STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

STEPHANIE WALL, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	SBA Case No. 2022-0016

FINAL ORDER

On May 19, 2022, the Presiding Officer submitted his Recommended Order to the State Board of Administration ("SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon the *pro se* Petitioner, Stephanie Wall, and upon counsel for the Respondent. Neither party filed exceptions to the Recommended Order which were due on June 3, 2022. 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 to be allowed to transfer from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan, even though her second election form was not

received by the Plan Choice Administrator prior to Petitioner's termination date, hereby is denied. Petitioner had been involuntarily terminated from her employment on June 30, 2019. She had filed a lawsuit against her employer for wrongful termination, and Petitioner and her employer entered into a settlement agreement on July 13, 2021. Under the terms of the settlement agreement, Petitioner's employment status was changed from "non-renewed" to "resigned." Her resignation date was retroactively made effective on March 1, 2020. Petitioner did not file her second election form until August 2021, at a time she clearly was not actively employed and earning salary and service credit in an employer-employee relationship. Thus, her attempted second election was invalid.

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.

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DONE AND ORDERED this 16th day of August, 2022, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

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

Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Stephanie Wall, *pro se*, both by email transmission to hise.stephanie@gmail.com and by U.P.S. to 395 Old Geneva Road, Geneva, Florida 32732; 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 16 day of August, 2022.

Ruth A. Smith

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

STEPHANIE WALL
Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

CASE NO. 2022-0016

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on March 2, 2022, 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: Stephanie Wall, *pro se*
395 Old Geneva Rd.
Geneva, FL 32732

For Respondent: Ruth Vafek
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's attempted second election to move from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan was valid, even though the

second election was submitted to the Plan Choice Administrator by the Petitioner after the Petitioner separated from FRS-eligible employment.

PRELIMINARY STATEMENT

Petitioner testified on her own behalf and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-7 and Petitioner's Exhibits P-1 and P-2 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on March 18, 2022. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based upon the undersigned's consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED FACTS

1. The Petitioner began employment with the Seminole County School Board ("SCSB"), an FRS-participating employer, in January of 2010. In accordance with section 121.4501(4)(b)2, Florida Statutes (2010), Petitioner was initially enrolled in the FRS defined benefit program and was given the last business day of the 5th month following her month of hire (4:00 p.m. Eastern Time on July 30, 2010) in which to make an initial election between the Pension Plan or the Investment Plan.

2. The FRS Plan Choice Administrator has no record of receiving an initial choice election from the Petitioner on or before the June 30, 2010 deadline. Pursuant to section 121.4501(4)(b)2.c., Petitioner was deemed to have made her initial choice to remain in the Pension Plan, which was the legislatively prescribed default at the relevant time.

3. Respondent has no record of Petitioner utilizing her second election during her term of employment with an FRS-participating employer, and there was no evidence presented at the hearing that Petitioner utilized her second election during her term of employment with an FRS-participating employer.

4. Petitioner was involuntarily terminated from her employment with SCSB on June 30, 2019.

5. Petitioner testified that she called "the FRS on June 1st, 2020" and on "July 14, 2021 [and she] was told [she] could not submit an election form because [she] was not earning the salary credit [sic] and that that form would be denied."

6. Respondent's records and Ms. Olson's testimony indicate that the June 1st, 2020, call described by Petitioner was to the Division of Retirement within the Florida Department of Management Services, which oversees the FRS Pension Plan.

7. Following her termination, Petitioner filed a lawsuit against SCSB, alleging several violations of Florida's Civil Rights Act and the Family Medical Leave Act.

8. Petitioner and SCSB entered into a settlement agreement dated July 13, 2021, pursuant to which Petitioner's employment status was changed from 'non-renewed' to 'resigned,' and her resignation date was retroactively made effective on March 1, 2020.

9. According to the terms of the settlement agreement, SCSB paid to Petitioner the sum of $85,000, which was allocated as follows: one payment of $40,000, less withholding, as "compensatory damages," one payment of $20,000, less withholding, designated as "back pay," and $25,000 of which was deducted as attorneys' fees.

10. The payment record accompanying the check from SCSB to Petitioner representing "back pay" indicates amounts were withheld for Federal taxes; however, no

amounts were withheld for FRS member contributions. There is no evidence that SCSB reported the income to FRS, and no employer contributions were made to FRS on behalf of Petitioner for the period between June 2019 and March 2020.

11. The only reference to FRS in the Settlement Agreement is found in Paragraph 5 (Release), under which the Petitioner agreed to release SCSB from any and all claims, including those "relating to … retirement benefits generally under the Florida Retirement System."

