

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

LLOYD A. CHISM,)
)
 Petitioner,)
)
 vs.)
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
)
 _____)

Case No. 2007-1033
SBA-09-1-FOI

FINAL ORDER

On January 6, 2009, 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, Lloyd A. Chism, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on January 21, 2009. 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.

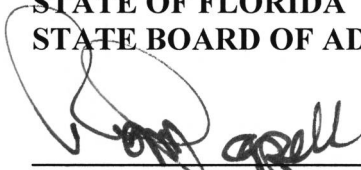
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to transfer his Pension Plan assets into the Investment Plan, even though he was not employed by an FRS-covered employer when his Second Election was received by the Plan Administrator, 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 200, 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.

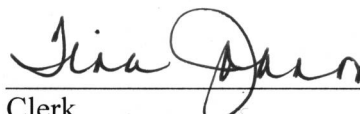
DONE AND ORDERED this 22nd day of January, 2009, in Tallahassee, Florida.

**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

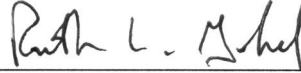
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Lloyd A. Chism, pro se, [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 22nd day of January, 2009.



Ruth L. Gokel
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

LLOYD A. CHISM,

Petitioner,

v.

CASE NO.: 2007-1033


STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on January 25, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Lloyd A. Chism, pro se

Petitioner

For Respondent: Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether the State Board of Administration (SBA) should grant Petitioner's request to transfer his Pension Plan assets to the Investment Plan, even though he was not employed

Exhibit A

RECEIVED
STATE BOARD OF ADMIN
09 JAN -7 PM 3:33
GENERAL COUNSEL'S OFFICE

by an FRS-covered agency when his Second Election was received by the third-party administrator.

PRELIMINARY STATEMENT

On October 18, 2007, Petitioner filed a Request for Intervention requesting that the second election form he executed be honored, and that his assets be transferred from the Pension Plan to the Investment Plan. This request was denied. Petitioner then filed a Petition for Hearing on November 19, 2007, resulting in an informal hearing which was held before the undersigned on January 25, 2008. During that hearing, exhibits 1 – 5 were offered by Respondent and admitted without objection. Testimony was taken from Petitioner and Dan Beard, Director of Policy, Risk Management and Compliance for the SBA.

A transcript of the informal hearing was made, filed with the agency and made available to the parties, who were invited to submit proposed recommended orders. Petitioner and Respondent jointly requested extensions of time to file Proposed Recommended Orders, which were granted to allow the parties to attempt to reach settlement. The parties were unable to amicably resolve this matter. A Proposed Recommended Order was submitted by Respondent; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. The Petitioner began his FRS-covered employment in May, 1986 and was enrolled in the Pension Plan. As an employee of Miami-Dade County, he was given the opportunity to join the FRS Investment Plan between December 2002 and February 2003, when that plan was rolled out by the Legislature. Because he did not elect to join the Investment Plan during that window, he remained in the Pension Plan. He has approximately 10 years of service in the Pension Plan.

2. Petitioner gave notice to his employer that he would be retiring in either late August or early September 2007. The Petitioner's employer reported that the Petitioner last worked on August 20, 2007, but that his termination date was recorded as September 4, 2007. His employer further reported that no leave time was used by the Petitioner during the August 20 – September 4 time period. Petitioner did not dispute these facts and testified that the last day he actually worked for Miami-Dade County was August 20, 2007.

3. Petitioner attempted to use his second election to switch from the FRS Pension Plan to the Investment Plan by filing a "2nd Election EZ Retirement Plan Enrollment Form." That form was executed by the Petitioner on August 30, 2007 and mailed to the Respondent's Third Party Administrator, CitiStreet, for processing.

4. The second election form executed by Petitioner states at the top of the first page:

You must be actively employed earning salary when your form is received by the FRS Plan Choice Administrator. If leaving FRS-covered employment, this form must be received prior to your termination date. If it is subsequently determined that you were not eligible to make a plan choice, your election will be considered invalid and will be reversed.

Petitioner was also advised of this requirement in the FRS Investment Plan Summary Plan Description and on the MyFRS.COM website.

5. The Petitioner utilized the MyFRS Financial Guidance Line counselors made available to him by the Respondent prior to filling out the 2nd Election form. On August 27, 2007, the Petitioner inquired of the counselor whether he could fax or email the completed form for processing and was told that he could not fax or email the form unless he wanted to wait until Friday, August 31, 2007 when a fax machine would be made available to him. In response, the Petitioner

advised that he would mail it because "it would get there quicker." Petitioner informed the counselor that he would get the form to CitiStreet "before the end of the month." There was no discussion regarding whether Mr. Chism was still actively employed on the date of this conversation, and the counselor seemed to assume that he was.

6. Petitioner's second election form dated August 30, 2007 was received by CitiStreet on September 4, 2007.

7. In its letter of October 31, 2007, Respondent informed Petitioner that he would have needed to submit a second election form while still earning service credit (receiving compensation) and prior to his termination date. Because he did not, his attempt to use his second election was deemed invalid.

CONCLUSIONS OF LAW

8. Section 121.4501(4)(e), Florida Statutes states:

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 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 defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. **Eligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship** consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be 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 that the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator.** This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

(Emphasis added).

9. An FRS member must be actively employed and earning service credit in the month a second election form is received by the third party administrator in order for the election to be deemed valid. On September 4, 2007, when CitiStreet received Mr. Chism's second election form, he was not working and earning service credit, and apparently had not been since August 20, 2007.

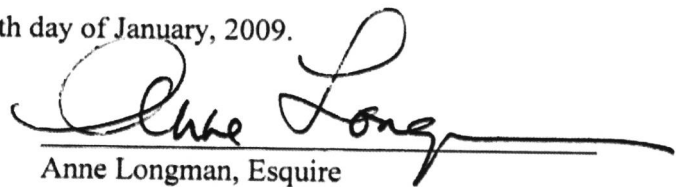
10. There does not appear to be any statutory authority under which Respondent State Board of Administration can legally grant the relief requested by the Petitioner, and agencies have only those powers conferred on them by statute. See e.g. East Cent. Regional Wastewater Facilities Operation Bd. v. City WPB, 659 So. 2d 402,404 (Fla. 4th DCA 1995); Gardinier Inc. v. Florida Dept. Pollution Control, 300 So. 2d 75,76 (Fla. 1st DCA 1974).

11. It is unfortunate that Petitioner tried to meet the statutory requirements for effecting a valid second election and was unable to do so, despite utilizing the available FRS resources, but I see no basis for the granting the relief requested.

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 sixth day of January, 2009.



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 should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

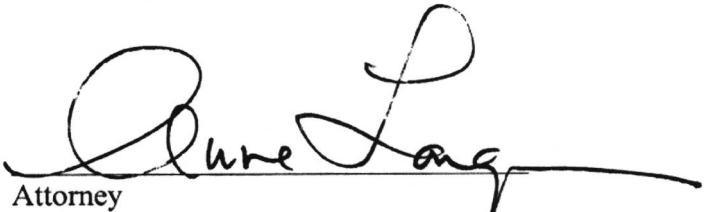
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 6th day of January, 2009.

Copies furnished to:

Lloyd A. Chism


Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent


Attorney