

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SHELLEY PORTER,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2021-0148
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On August 11, 2021, 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, Shelley Porter, and upon counsel for the Respondent. No exceptions to the Recommended Order, which were due by August 26, 2021, 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 her one-time second election from the Florida Retirement System (“FRS”) Pension Plan to the FRS Investment Plan be cancelled and that she be refunded her total employee contributions to the FRS Pension Plan (\$6,216.01) as of the date she switched plans, hereby is denied. Petitioner claimed that she received erroneous

information from a trusted supervisor; that her employer human resources representative did not timely set up a telephone call with the MyFRS Financial Guidance Line to discuss the ramifications of her switching retirement plans; and that the MyFRS Financial Guidance Line failed to staff the telephones adequately to handle FRS members' calls. However, even if Petitioner had been provided erroneous information by someone hired by her employer, Section 121.021(10), Florida Statutes, specifically provides that employers are not agents of the SBA and that, therefore, the SBA by law is not responsible for any erroneous information that may be provided by employer representatives. While Petitioner may have had some difficulty in accessing the MyFRS Financial Guidance Line, there were numerous other sources of information available to her, including the form she used to file her second election, to explain that the total amount transferred from her FRS Pension Plan account to her FRS Investment Plan account remained subject to the FRS Pension Plan vesting requirement.

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 9th day of November, 2021, 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

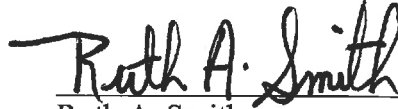
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Shelley Porter, *pro se*, both by email transmission to Shelley_Porter@MSN.com and by U.S. mail to Post Office Box 142, Ft. Myers, Florida 33902; 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 9th day of November, 2021.



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

SHELLEY PORTER,

Petitioner,

vs.

CASE NO. 2021-0148

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 15, 2021, 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: Shelley Porter, *pro se*
Post Office Box 142
Ft. Myers, Florida 33902

For Respondent: Deborah S. Minnis
Ausley McMullen, P.A.
123 South Calhoun Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Petitioner asserts that she has lost \$6,216.01 in Pension Plan contributions because of erroneous information given to her by a trusted supervisor “that led to [her] making the switch that actually forfeited [her] contribution to the plan”; because of delay in setting up a call with the MyFRS Guidance Line by an employer human resource representative; and because the

EXHIBIT A

MyFRS Guidance Line “apparently do[es] not staff the phones adequately to take all calls.” She requests return of this amount as of the date she “converted to the Investment Plan.”

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 were admitted into evidence without objection. At my request, Respondent gathered additional information about calls to the Guidance Line, which was submitted as Respondent’s Exhibit R-8 and made a part of the record.

A transcript of the hearing was made, filed with the agency clerk on June 28, 2021, and provided to the parties on July 7, 2021. The parties were invited to submit proposed recommended orders within thirty-days after the transcript was filed. The following recommendation is based on the undersigned’s consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with the Lee County Board of County Commissioners, a Florida Retirement System (FRS) participating employer, on June 8, 2015. Petitioner was placed in the Pension Plan and had until November 30, 2015 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan.

2. Petitioner did not submit an election form to the Plan Choice Administrator within the required period, and so pursuant to Section 121.4501(4)(a)1b, Florida Statutes, was deemed to have elected to retain membership in the Pension Plan.

3. In January of 2021, Petitioner was considering retiring when she reached age 62 on March 13, 2021. She contacted the Florida Division of Retirement, Department of

Management Services and was directed to the FRS Financial Guidance Line toll-free number. Petitioner called this line three times between February 8 and 9, 2021. Petitioner was placed on hold in a queue, on one call for more than four minutes. These calls were ultimately abandoned. Petitioner did not opt to leave a message at the on-hold prompts, and explains that she wanted to speak to a live person.

4. On February 17, 2021, Petitioner completed and submitted a 2nd Election EZ Retirement Plan Enrollment Form on the MyFRS.com website, electing to transfer from the Pension Plan to the Investment Plan. Petitioner's action was prompted, at least in part, by advice from a trusted manager at the Collier County Courthouse, that if she moved from the Pension Plan to the Investment Plan, she "would receive her contributions if retiring before she was vested per the Pension Plan." This advice was incorrect. The FRS Plan Choice Administrator processed her second election form on February 17, 2021, and that election became final and irrevocable on February 17, 2021, at 4:00 p.m. (EST), with an effective date of March 1, 2021.