12. Paragraph 11 of the Settlement Agreement states:

> This Agreement contains the entire understanding and agreement between the Parties and shall not be modified or superseded, except upon express written consent of the Parties to this Agreement. Wall represents and acknowledges that in executing this Agreement, she does not rely and has not relied upon any representation or statement made by the SBSC which is not set forth in this Agreement.

13. Nothing in the Settlement Agreement indicates Petitioner could be deemed to have been earning service credit or salary during the period between her original termination date of June 2019 and her designated resignation date of March 1, 2020, and in fact Petitioner did not earn any service credit for that period of time.

14. Respondent ascertained that Petitioner made calls to the FRS Financial Guidance Line, or to Respondent's Plan Choice Administrator acting as Respondent's agent, on the following dates:

a. July 14, 2021 (which was forwarded to the Division of Retirement);

b. August 27, 2021;

c. September 22, 2021;

d. September 28, 2021;

e. October 13, 2021;

f. December 20, 2021; and

g. December 29, 2021.

15. In August of 2021, the Plan Choice Administrator received from Petitioner what purported to be a second election form, seeking to transfer from the Pension Plan to the Investment Plan. That election was denied.

16. Although there was some dispute regarding what the Division may or may not have told Petitioner in June of 2020, it is undisputed that Respondent, State Board of Administration, did not make any representations to Petitioner regarding her eligibility to transfer from the Pension Plan to the Investment Plan prior to the time she executed the settlement agreement with SCSB. SCSB reported to Respondent that Petitioner's last day of employment with them is now recorded as March 1, 2020.

17. On or about January 12, 2022, Petitioner submitted a Request for Intervention ("RFI") requesting that her Investment Plan election be granted. Petitioner's RFI was denied.

18. On or about January 27, 2022, Petitioner filed a Petition for Hearing ("PFH") requesting the same relief. This administrative proceeding followed.

CONCLUSIONS OF LAW

19. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transn. v. J.W.C. Co.* 396 So. 2d 778 (Fla. 1st DCA 1981).

20. The Florida Retirement System is comprised primarily of two plans which are defined in Part I of Chapter 121, Florida Statutes, as follows:

> (3) "Florida Retirement System" or "system" means the general retirement system established by this chapter, including, but not limited to, the defined benefit program administered under this part, referred to as the "Florida Retirement System Pension Plan" or "pension plan" and the defined contribution program administered under part II of this chapter, referred to as the "Florida Retirement System Investment Plan" or "investment plan."

§ 121.021(3), Fla. Stat.

21. Movement between the two FRS plans is governed by Section 121.4501(4), Florida Statutes. This section states, in pertinent part:

> (f) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, 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 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, 2005, such elections are 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 when the election is received by the third-party administrator. This paragraph is contingent upon approval by the Internal Revenue Service.

§ 121.4501(4)(f), Fla. Stat. (emphasis added).

22. As provided in the above statute, members of the FRS have one opportunity to switch plans after their initial election period expires. This election is referred to as the employee's "second election."

23. Petitioner's settlement with SCSB was executed with an effective date of July 13, 2021, and pursuant to that settlement, she was deemed by the parties to the settlement to have been reinstated as an employee from June of 2019 to March 1, 2020. However, Petitioner did not submit her second election form prior to or on March 1, 2020. Instead, her election form requesting a move from the FRS Pension Plan to the FRS Investment Plan was received by the Plan Choice Administrator in August of 2020, when Petitioner was no longer employed or earning service credit in an FRS-eligible position.

24. Petitioner argues that she should be permitted to retroactively use her second election to enroll in the FRS Investment Plan because she submitted the second election enrollment form upon receipt of her settlement payment from SCSB, which included a sum designated as back pay.

25. However, Petitioner unfortunately did not make a valid second election, as the latest day she could possibly have been considered as "actively employed and earning salary and service credit in an employer-employee relationship" was March 1, 2020.

26. It is doubtful that a second election made after Petitioner's termination date would have been valid, even if it had been made prior to her resignation date of March 1, 2020, because she was not earning service credit under FRS during that period.

27. With respect to second elections, section 121.4501(4)(f), Florida Statutes, states: "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)."

28. Rule 19-11.007(2), F.A.C., reiterates the requirement of current employment in order to use a second election:

> 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..

(Emphasis added).

