

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

NIGEL R. GUMBS,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2022-0137
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On July 27, 2022, 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, Nigel R. Gumbs, and upon counsel for the Respondent. No exceptions to the Recommended Order, which were due by August 11, 2022, 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 he be allowed to switch from the Florida Retirement System (“FRS”) Pension Plan to the FRS Investment Plan hereby is denied. There was no evidence produced by Petitioner to show that he filed his second election form while he still was actively employed in an FRS eligible position and earning salary and service credit. Petitioner is not entitled to the relief requested.

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 17 day of October, 2022, 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 Nigel R. Gumbs, *pro se*, both by email transmission to investortank@gmail.com and by U.P.S. to 10740 SW 222 Drive, Miami, Florida 33170; 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 17 day of October, 2022.



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**

NIGEL R. GUMBS,

Petitioner,

vs.

CASE NO. 2022-0137

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on June 6, 2022, at 10:00 a.m., with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner:	Quinton Gumbs, <u>pro se</u> As authorized representative for Nigel Gumbs
For Respondent:	Deborah Minnis Ausley McMullen, P.A. 123 South Calhoun Street (32301) Post Office Box 391 Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner made a valid election to switch from the Florida Retirement System (FRS) defined benefit Pension Plan into the FRS defined contribution Investment Plan.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone. Petitioner's authorized representative also attended the hearing by telephone, testified on behalf of Petitioner¹ and presented no other witnesses. Respondent attended the hearing by telephone and presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-6 were admitted into evidence during the hearing. Respondent, at my request, also submitted supplemental Exhibits R-7 and R-8 on June 10, 2022.

A transcript of the hearing was made, filed with the agency, and provided to the parties on June 20, 2022. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based on my consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED MATERIAL FACTS

1. Petitioner was hired in an FRS covered position by Miami-Dade County in June 1991. The only FRS plan at that time was the Pension Plan. The Investment Plan as created by the Florida Legislature was implemented in 2002, and it provided a deadline of February 28, 2003, for Pension Plan members such as Petitioner to elect to remain in the Pension Plan or to enroll in the new Investment Plan.

2. The Plan Choice Administrator, Alight Solutions, does not have a record of receiving an election from Petitioner prior to the expiration of the applicable deadline date and, therefore, he was defaulted into the Pension Plan with an effective date of March 1, 2003.

3. On December 23, 2021, Petitioner, with his son as his approved representative, contacted the MyFRS Guidance Line. During this telephone call, the EY Financial Planner

¹ During the hearing, Mr. Quentin Gumbs testified on behalf of Petitioner Nigel Gumbs. On July 14, 2022, Petitioner filed email correspondence in this matter authorizing Quentin Gumbs to speak on his behalf.

outlined the second election process with Petitioner and his son and went through with them the forms that would be needed to make a plan change.

4. Petitioner terminated his FRS eligible position with Miami-Dade County effective January 21, 2022. He then submitted a second election form on January 27, 2022, requesting a transfer from the Pension Plan to the Investment Plan.

5. Petitioner and his son contacted the MyFRS Guidance Line again on January 27, 2022. Petitioner and his son initially stated that he had emailed the second election form earlier and was calling to confirm receipt of the same.

6. The EY Financial Planner advised Petitioner and his son that there was no record of the second election form being received by the SBA Plan Choice Administrator. Petitioner was advised that because he was no longer actively employed and earning service credits and salary that he could no longer make an FRS plan change.

7. Petitioner also was advised that the Plan Choice Administrator did not have an email address on file for him. Petitioner then stated that the earlier second election form had been faxed.

8. Petitioner called the MyFRS Guidance Line again on January 28, 31, and February 1, 2022, to check the status of his second election. He stated that he faxed the form on January 19, 2022, and received a fax confirmation number.

9. In his Request for Intervention, Petitioner stated that he sent a fax confirmation sheet to FRS; he also testified to this during the hearing.

10. Upon receipt of Petitioner's request, Respondent conducted a search of its records to ensure that the document had not been inadvertently misfiled or received but not processed. Respondent also asked the Plan Choice Administrator to search for the confirmation sheet referenced by Petitioner and for all faxes received on the date indicated by Petitioner.

