS-participating employer, in August 1993. At this time, the Pension Plan was the only retirement program available for eligible employees.
2. Petitioner subsequently worked for the Hardee County School Board, the Polk County Sheriff's Office and the Collier County Sheriff's Office where she is currently employed. All those entities are FRS participating agencies.
3. Upon the Florida Legislature's creation of the Investment Plan, all current employees of FRS participating agencies could make an initial election to remain in the Pension Plan or enroll in the Investment Plan. Petitioner had a choice election period of December 1, 2002 to February 28, 2003 to make her initial election.
4. Respondent's records reflect that the Plan Choice Administrator received Petitioner's initial election to remain in the Pension Plan on February 21, 2003.

5. Respondent's records indicate that Petitioner exercised her one-time second election to transfer from the Pension Plan to Investment Plan in November 2005. The Plan Choice Administrator received Petitioner's second election form on November 18, 2005.

6. Petitioner claims that an individual named Pauline Thomas convinced her that the Investment Plan and not the Pension Plan would be a better retirement option for her. Ms. Thomas was not an employee of Respondent, but was an employee of the Collier County Sheriff's Office.

7. In multiple sections of the election form, Petitioner was advised that this would be her onetime second election. In fact, section 4, item 1, of the form states that the signee understands that the enrollment selected would represent a second election and that the signee would have to remain in the selected retirement plan until retirement from FRS. Petitioner was advised that her election was irrevocable. Petitioner was also reminded of the finality of this election in section 4, item 3.

8. Petitioner's second election became final and irrevocable at 4:00 p.m. (EST) on November 18, 2005. By law, Petitioner had a grace period until December 30, 2005 to rescind this election.

9. Petitioner did not rescind her election within the statutory grace period.

CONCLUSIONS OF LAW

10. 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).

11. There is no statutory provision authorizing Respondent to grant Petitioner a third election to switch back to the Pension Plan.

12. As provided in the above statute, FRS members each have one, and only one, opportunity to switch plans after their initial election period expires. Because Petitioner used her one-time second election in 2005, she has exhausted her only opportunity to move between plans. There is no “third” election. Petitioner cannot rescind her second election at this point because she failed to do so before the deadline established by the applicable rule. The grace period provided under Rule 19-11.007, Florida Administrative Code, is as follows:

(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).

13. Under this rule, Petitioner had until the time the present value of her Pension Plan benefit was transferred to her Investment Plan account (December 30, 2005) to rescind her second election.

14. Petitioner contends that she was manipulated into switching to the Investment Plan in 2005 based on assertions made by a certain "Pauline Thomas." Ms. Thomas is not an employee of Respondent or any of its vendors, and Respondent is not responsible for Petitioner's actions based on information from individuals who are not associated with Respondent or its vendors. 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."

15. 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 2005 was done without her knowledge and consent. Rather, all of the evidence, including her testimony at the hearing and her handwritten signature on her second election form, demonstrates 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.

16. In light of the above, Petitioner made a valid and binding second election, and Florida law does not permit her either to make a third election or to rescind her second election at

this time, almost thirteen years later. Accordingly, Petitioner was and still is correctly placed in the Investment Plan.

17. 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.

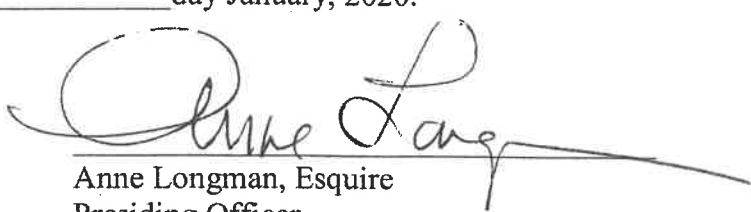
18. Respondent is not authorized to depart from the requirements of statute when exercising its jurisdiction and has no power to enlarge, modify, or contravene the authority granted to it by the legislature. State, Dept. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco v. Salvation Ltd., Inc., 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").

19. Respondent has no authority to allow Petitioner a third election or to 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 21st day January, 2020.


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

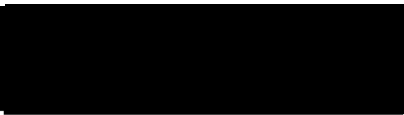
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which 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 Boulevard, 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:

Virginia Wilson



Petitioner

and via electronic mail only to:

Deborah Minnis, Esquire
Ruth Vafek, Esquire
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32301
dminnis@ausley.com
rvafek@ausley.com
jmcvaney@ausley.com
Counsel for Respondent