

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

VIVIAN F. ADKINS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2007-1045
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On June 18, 2008, 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, Vivian F. Adkins, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on July 3, 2008. 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 rescind her second election into the FRS Investment Plan after switching into the FRS Investment Plan two years earlier 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 8th day of July, 2008, 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 Vivian F. Adkins, 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 8th day of July, 2008.

Ruth L. Gokel

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

VIVIAN F. ADKINS,

CASE NO. 2007-1045

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

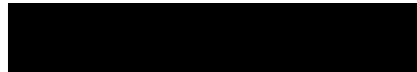
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GENERAL COUNSEL'S OFFICE

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on February 4, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Vivian F. Adkins, pro se


Petitioner

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

STATEMENT OF THE ISSUE

At issue is whether the Respondent SBA should honor the Petitioner's request made on November 2, 2007, to rescind her second election switching into the Investment Plan, made on May 31, 2005.

PRELIMINARY STATEMENT

Petitioner was a member of the Florida Retirement System (FRS) Pension Plan who used her second election to switch to the FRS Investment Plan in 2005. In November of 2007, she contacted Respondent in an effort to rescind her second election. Respondent investigated and determined it was without authority to grant Petitioner's request. Petitioner filed a Request for Intervention and a subsequent Petition for Hearing requesting the same relief, which were ultimately transmitted to the undersigned for informal hearing.

Petitioner attended the hearing by telephone. Respondent attended the hearing in person and presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Respondent's Exhibits R-1 and R-2 were admitted into evidence without objection. Petitioner did not submit any exhibits.

A transcript of the informal hearing was made, filed with the agency on February 20, 2008, and made available to the parties. The parties were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner has been employed with the Florida Department of Corrections for approximately 9 years as a counselor.
2. The Petitioner defaulted into the FRS Pension Plan, and in May of 2005, executed a second election form in order to switch from the FRS Pension Plan into the FRS Investment Plan. That switch was made effective on June 1, 2005.

3. Petitioner decided to make the switch because a co-worker who was retiring switched to the FRS Investment Plan from the FRS Pension Plan. Petitioner testified that she relied on information from her co-worker and was ignorant as to what she was actually doing.

4. Petitioner called the MyFRS Financial Guidance Line prior to making the switch from the FRS Pension Plan to the FRS Investment Plan and had a number of sources of education materials available to her that explained the ramifications of making this change including access to the MyFRS Financial Guidance Program that offers a website, telephone counseling, a summary plan description, the governing statutes and rules, and employer resources who were available to provide information on retirement matters.

5. The Second Election form executed by the Petitioner states:

Before you change retirement plans, take advantage of the FREE resources offered through the MyFRS Financial Guidance Program to help you understand the impact of changing from one plan to another and how much it may cost to do so. These resources include the:

- Toll-free MyFRS Financial Guidance Line at 1-866-44-MyFRS (1-866-446-8377; or TTY: 1-888-429-2160); and
- *2nd Election CHOICE SERVICE*, a comparison of your projected benefits under both plans, available at MyFRS.com or through the Financial Guidance Line.

...

If you selected Option 2 in Section 1:

I understand that I have elected to change retirement plans to the FRS Investment Plan, and that any accrued value I may have in the FRS Pension Plan will be transferred to the FRS Investment Plan. I understand that this election will constitute my one-time second election as provided under the FRS and that I must remain in this retirement plan until my retirement. I understand that my one-time second election is irrevocable.

6. Petitioner testified that she did not believe she was misled by anyone other than her co-worker in making this second election.

7. Shortly after switching plans, Petitioner received a mailing confirming that she had switched plans. She also testified that she has been receiving quarterly statements since her

switch, showing that the assets were transferred to the Investment Plan. Despite having received the confirmation shortly after the switch was effective on June 1, 2005, and a number of quarterly statements, Petitioner admits she did not contact the Respondent in order to attempt to rescind the second election until November, 2007.

CONCLUSIONS OF LAW

8. Section 121.4501(4)(e), Florida Statutes (2004), 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. 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.

§ 121.4501(4)(e), Florida Statutes (2004).

9. The above statute gives participants only one opportunity to switch between plans. Petitioner used this opportunity in June, 2005.

10. Petitioner did not seek to rescind her election within the window provided by Rule 19-11.007, Florida Administrative Code, which sets out a grace period for voiding of second elections made in error. It states, in pertinent part:

(6) Grace Period.

(a) If a member files an election with the TPA and the employee realizes that the election was made in error, the SBA will consider, on a case-by-case basis, whether the election will be voided, subject to the following requirements:

1. Member Elects the FRS Investment Plan. The SBA must be notified, by a telephone call to the toll free number: 1(866)446-9377, or by e-mail, or by written correspondence directly to the SBA, to the TPA, or to the Division of Retirement,

before assets are transferred from the FRS Pension Plan to the member's FRS Investment Plan account. This transfer occurs no later than the last business day of the month following the election month.

2. Member Elects the FRS Pension Plan. The SBA must be notified no later than the last business day of the month following the election month.

Rule 19-11.007, F.A.C.

11. Petitioner is seeking to void a second election more than two years after it was made. This is clearly outside the time frame set out in the above rule.

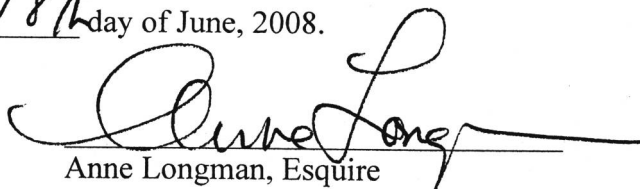
12. Section 121.4501(8)(a), Florida Statutes obligates the Respondent to administer the Investment Plan. The Respondent is not authorized to depart from the requirements of this statute when exercising its jurisdiction, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and Respondent'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).

13. No authority has been cited that would authorize Respondent to void the Petitioner's one time second election under the circumstances of this case.

RECOMMENDATION

Having considered the law and the undisputed facts in this matter, I recommend that the Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 18th day of June, 2008.



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

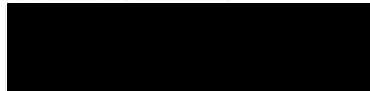
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

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 18th day of June, 2008.

Copies furnished to:

Vivian F. Adkins



Petitioner

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