

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DEBORAH A. MCLEOD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2014-3114
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On January 13, 2015, the Presiding Officer submitted her Recommended Order to the State Board of Administration (“SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Deborah A. McLeod, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions which were due January 28, 2015.

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 she be deemed to have made a valid second election to transfer from the Florida Retirement System Pension Plan to the Florida Retirement System Investment

Plan prior to the date she terminated Florida Retirement System covered employment, where Petitioner could not demonstrate by a preponderance of evidence that she had actually filed a second election form prior to 4:00 p.m. on her termination date and there is no record of the receipt of second election form from Petitioner by the SBA or its Plan Choice Administrator, 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 13th day of March, 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.

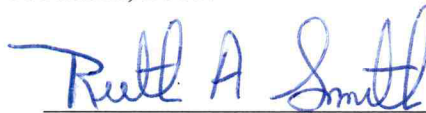


Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Deborah A. McLeod, pro se, both by email transmission,

([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 13th day of March, 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

DEBORAH A. MCLEOD,

Petitioner,

vs.

Case No.: 2014-3114

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 November 13, 2014, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Deborah A. McLeod, pro se


Petitioner

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be allowed to transfer from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan based upon her assertion that she timely submitted a second election form prior to her termination of FRS-covered employment, when that form was not received by Respondent's Plan Choice Administrator.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-7 and Petitioner's Exhibits P-1 through P2 were admitted into evidence without objection.

A transcript of the informal 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.

MATERIAL UNDISPUTED FACTS

1. Petitioner enrolled in the Florida Retirement System on February 12, 2008. She was a member of the defined benefit Pension Plan.
2. Petitioner terminated employment with her FRS-covered employer, the City of Mexico Beach, on July 5, 2013.
3. Petitioner testified that she was aware that she was obligated to submit a second election form before she terminated FRS-covered employment if she wished to transfer from the Pension Plan to the defined contribution Investment Plan.
4. Petitioner testified that she faxed a second election form indicating her desire to transfer to the Investment Plan to Aon Hewitt, the SBA's Plan Choice Administrator, in July of 2013, prior to her resignation. Petitioner has been unable, however, to find a copy of this form or any other evidence of it.

5. Petitioner testified that she was alone in the room with the fax machine when she transmitted her second election form. Accordingly, she could not produce any witness to corroborate her testimony that the form was faxed to the SBA before her resignation.

6. Petitioner produced a letter from Adrian Welle, the City Clerk for Mexico Beach, which states that “[p]rior to the resignation of City Clerk Deborah McLeod in 2013, Ms. McLeod submitted a form to the Florida Retirement System changing from the Pension [P]lan to the Investment [P]lan system.” Petitioner testified, however, that Mr. Welle had no first-hand knowledge of the facts recited in his letter.

7. Petitioner acknowledged that the fax journal report produced by the City of Mexico Beach does not show a facsimile being transmitted to the SBA during the relevant time-frame.

8. Petitioner contends that the city’s fax machine often malfunctioned, explaining why there is no record of her fax to the SBA. Petitioner produced a second letter from Mr. Welle which states that the fax machine at the City of Mexico Beach malfunctions often.

9. Petitioner had the option of submitting her second election form by three different means: mail, facsimile, or online. The SBA’s receipt of second election forms can be confirmed with a telephone call to Aon Hewitt, the Plan Choice Administrator for the Investment Plan. FRS member calls to AON Hewitt are recorded.

10. There is no record of the SBA or its Plan Choice Administrator receiving a second election form from Petitioner, despite searches of records from the relevant time period.

CONCLUSIONS OF LAW

11. Petitioner has one second election option to transfer from the Pension Plan to the Investment Plan. Section 121.4501(4)(g), Florida Statutes requires that an employee be earning

service credit with an FRS-covered employer when a second election option is exercised. The process for making a valid second election is governed by Rule 19-11.007(2), Florida Administrative Code:

A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator while 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, terminated members, or employees of an educational institution on summer break cannot use their 2nd election until they return to covered FRS employment. In general terms, this means that the 2nd election must be made and processed while the member is actively working and being paid for that work. It is the responsibility of the member to assure that the 2nd election is received by the Plan Choice Administrator no later than 4:00 p.m. Eastern Time on the last business day the member is earning salary and service credit.

(Emphasis added).

12. Under this rule, Petitioner bears the burden of showing that her second election form was received by the Plan Choice Administrator no later than 4:00 p.m. on her last day of FRS-covered employment. Petitioner has been unable to provide any proof that her second election form was received by the Plan Choice Administrator before 4:00 p.m. on July 5, 2014, the day she terminated FRS-covered employment. She therefore cannot meet her burden to show that she is entitled to Investment Plan membership. Serpas v. State Board of Administration, DOAH Case No. 12-3250 (Recommended Order January 30, 2013; adopted by Final Order February 20, 2013.)

13. In the above-referenced case, Mr. Serpas presented a witness who testified that he faxed a second election form to the Plan Choice Administrator for Petitioner before 4:00 p.m. on his last day of FRS-covered employment. Mr. Serpas was unable, however, to produce a copy of his second election form, any proof that the form had been successfully transmitted by facsimile,

or any proof that the form had been received by the Plan Choice Administrator. The Administrative Law Judge found that Mr. Serpas failed to meet his burden to demonstrate that he timely processed his second election option under Rule 19-11.007(2), and was therefore not entitled to Investment Plan membership.

14. The undisputed facts here are similar to the facts in Serpas except that Petitioner has no witness who saw her transmit her second election form. Petitioner has been unable to locate a copy of the form or any evidence that a form was received by the Plan Choice Administrator before her second election deadline expired.

15. Petitioner did produce evidence that the Mexico Beach fax machine that she used often malfunctioned, which would explain why her fax was not received by the SBA and why there was no record of its transmission on the city's fax journal report. But unfortunately this evidence does not prove that her second election form was received by the SBA; at most it would prove that the city's fax machine malfunctioned during her attempt to submit her second election form.

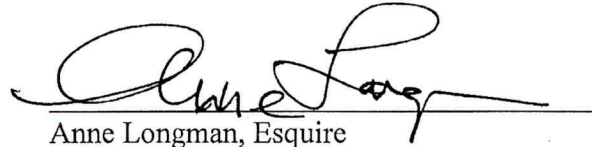
16. The SBA is not authorized to depart from the requirements of Section 121.4501(8)(a) or its duly enacted rules when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The SBA's construction and application of 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). Absent proof of the timely receipt of her second

election form by Aon Hewitt, Petitioner cannot show entitlement to Investment Plan membership.

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 13th day of January, 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

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

This 13th day of January, 2015.

Via U.S. Mail and email:



Petitioner

Via electronic delivery:

Brian A. Newman, Esquire

Brandice D. Dickson

Pennington, P.A.

Post Office Box 10095

Tallahassee, FL 32302-2095

slindsey@penningtonlaw.com

Attorneys for Respondent

A handwritten signature in cursive script, appearing to read "Anne Long", written over a horizontal line.

Attorney