

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

MARY WILKERSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2007-864
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
	)	
_____	)	

**REVISED  
FINAL ORDER**

On January 14, 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, Mary Wilkerson, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order on January 2, 2008. Respondent filed Exceptions, which were due on January 29, 2008. Respondent also filed a Suggestion of Mootness on January 30, 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 Petitioner's request to be allowed to rescind her election of the Investment Plan Hybrid Option and make an election to the Investment Plan is denied.

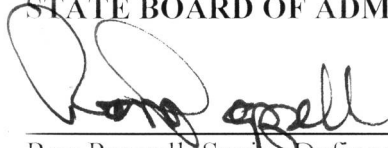
Petitioner became retired when she cashed or deposited her first retirement benefit check. See Rule 60S-4.002(4), F.A.C. Her last day of work was June 12, 2007 and she testified at the hearing on this matter, September 19, 2007, that she had cashed the retirement checks she had received. T 37-38.

This case is dismissed as moot.

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.

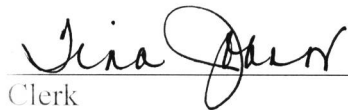
DONE AND ORDERED this 5th day of February, 2008, in  
Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



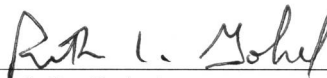
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

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

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order  
was sent by UPS to Mary Wilkerson, pro se, [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 5th day of February, 2008.



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

MARY WILKERSON,

CASE NO. 2007-864

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STATE BOARD OF ADMINISTRATION,

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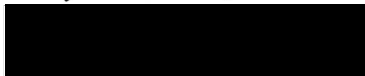
**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned Presiding Officer for the STATE BOARD OF ADMINISTRATION (SBA) on September 19, 2007, in Tallahassee, Florida. The Petitioner appeared by telephone and the Respondent in person as follows:

**APPEARANCES**

For Petitioner:

Mary Wilkerson, 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

Exh. A

## **STATEMENT OF THE ISSUE**

The issue is whether the SBA should grant the Petitioner's request to void her second election into the FRS Investment Plan Hybrid Option and allow her to file a corrected second election form to transfer all of her Pension Plan assets to the Investment Plan.

## **PRELIMINARY STATEMENT**

On March 28, 2007, Petitioner submitted a Request for Intervention seeking to have her retirement assets moved from the Pension Plan into the Investment Plan prior to her anticipated retirement in June, 2007, despite having filed a second election form on October 20, 2006 indicating election of the Hybrid Option. Respondent conducted an investigation and provided notice to Petitioner of its intent to deny this request. Petitioner then filed a Petition for Hearing which was transmitted to the undersigned for informal hearing.

At the hearing, Petitioner testified on her own behalf and submitted exhibits P1 and 2, consisting of the sworn statement of Darlene Bolden and Petitioner's hearing request with attached summary of events. The SBA presented the testimony of Dan Beard, Director of Policy Risk Management and Compliance and exhibits R1-14, consisting of official agency records and communications by and to the Petitioner. Recorded telephone calls between Petitioner and the MyFRS Financial Guidance Line on October 17, 2006 (Ex. R-6) and October 26, 2006 (Ex. R-7) as well as a recorded call dated October 19, 2006 between Darlene Bolden and the MyFRS Financial Guidance Line (Ex. R-15) were played at the hearing. A CD-ROM with the audio version of those recorded calls was submitted for the record. The parties were given an opportunity to supplement the record after the hearing concluded. Respondent filed an affidavit

of Daniel Beard regarding his efforts to locate records of any additional calls between Petitioner and the various agencies and entities involved and indicating the dates corresponding to transcripts of a number of telephone calls submitted as Respondent's exhibits; Petitioner filed copies of her personal planner pages showing her notes. She also filed a pleading styled Petitioner's First Request to Produce To Defendant To the Respondent, asking for all documents and communications concerning her. A transcript of the informal hearing was made, filed and made available to the parties; both parties filed Proposed Recommended Orders.

### **UNDISPUTED MATERIAL FACTS**

1. Petitioner was enrolled in the Florida Retirement System (FRS) Pension Plan through her employment with the Palm Beach County School Board.

2. FRS participants in the Pension Plan may make a one-time second election in which they may move from the Pension Plan into the Investment Plan or the Investment Plan Hybrid Option.

3. Prior to making a second election, and in preparation for her retirement, the Petitioner contacted various advisors through the toll free MyFRS Guidance Line. Through this line, participants may speak with advisors from Ernst & Young and CitiStreet, third-party vendors with whom the Respondent has contracted to provide education and information to FRS participants, and also with Division of Retirement (DOR) personnel. After dialing the guidance line, a participant may choose from various options which will route the call to one of these three sources of information. In addition, the three sources of information can route calls among themselves as well as conference together with a participant caller. Calls between FRS plan

participants and Ernst & Young or CitiStreet are recorded, those with DOR are not.

