

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SURINDER PAUL BAWA,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2010-1840
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On November 9, 2010, 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, Surinder Paul Bawa, and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. Petitioner timely filed exceptions to the Recommended Order on November 22, 2010. 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.

RULING ON PETITIONER’S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner filed four paragraphs of unnumbered exceptions to the Recommended Order. The exceptions set forth under the first three paragraphs are not exceptions to the Recommended Order itself, but instead set forth an assertion by the Petitioner that his

public records request, as set forth in Petitioner's Proposed Recommended Order, and his request for certain telephone call transcripts, have not received a complete response.

Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

The first three paragraphs of Petitioner's exceptions clearly do not identify any disputed portions of the Recommended Order, do not identify any legal basis for the exceptions, and do not include appropriate and specific citations to the record. Further, none of the materials requested by Petitioner were required by the presiding officer in formulating her recommendation, as is noted in the Preliminary Statement of the Recommended Order. Accordingly, the first three paragraphs of Petitioner's exceptions hereby are rejected. Any issues pertaining to the Petitioner's public records request and request for telephone call transcripts will be handled separately from this Final Order.

The fourth paragraph of Petitioner's exceptions does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, does not identify the legal basis for the exceptions, and does not include appropriate and specific citations to the record. This paragraph consists merely of an argument that Respondent's attorney and witness provided incorrect information that the Petitioner had stated he was going to be leaving FRS employment. Further, Exhibit R-11 to the hearing transcript, that sets forth a transcript of the telephone conversation between the Petitioner and the MyFRS Guidance Line on July 14, 2003, contains some statements by the Petitioner, on pages 6 through 14, to the effect that

Petitioner might be leaving FRS employment sometime during August 2003. Accordingly, the fourth paragraph of Petitioner's exceptions hereby is rejected.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be permitted to make another election to transfer from the Investment Plan to the Pension Plan 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 4th day of January, 2011, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



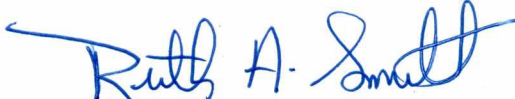
Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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.


Clerk Tina Joanos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Surinder Paul Bawa, [REDACTED], [REDACTED] and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 4th day of January, 2011.



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

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SURINDER PAUL BAWA,

Petitioner,

vs.

Case No.: 2010-1840

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on September 10, 2010, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Surinder Paul Bawa


For Respondent:

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner may be permitted to make another election in order to move from the Investment Plan to the Pension Plan.

PRELIMINARY STATEMENT

An informal hearing was held on the Petition for Hearing of July 21, 2010, in which Petitioner asserts that he has not yet used his second election and should be allowed to return to the Florida Retirement System (FRS) Pension Plan. Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-13 were admitted into evidence without objection. Respondent's Exhibit R-14, a Plan Choice Workshop Schedule, was submitted post-hearing after testimony on same. Petitioner has objected to this exhibit as not having been in the "choice book" that is R-3. This appears to be true, but R-14 will be admitted over this objection and for information purposes, although I do not rely on it in making my recommendation.

A transcript of the hearing was filed with the agency and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Both Petitioner and Respondent filed Proposed Recommended Orders. Petitioner's proposed order includes at item nine a request for public records "of MYFRS records for members (active members) who were allowed to go back to the pension fund or rescinded there election from October 2002 till October 2010," and also asserts that he did not know of the potential availability of a hearing in the Division of Administrative Hearings (DOAH). After a thorough review of the record, I do not find there to be a disputed issue of material fact that would warrant referral to DOAH for a formal proceeding, and while Petitioner certainly has the right to request public records from the SBA, I have based my recommendation on the materials before me at the present time.