29. Although the evidence supports a conclusion that Petitioner intended to use her second election to move to the Investment Plan during the term of her deemed reinstatement, there is no evidence the Petitioner and the SCSB were in an "employer-employee relationship," as contemplated by section 121.4501(4)(f), Florida Statutes, between June 2019 to March 2020. Respondent SBA does not possess the discretion to ignore that statutory requirement.

30. Even if Petitioner could have been considered as "earning service credit in an employer-employee relationship" (a conclusion the evidence does not support) between June 2019 and March 1, 2020, her second election form was submitted after March 1, 2020. According to the express terms of the governing statute, Petitioner's Investment Plan election must have been received by the Plan Choice Administrator while Petitioner was still deemed employed in an eligible position.

31. Section 121.021(17)(b)4, Florida Statutes, states that monthly service credit under FRS is awarded as follows: "...one month of service credit shall be awarded for each month salary is paid for service performed." The Settlement Agreement and accompanying documents indicate Petitioner was paid a sum of money that was designated as back pay. However, nothing in those documents supports a conclusion that Petitioner was paid a "salary for services performed" between her original termination in June 2019 and her deemed resignation on March 1, 2020.

32. It should also be noted that nothing in the Settlement Agreement indicates the parties thereto contemplated Petitioner earning additional service credit under FRS for the period of her deemed reinstatement between June 2019 and March 2020. If it was the intent of the parties that Petitioner earn such additional service credit, they unfortunately did not include any language in the settlement agreement evincing such an intent, or any lawful method by which such a goal could be achieved. The conclusion that the settlement agreement did not contemplate Petitioner's accrual of additional service credit during the period immediately preceding the effective date of her resignation is further supported by the fact that neither the SCSB nor the Petitioner made any contributions to FRS for that period.

33. Petitioner argues that she should not be held to a strict application of the law, since she submitted her second election as soon as the Settlement Agreement was reached. She points out that there was no way for her to "go back in time" and submit her second election during the period she was deemed to be actively employed under the Settlement Agreement. But the Respondent has no legal authority to waive statutory requirements in order to facilitate the terms of a settlement agreement; particularly one to which it was not a party. Respondent had no role or input in formulating the terms of the settlement agreement and is neither required to facilitate Petitioner's understanding of that agreement, nor permitted to do so. If the Petitioner and the SCSB intended for Petitioner to be able to use her second election under the terms of the settlement agreement, it was incumbent upon those parties to understand the applicable law and draft an agreement in accordance with that law.

34. The express terms of the governing statute require Petitioner to submit her Investment Plan election to the Plan Choice Administrator while employed in an eligible position with an FRS-participating employer and earning service credit. There is no support in the evidence for a timely second election by Petitioner having been received as required by Section 121.4501(4)(f), and therefore she did not make an effective election.

35. In a recent case before the State of Florida Division of Administrative Hearings, *Wagner v. State Board of Administration*, No. 19-4954 78PL (Fla. DOAH Jan. 8, 2020) (Recommended Order), an Administrative Law Judge considered a somewhat similar issue. Like Ms. Wall, the Petitioner in *Wagner* was challenging a decision by SBA denying her second election. In *Wagner*, the Petitioner attempted to make her second election through the FRS website, MyFRS.com, from her home computer. Although Ms. Wagner believed she had clicked all the required buttons to properly execute her election, she did not complete the process, and

the election was not submitted. Although the Administrative Law Judge found that evidence established that Ms. Wagner "intended to make her second election on March 4, 2019" the evidence also established that Ms. Wagner failed to complete her second election and that Alight Solutions, the Plan Choice Administrator for the Investment Plan did not receive her election." *Id.*, at page 14, paragraphs 44 and 45.

36. 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.

Id., at page 17, paragraph 52.

37. In August of 2021, when the Plan Choice Administrator received the second election form from Petitioner in the present matter, she had already separated from FRS-eligible employment, even according to the most expansive interpretation possible of her settlement agreement terms.

38. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear, and the SBA cannot deviate from them. *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").

39. Accordingly, Respondent does not have the authority to allow Petitioner to enroll in the FRS Investment Plan, 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 Petitioner's request for relief.

DATED this 9th day of May, 2022.

Glenn E. Thomas, 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
mini.watson@sbafla.com
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Stephanie Wall
395 Old Geneva Road
Geneva, FL 32732
hise.stephanie@gmail.com
Petitioner

and via electronic mail only to:

Deborah Minnis, Esquire
Ruth E. Vafek, Esquire
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32301
dminnis@ausley.com
rvafek@ausley.com
jmcvaney@ausley.com