4. During a telephone call with an Ernst & Young advisor which Respondent identified as occurring on October 17, 2006, Petitioner told the advisor that she wanted to be able to leave her accumulated benefit to her adult son, and indicated that she knew she could do this only by switching to the Investment Plan.

5. The Petitioner told this advisor, identified only as "David," that she was calling to get the application or whatever necessary papers she needed to switch to the investment program. She stated that she had spoken previously with an advisor identified as "Beck" who gave her a side-by-side comparison between the pension and investment plans. David advised her that remaining in the Pension Plan would provide her a larger benefit, which she understood, but she stated that in order to carry out her estate planning wishes that she had to move into the Investment Plan.

6. David confirmed the Petitioner's understanding of the estate planning aspect of the Investment Plan and informed the Petitioner that she would have to execute and deliver a second election form in order to effectuate the desired switch in plans, and that the form had to be filed prior to terminating her employment.

7. During that telephone call, neither David nor the Petitioner mentioned or discussed the Hybrid Option or "box 3" on the second election form, the choice that allows participants to freeze their Pension Plan funds in that plan and have future contributions made to the Investment Plan. Rather, both the Petitioner and David acknowledged that the Petitioner wanted to switch from the Pension Plan into the Investment Plan so that all of the Petitioner's funds were available to her after her retirement. David then proceeded to a discussion of the

investment vehicles available in the Investment Plan and advised he would fax the Petitioner a second election form and beneficiary form after their telephone call was terminated.

8. The Petitioner executed a second election form on October 20, 2006 and mailed it to the Respondent's third party administrator. On that form, in Section 1, she marked box #3, "Change from the FRS Pension Plan to the FRS Investment Plan Hybrid Option."

9. Box 3 had the following description printed next to the box:

**Change from the FRS Pension Plan to the FRS Investment Plan Hybrid Option.** (Please complete Sections 3 and 4) I am retaining any accrued benefit in the FRS Pension Plan with future employer contributions deposited in my FRS Investment Plan account. I understand that I must have 5 years of Pension Plan service to select this option.

The signature page of the second election form states:

**If you selected Option 3 in Section 1:**

I understand that I have elected to change retirement plans to the FRS Investment Plan and that my FRS Pension Plan benefit already accrued will remain with the FRS Pension Plan and that a FRS Investment Plan account will be established to receive all future employer contributions. 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.

10. Petitioner admits she did not read the text on the form which sets out the consequences of selecting the Hybrid Option. She testified that she had a different or additional conversation with David on October 20, 2006, in which David instructed her to check box 3 in Section 1 of the second election form and choice two on the next page under Section 3: FRS Investment Plan Fund Selections, reflecting selection of a moderate investment fund, and that during this call, she handed the phone to co-worker Darlene Bolden, who also spoke to David



and received the same information, about which they later conferred. Ms. Bolden's sworn statement attests to this call occurring on October 20, 2006. The SBA requested all recorded calls between Ernst & Young and the Petitioner be forwarded to the SBA for its investigation into the Petitioner's allegation, which did not reveal a record of any call between the Petitioner and Ernst & Young on October 20, 2006.

11. Petitioner received a confirmation statement showing that she had elected the Hybrid Option, but did not understand the import of that document.

12. The Petitioner has now retired from FRS-covered employment and is currently receiving a monthly benefit from her Pension Plan account.

#### CONCLUSIONS OF LAW

13. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes (2006). That section states, in pertinent part:

(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 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.

§ 121.4501(4)(e), Fla.Stat. (2006).

14. Rule 19-11.007, Florida Administrative Code, provides a grace period for rescission of second elections as follows:

(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 (6), F.A.C.

15. The literal terms of the above rule allow the SBA to consider, on a case-by-case basis, whether an election will be voided. This case-by-case consideration is to be applied in situations where the employee realizes that an election was made in error, subject to certain other requirements set out in the following subsections. Id. Rule 19-11.007 at subsection (6)(a)1. applies when a member elects the FRS Investment Plan in error; subsection (6)(a)2. applies when the member elects the FRS Pension Plan in error. Neither of these rule subsections applies by its express terms to the situation in this case, where the member elects the FRS Investment Plan Hybrid Option in error, which therefore leaves the Respondent free to apply case-by-case consideration without the time strictures set out in §19-11.007(6)(a)1 or 2.

The rule section describing the time constraint applicable in the situation closest to this one (transfer to Investment Plan) requires notification of the mistake “before assets are transferred from the FRS Pension Plan to the Member’s FRS Investment Plan account.” Id. at 1. In this case, no assets were transferred from Petitioner’s Pension Plan to her Investment Plan

account, rather only future employer contributions were deposited in her Investment Plan account, as is contemplated by the Hybrid Option. It appears that the guiding principle behind this part of the rule is not violated by a case specific consideration of this Petitioner's error, even if outside the general grace period timeframe suggested by the parts of the rule not directly applicable here.