UNDISPUTED MATERIAL FACTS

1. For all relevant times, Petitioner has been employed by the Broward County Board of County Commissioners.
2. In 2002, during the initial implementation of the Public Employee Optional Retirement Program (known as the Investment Plan) he was informed that the FRS was adding this defined contribution program as a retirement plan choice.
3. At the time, the Petitioner was a member of the Pension Plan, as were all FRS participants.
4. Respondent mailed the Petitioner a Choice Kit that explained he would have to elect between the new Investment Plan and the Pension Plan, set out the time period in which this would have to be done and advised that the choice between the two had to be made no later than February 28, 2003. The Choice Kit also stated that Petitioner would have one remaining opportunity to switch plans after the initial election period expired on February 28, 2003.
5. Petitioner spoke with a MyFRS Financial Guidance Line counselor on February 28, 2003, the last day of his initial choice period. He acknowledged that it was the last day to make his choice, that he had received materials about making this choice, and that he knew he had another one-time election. He was warned that this second election had to be made while he was still employed.
6. On July 9 and 14, 2003, after the initial election period was over, the Petitioner again called the MyFRS Financial Guidance Line. In both of these calls, Petitioner's stated intention was to move from the Pension Plan to the Investment Plan. He was told specifically during the July 9, 2003 call that he had already used his first election even though he had not made an active election and instead remained by default in the Pension Plan: "Your first, your

first election was by the end of February, which, even though you did not make an active one, it was still considered to be your first election.”

7. Also during the July 14, 2003 telephone call, Petitioner stated that he was going to send in a second election and switch plans and advised the Guidance Line representative that he was planning to leave his FRS-covered employment in August. He was warned at length that switching to the Investment Plan could result in his receiving a lesser amount than if he waited and took his vested Pension Plan benefit, but he continued to state that this was what he wanted to do.

8. On July 16, 2003, Petitioner filed a 2nd Election Retirement Plan Choice Form and elected to switch from the FRS Pension Plan to the FRS Investment Plan. That form advised Petitioner:

I also understand that... if I am currently a member of the FRS Pension Plan, this election will constitute my second choice election as provided under the FRS. As such, my one-time second election will be irrevocable for as long as I am actively employed in an FRS covered position and I understand that I must remain in this plan until my retirement.

9. Petitioner’s second election was processed, and he was enrolled in the FRS Investment Plan effective July 16, 2003. Some seven years later, Petitioner submitted a Request for Intervention dated June 18, 2010 that for the first time requested he be placed back into the FRS Pension Plan.

10. The Petitioner was advised by the Respondent on July 8, 2010 that his request to return to the FRS Pension Plan was denied because he had exhausted his elections.

CONCLUSIONS OF LAW

11. In 2002, the Florida Legislature required that a defined contribution plan be added to the FRS retirement offerings. Covered FRS employees could elect to participate in either the defined benefit program (the Pension Plan) or the Public Employee Optional Retirement Program, (the Investment Plan). During the roll-out period, local government employees could participate in the Investment Plan by filing an election form by February 28, 2003. §121.4501(4), Fla.Stat. (2002). Employees such as Petitioner, who did not file an election within this initial period, remained by default in the Pension Plan.

12. After the initial election period expired, these employees still had a one-time irrevocable second election that could be used to switch from the Pension Plan into the Investment Plan. Section 121.4501(4)(e), Florida Statutes (2002) states:

(e) After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, or the month following the eligible employee's plan selection effective date, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program.

§ 121.4501(4)(e), Fla.Stat. (2002).

After the initial election period expires and the second election is used, there is no other statutory vehicle providing for a switch between plans. Consistent with the statute, the plan choice form filed by Petitioner makes clear that this one time opportunity to change plans is irrevocable.

13. Petitioner has asserted that his passive initial “default” into the Pension Plan, cannot be interpreted as his having ever utilized a “first” election and that therefore a “second” election must still be available to him. Whatever the various choices may be called, my review of the record here indicates that the information provided to Petitioner, both in print and by

telephone, was correct, and that he was not misled as to the effect of the switch to the Investment Plan that he made in 2003.

14. The SBA was and is statutorily charged with making available to FRS members the educational materials they need to make an informed choice between the two FRS plans. See § 121.4501(10), Fla.Stat. (2002). Through its workshops, direct mailings, access to online resources and the telephone MyFRS Financial Guidance Line, Respondent satisfied its duty to make the necessary information material available to Petitioner.

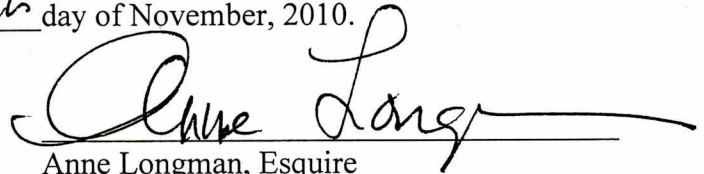
15. Respondent is not authorized to depart from the requirements of the statutes it administers, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See 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).