11. At my request, a fax confirmation sheet that Petitioner had provided to Respondent SBA was made a part of the record as Respondent's Supplemental Exhibit R-7.² This fax confirmation document was sent from 305-278-1069. That number does not appear on the Plan Choice Administrators fax log for January 19, 2022; the document also shows a received date of January 31, 2022.

12. Finally, the records of the Plan Choice Administrator show that a 2nd Election Retirement Plan Enrollment Form from the Petitioner electing to change from the FRS Pension Plan to the FRS Investment Plan was received on January 27, 2022.

13. There is no record evidence that a 2nd Election Retirement Plan Enrollment Form was received from Petitioner prior to the date he terminated his FRS position on January 21, 2022.

CONCLUSIONS OF LAW

14. Petitioner asserts that he should be enrolled in the FRS Investment Plan because he made a valid second election by submitting his 2nd Election Retirement Plan Enrollment Form by fax on January 19, 2022.

15. Although there is some evidence that supports Petitioner's assertion of his intent to elect the FRS Investment Plan on January 19, 2022, pursuant to Section 121.4501(4)(f), the issue is whether the Plan Choice Administrator received Petitioner's election before he terminated his employment with Miami-Dade County.

16. Section 121.4501(4)(f), Florida Statutes, provides in relevant part:

...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,

² During the hearing, Petitioner indicated that he had evidence of a fax confirmation sheet. Petitioner was invited to file this sheet with the hearing officer. To date, the only document filed is Respondent's Supplemental Exhibit 7.

2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator...

(Emphasis added.)

17. Pursuant to the express terms of the governing statute, Petitioner's Investment Plan election must have been received by Alight Solutions, the Plan Choice Administrator, while he was still employed in an FRS eligible position. There is no support in the evidence for any second election by Petitioner having been received as required by Section 121.4501(4)(f).

18. Rule 19-11.007(2), F.A.C., reiterates the requirement of current employment:

A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator during the month in which 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 or terminated members cannot use their 2nd election until they return to FRS-covered employment. ...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 of the month the member is actively employed and earning salary and service credit.

(Emphasis added).

19. Again, the test is whether the election is received and processed by the Plan Choice Administrator during the permitted time frame; since Petitioner's second election was never received or processed, it was not effective.

20. In Wagner v. State Board of Administration, Case No. 19-4954, a recent case before the State of Florida Division of Administrative Hearings, the Administrative Law Judge considered a strikingly similar issue. The Petitioner in Wagner, attempted to make her Second Election through the FRS website, MyFRS.com from her home computer. Ms. Wagner believed she had clicked all the required buttons to properly execute her election. The Administrative Law Judge found:

The preponderance of the evidence establishes that Ms. Wagner intended to make her second election on March 4, 2019, and to move her retirement account from the Pension Plan to the Investment Plan. The preponderance of the evidence also establishes that Ms. Wagner failed to complete her second election and that Alright Solutions, the Plan Choice Administrator for the Investment Plan did not receive her election.

Page 14, Paragraphs 44 and 45. (Emphasis Added.)

21. The administrative Law Judge ruled:

The rule reiterates the statute's admonition that the second election must be received by the Plan Choice Administrator to be effective. It also places a duty on the employee to assure that the Plan Choice Administrator has received the second election before the employee leaves active employment....Even if the server malfunctioned, Ms. Wagner still had a responsibility to follow up once she failed to receive a confirmation statement from the Plan Choice Administrator.

Page 17, Paragraph 52.

22. Though not binding, this ruling is persuasive.

23. As an administrative entity of the State of Florida, Respondent SBA 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.

24. Respondent is charged with implementing Chapter 121, Florida Statutes, 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

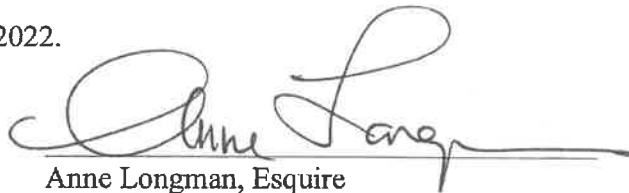
agency "is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction").

25. Although it is unfortunate that Mr. Gumbs is not now in the FRS retirement plan that he prefers, Respondent does not have the authority to allow him to enroll in the FRS Investment Plan other than in accordance with applicable law, and therefore cannot grant the relief requested.

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.

DATED this 27th day of July 2022.



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
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(850) 488-4406

COPIES FURNISHED via email and U.S. mail to:

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