5. As provided by Rule 19-11.007(4), Florida Administrative Code, and as set out on page two of the form she filed, Petitioner had until March 31, 2021, the time the present value of her Pension Plan benefit transferred to her Investment Plan account, to rescind her second election. Respondent has no record of Petitioner notifying the FRS Plan Choice Administrator of any desire to rescind her second election.

6. The 2nd Election EZ Retirement Plan Enrollment Form, under the bullet titled "If You Elected Option 2," also advised Petitioner that the amount transferred to her Investment Plan account as her opening balance would be an actuarial determination, was not tied directly to the contributions made into the Pension Plan, and was not segregated into the

employee/employer contributions made up to that point. It advised as well that the opening balance would be subject to the applicable Pension Plan vesting requirements.

7. A Florida Retirement System Confirm of 2nd Election-Investment Plan notice dated February 18, 2021 confirming Petitioner's Investment Plan election was sent to Petitioner at her address of record. This notice confirmed that she had utilized her one-time second election and that she now had to remain in the FRS Investment Plan until her retirement from FRS-covered employment. This notice states in pertinent part:

You have elected to change to the FRS Investment Plan and transfer the Present Value of your FRS Pension Plan benefit. The effective date of this election will be March 1, 2021. Future employee and employer contributions will be directed to your new FRS Investment Plan account. As a member who is using your 2nd election to transfer to the FRS Investment Plan, you will have the Present Value of your FRS Pension Plan benefit calculated and transferred to the FRS Investment Plan as your operating account balance. The Present Value calculation is an actuarial determination of your service credit; it is not the total of any employee or employer contributions paid into the Pension Plan.

If you terminate prior to vesting in your transferred FRS Pension Plan benefit (with less than 6 or 8 years of total FRS service, depending on your date of hire) you will only be entitled to receive a distribution of:

- If less than 1 year of total service, your employee contributions, plus earnings, paid into the Investment Plan since the effective date of your transfer to the Investment Plan
- If more than 1 year but less than 6 or 8 years of total FRS service, your employee and employer contributions plus earnings paid into the Investment Plan since the transfer.

This is your final Plan Choice Election under the Florida Retirement System. You must remain in the FRS Investment Plan until your retirement from FRS-covered employment. (Emphasis added.)

8. Finally, information in the notice again advised Petitioner of her ability to cancel her election:

If you feel this retirement plan election was made in error, you may be able to cancel it. Please call the MyFRS Financial Guidance Line at 1-866-446-9377, Option 2. Failure to notify us no later than 4:00 PM EST on the last business day of the month following your election month will void your right to cancel this election.

9. On March 31, 2021, the present value of Petitioner's Pension Plan benefit was transferred into her Investment Plan account as an opening balance.

10. Petitioner decided to retire effective April 26, 2021. On April 1, 2021, before her scheduled retirement date, Petitioner was conferenced in on a call to the MyFRS Financial Guidance Line set up by her employer's human resources manager and spoke with an EY Representative. During this call, Petitioner was advised that by retiring now, because she was not vested in the contributions transferred from the Pension Plan, she would not be eligible to receive a refund of those contributions. She was also advised that the deadline to rescind her switch had expired.

11. On April 1, 2021, Petitioner completed a Request for Intervention asking that she be allowed to rescind her second election, reverse her transfer from the Pension Plan to the Investment Plan, and receive a refund of the employee contributions she made into the Pension Plan, asserting that she erroneously relied on information provided by her supervisor.

12. Her request was denied, and on April 28, 2021, Petitioner filed a Petition for Hearing seeking the same relief.

CONCLUSIONS OF LAW

13. 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 Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

14. The two main FRS plans as set out in Part I of Chapter 121, Florida Statutes at section 121.021(3), Florida Statutes, are the Pension Plan and the Investment Plan:

(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.”

15. Movement between the two FRS plans is governed by Section 121.4501(4)(f), 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).

16. As provided in the above statute, members of the FRS have one opportunity to switch plans after their initial election period expires. Petitioner used her one-time second election in 2021.

17. The grace period during which a member can rescind a second election is set out in Rule 19-11.007, Florida Administrative Code, which reads as follows:

(4) Grace Period.