16. It is unfortunate that Petitioner used his second election to switch to the Investment Plan when he has remained in FRS-covered employment and clearly would prefer now to be in the Pension Plan. My review of the record in this case indicates, however, that Petitioner was intent on entering the Investment Plan, that he was given appropriate informational material to enable him to make an informed decision between the Pension Plan and the Investment Plan, and that he was specifically warned that this might not be the correct decision and told that he had already made a first election before he submitted his second and last election on July 16, 2003. There is no provision of law that would allow him now to return to the Pension Plan.

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 9th day of November, 2010.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

NOTICE: 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, which 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 with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 9th day of November, 2010.

Copies furnished to:



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Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent

Chae Sang
Attorney

Surinder Paul Bawa

Petitioner,

Case No. 2010-1840

Vs.

State Board of Administration,

Respondent

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GENERAL COUNSEL'S OFFICE

Exceptions to the Recommended Order

I received the recommended order from the Presiding officer Ann Longman dated November 9, 2010 on November 13, 2010. I also received a letter from Mr. Daniel Beard dated November 2, 2010, postmarked dated November 3, 2010 on November 6, 2010. I had requested in my Proposed Recommended Order, for Public Records Request and Transcripts of June/July 2010 conversations with MYFRS Representative, which I Petitioner will submit as Exhibits. Mr. Daniel Beard has not complied with my Public Record Request.

I did however receive a letter from Mr. Beard explaining the two lists he submitted instead. **One Granted Request and Second Denied Request.** Mr. Beard in his Granted Request list does not show any dates when the members requested to move out of Investment Plan and then rescinded to the Pension Plan but in the Denied Request he shows all the dates. Seems to me that Mr. Beard's office cut and paste names from I don't know where and added it to a MS Word document or an Excel document with a heading Granted Request and Denied Request. This does not suffice the request I had made for Public Record Request. Please provide Petitioner with the correct information in detail, **Public Record Request means complete document and In case Mr. Beard did not understand my original request he should understand it now. I want to have access to the complete request made by the MYFRS members to rejoin the Pension Plan and not to have to rely on Mr. Beard statement in his letter that there situation does not apply to me and to create his own list.**

Mr. Beard to date has not provided the Petitioner with the transcripts which were requested of him, conversations between the Petitioner and MYFRS Representative's as of June/July 2010, which will clearly show what Petitioner has been saying from the inception of his request that similar complaints were made and relief was provided to members who complained that they were misguided by MYFRS Representatives, this is contrary to their current position in which the Respondent and Mr. Beard assert that no such relief is available, I think Mr. Beard is worried of what he will hear in this conversation between Petitioner and MYFRS Representative's in MYFRS Representative's own words.

Respondents attorney and Mr. Beard keep insisting that I told MYFRS Representatives that I was leaving and I keep on saying no, MYFRS Representatives kept on asking me if I was leaving which is in July 9 transcript (**Exhibit 12**). In July 9, 2003 transcript page 8 line 18-22 MYFRS Representatives says "So the first thing I'm going to do for you is - let's say you decide you're going to work up until age 53 and then we'll estimate you receiving your benefit at age 62; Okay? Since you seem kind of interested in, you know, possibly leaving. So I think, you know, working for another two years there or --", at this point I said on page 8 line 25 "I doubt even two years and MYFRS Representative says, okay I'll cut that down to age 52" because being asked time and again if I'm leaving. MYFRS Representative was explaining to me

how the switch works because I still have to be on payroll for the first day of the following month that you submit your election, this is on page 10 Line 24 and ends on page 12 line 10. In **Exhibit 11** Petitioner asks MYFRS Representative when the transfer from Pension Plan to Investment Plan take effect and MYFRS Representative saying in Page 8 Line 1 to Page 9 Line 25 (It goes in effect the first day as long as you're there one day working on the payroll in August. That is where the assumption of month and dates transpired; I don't know where Respondents attorney and Mr. Beard got this information from, do they have another transcript which they did not provide or I'm not privy to. I never said that I was leaving.


Surinder Paul Bawa

[REDACTED]

[REDACTED]

November 17, 2010

Copies furnished to:

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