16. It is undisputed that Petitioner wished to and intended to use her second election to transfer all her Pension Plan assets to the Investment plan so that she could then direct use of a lump sum after retirement to carry out her estate plan for herself and her beneficiaries. She repeatedly sought advice from resources provided by the SBA, and in her communications with them, was clear as to her intentions. She did not realize until over six months after her second election that although she had elected the Investment Plan, it was the Investment Plan Hybrid Option, and that all her funds from before the second election had stayed in the Pension Plan, with only a very small accumulation having built up in her Investment Plan account, from contributions after her second election.

17. Respondent does not dispute that Petitioner intended to utilize her second election to transfer her assets to the Investment Plan. Petitioner does not dispute that she filed the erroneous second election form. She does dispute the accuracy and completeness of the record and the transcription of the phone calls between her and the various SBA information providers. It is possible that the conversation she and Ms. Bolden remember from October 20, 2006, which does not appear in records located by the SBA, was with a DOR employee and therefore not recorded, although DOR has no record of this call. It is also possible that there has been some confusion in assigning dates to particular recorded phone calls, or that Petitioner's Request for

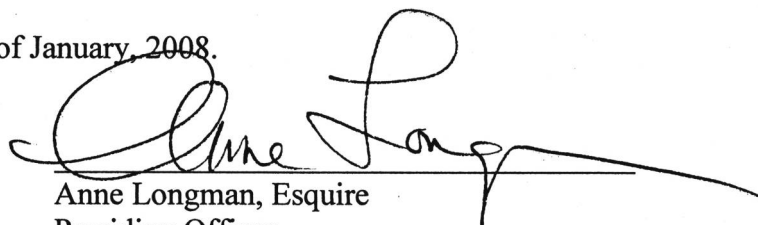
Production of Documents, if filed in a fact-finding forum, would reveal additional details relevant to her case. But these potential factual disputes, resolution of which is outside the scope of this proceeding, are not material to my recommendation.

18. Respondent has cited the principle of contract law which states that a party may not defend against the enforcement of a contract on the grounds that he signed it without reading it. Allied Van Lines, Inc. v. Bratton, 351 So. 2d 344 (Fla. 1977). Contract law is not strictly applicable in this situation, but to the extent that it provides guidance, the first rule of contract construction is to give effect to the intention of the parties, and courts will try to put themselves in the situation of the parties when the document was executed to determine the objectives sought to be accomplished. Huntington on the Green Condominium v. Lemon Tree I- Condominium, 874 So.2d 1 (Fla. 5<sup>th</sup> DCA 2004). Pension statutes are to be construed liberally in favor of the intended recipients. Bd. of Trustees, etc. Firefighters' Pension Plan v. Town of Lake Park, 966 So.2d 448 (Fla. 4<sup>th</sup> DCA 2007), citing Greene v. Gray, 87 So.2d 504, 507 (Fla. 1956). In this case, the statutes and rules guiding the SBA's review of Petitioner's request permit a case-by-case consideration of whether Petitioner's second election was made in error and can be voided.

## RECOMMENDATION

Having considered the undisputed facts in this matter, I recommend that the SBA allow Petitioner to effectuate her intent to transfer her assets to the Investment Plan, if this is still what she desires; that her second election executed October 20, 2006 be voided by SBA Final Order, and that Petitioner be given one calendar month from the date of that order to make a new second election pursuant to Rule 19-11.007 (6)(b), Florida Administrative Code.

Respectfully submitted this 14<sup>th</sup> day of January, 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 OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to the Recommended Order should be filed with the Agency Clerk of the State Board of Administration.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been provided via U.S. Mail this 14<sup>th</sup> day of

January, 2008 to:

Filed with:

Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308

Copies Furnished to:

Mary Wilkerson  


Petitioner

Brian A. Newman, Esquire  
Brandice D. Dickson, Esquire  
PENNINGTON, MOORE, WILKINSON, BELL  
& DUNBAR, P.A.  
215 S. Monroe Street, Suite 200  
Post Office Box 10095  
Tallahassee, FL 32302-2095

Attorneys for Respondent

**STATE OF FLORIDA  
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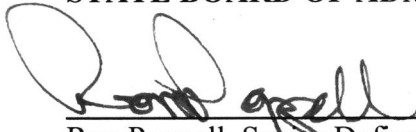
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DONE AND ORDERED this 1st day of February, 2008, in  
Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



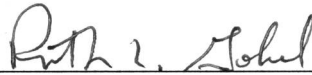
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\_\_\_\_\_  
Clerk

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**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order  
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2095, this 1st day of February, 2008.

  
\_\_\_\_\_

Ruth L. Gokel  
Assistant General Counsel  
State Board of Administration of Florida  
1801 Hermitage Boulevard  
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