(a) If a member files an election with the Plan Choice Administrator and the member realizes that the election was made in error, or if the member has considered his or her plan choice, the SBA will consider, on a case-by-case basis, whether the election will be reversed, subject to the following: The member must notify the SBA by a telephone call to the toll free MyFRS Financial Guidance Line at: 1(866) 446-9377, or by written correspondence directly to the SBA, to the Plan Choice Administrator, to the Financial

Guidance Line, or to the Division, no later than 4:00 p.m. Eastern Time on the last business day of the election effective month.

- (b) If the request to reverse the election is made timely and the SBA finds the election was made in error, the member will be required to sign a release and return it to the SBA no later than 4:00 p.m., Eastern Time, on the last business day of the election effective month prior to the election's being officially reversed. Upon receipt of the release, the Division and the Plan Choice Administrator will be directed to take the necessary steps to reverse the election and to correct the member's records to reflect the election reversal.
- (c) A confirmation that the election was reversed will be sent to the member by the FRS Plan Choice Administrator.
- (d) The member retains the right to file a subsequent second election consistent with subsections (2) and (3), above.
- (e) Nothing contained in this subsection will interfere with a member's right to file a complaint, as permitted by Section 121.4501(8)(g), F.S. and discussed in Rule 19-11.005, F.A.C.

Rule 19-11.007(4), F.A.C. (emphasis added).

18. Petitioner had until the time the present value of her Pension Plan benefit was transferred to her Investment Plan account (March 31, 2021) to rescind her second election.

19. The online form completed and submitted by Petitioner titled 2nd Election EZ Retirement Plan Enrollment Form states in bold, at the top:

Before using your one time 2nd Election, be sure you understand the impact of changing from one plan to another. Call the toll-free MyFRS Financial Guidance Line at 1-866-446-9377, Option 2, use the 2nd Election CHOICE SERVICE on MyFRS.com, and review the requirements of Rule 19.11007, F.A.C.

20. At multiple locations within the form Petitioner was advised that she had only one opportunity to switch between plans, that using the second election was irrevocable, what to do if she made the election in error, and also, that any accrued value transferred from her Pension Plan to her Investment Plan account opening balance remained subject to the Pension Plan vesting requirements.

21. A confirmation of her switch from the Pension Plan to the Investment Plan was sent to Petitioner on February 18, 2021. In that notice, Petitioner was again advised that she was using her one-time second election, that the present value of her Pension Plan account would be transferred to her Investment Plan account as her opening balance, and that the present value of her Pension Plan benefit transferred to her Investment Plan account remained subject to the Pension Plan vesting requirements.

22. Petitioner asserts that she relied on erroneous information provided by a supervisor in deciding to transfer to the Investment Plan. Pursuant to Section 121.021(10), Florida Statutes, FRS participating employers are not Respondent's agents and have no power to bind the agency.

Employers are not agents of the department, the state board, or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.

§121.021(10) Fla. Stat.

23. Petitioner also asserts that she attempted to contact the MyFRS Financial Guidance Line before initiating the transfer but failed to get the information needed due to extended wait times during which her calls were never answered or were dropped. Petitioner apparently did experience substantial frustration in trying to promptly access the MyFRS Guidance Line, but numerous other sources of accurate information were readily available and were timely put before her.

24. 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

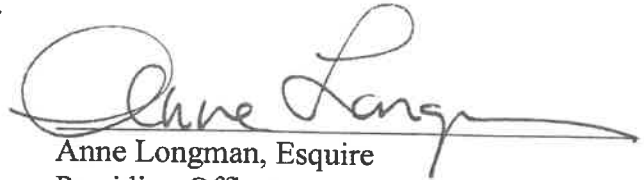
from the requirements of its organic statute when it exercises its jurisdiction’); Pesta v. Dep’t of Corr., 63 So. 3d 788, 790 (Fla. 1st DCA 2011) (observing that administrative agencies have only such powers as statutes confer). The SBA is required to treat all participants in accordance with its statutes and rules.

25. It is unfortunate that Petitioner’s intentions for her retirement account were not realized, and that she was given misleading advice by a fellow employee, but Respondent does not have the authority to waive the statutory and rule requirements applicable here, or to grant Petitioner’s request in this case.

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 11th day of August, 2021.



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
mini.watson@sbafla.com
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Ruthie.Bianco@sbafla.com
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