

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

|                                |   |                        |
|--------------------------------|---|------------------------|
| JOSEPH LOPEZ,                  | ) |                        |
|                                | ) |                        |
| Petitioner,                    | ) |                        |
|                                | ) |                        |
| vs.                            | ) | SBA Case No. 2014-3095 |
|                                | ) |                        |
| STATE BOARD OF ADMINISTRATION, | ) |                        |
|                                | ) |                        |
| Respondent.                    | ) |                        |
| _____                          | ) |                        |

**FINAL ORDER**

On November 20, 2014, 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, Joseph Lopez, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. No exceptions to the Recommended Order, which were due December 5, 2014, were filed by either party. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending, for final agency action, before the appropriate designee who has been appointed to carry out the duties and responsibilities delegated to the Senior Defined Contribution Programs Officer.

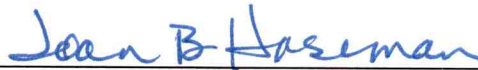
**ORDERED**

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that his second election to join the FRS Investment Plan be deemed valid, even though the request was submitted while Petitioner was on medical leave without pay, hereby 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 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.

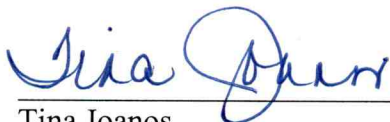
DONE AND ORDERED this 9<sup>th</sup> day of December, 2014, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



**Joan B. Haseman**  
Senior Defined Contribution Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

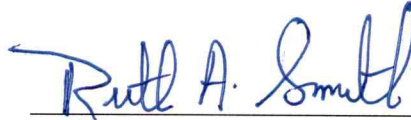
FILED ON THIS DATE PURSUANT TO  
SECTION 120.52, FLORIDA STATUTES  
WITH THE DESIGNATED CLERK OF THE  
STATE BOARD OF ADMINISTRATION,  
RECEIPT OF WHICH IS HEREBY  
ACKNOWLEDGED.



Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS to Joseph Lopez, [REDACTED] and by email transmission to Brian Newman, Esq. ([brian@penningtonlaw.com](mailto:brian@penningtonlaw.com)) and Brandice Dickson, Esq., ([brandi@penningtonlaw.com](mailto:brandi@penningtonlaw.com)) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 9<sup>th</sup> day of December, 2014.



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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

JOSEPH LOPEZ,

Petitioner,

vs.

Case No.: 2014-3095

STATE BOARD OF ADMINISTRATION,

Respondent.

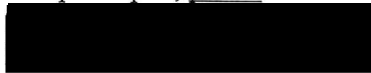
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**RECOMMENDED ORDER**

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on September 26, 2014, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Joseph Lopez, pro se



For Respondent: Brandice D. Dickson, Esquire  
Pennington, P.A.  
215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301

## **STATEMENT OF THE ISSUE**

The issue is whether Respondent correctly reversed Petitioner's June 13, 2014 attempt to switch from the Pension Plan to the Investment Plan.

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Petitioner offered no exhibits. Respondent's Exhibits 1-4 were admitted into evidence over Petitioner's objection, which was that he was misled; but he did not dispute the accuracy of the documents.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Respondent filed a proposed recommended order; Petitioner made no further filings.

## **MATERIAL UNDISPUTED FACTS**

1. Petitioner was employed by the Martin County School District, an FRS-covered entity, beginning on June 20, 2005.
2. Petitioner had until November 30, 2005 to make an initial election to join the defined benefit Pension Plan or the defined contribution Investment Plan. Petitioner made no affirmative initial election and therefore defaulted to Pension Plan membership.
3. On April 7, 2014, Petitioner was placed on medical leave without pay. Petitioner's last day of work for the Martin County School District was on or about that same day.

4. On June 9, 2014, Petitioner signed and submitted a second election form stating that he wanted to transfer from the Pension Plan to the Investment Plan. This form was received by Respondent's third party administrator on June 13, 2014.

5. Petitioner's second election was reversed by Respondent because it determined he was not actively employed and earning service credit when Respondent's third party administrator received his election form.

6. Petitioner filed a request for intervention and later a petition for hearing to challenge this decision, thus initiating this administrative proceeding.

#### CONCLUSIONS OF LAW

7. To make a valid second election to move from the Pension Plan to the Investment Plan the member must be earning service credit "in an employer-employee relationship" with an FRS-covered employer when the second election is made. § 121.4501(4)(g), Florida Statutes (2014).

Section 121.4501(4)(g) provides:

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.

(Emphasis added).

8. The timeliness of the submission of second election forms is governed by Rule 19-11.007(2), Florida Administrative Code:

A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator while 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, terminated members, or employees of an educational institution on summer break cannot use their 2nd election until they return to covered FRS employment. In general terms, this means that the 2nd election must be made and processed while the member is actively working and being paid for that work. 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 the member is earning salary and service credit.

Under this rule, Petitioner was responsible to see that his second election form was received by the Plan Choice Administrator no later than 4:00 p.m. on the last day he was earning salary and service credit. In Petitioner's case, his last day of work was well before his submission of a second election form in June 2014.

9. It is clear that Petitioner here was not earning service credit when his second election form was submitted, over a month after his last day of actively working, and that attempted switch to the Investment Plan was therefore invalid.

10. Petitioner alleges that he was misled by personnel or human relations officers at his place of employment into thinking that he could switch plans and eventually receive a lump

sum, and that no mention was made of the requirement that he still be actively working in order to make a second election. Petitioner's allegations against his employer are outside the scope of this proceeding, and I see nothing in the record before me that is evidence of his having been misled. Mr. Lopez may not have had time to fully review his retirement options before being put on medical leave without pay, and if so, this is unfortunate, but I can find no statutory requirement that he be afforded such an opportunity. I do note in addition that he is entitled to receive a pension that includes disability retirement.

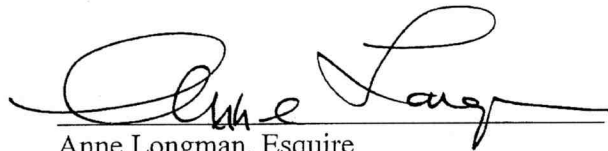
11. Section 121.4501(8)(a), Florida Statutes obligates the SBA to administer the Investment Plan. The SBA is not authorized to depart from the requirements of this statute when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The SBA'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). Petitioner's request must be denied because Respondent lacks the statutory authority to place Petitioner into the Investment Plan without a timely election having been made with the Plan Choice Administrator.

#### **RECOMMENDATION**

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



RESPECTFULLY SUBMITTED this 20th day of November, 2014.



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

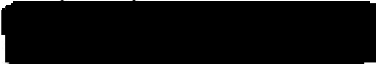
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which 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  
Nell.Bowers@sbafla.com  
Daniel.Bead@sbafla.com  
mini.watson@sbafla.com  
(850) 488-4406

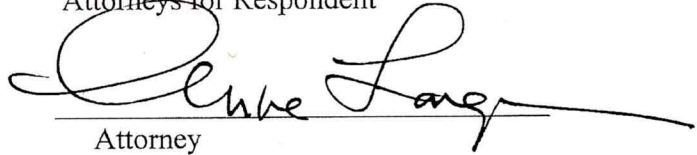
This 20<sup>th</sup> day of November, 2014.

Copies furnished to:

Via U.S. Mail  
Joseph Lopez

  
Petitioner

Via electronic delivery:  
Brian A. Newman, Esquire  
Brandice D. Dickson  
Pennington, P.A.  
Post Office Box 10095  
Tallahassee, FL 32302-2095  
[slindsey@penningtonlaw.com](mailto:slindsey@penningtonlaw.com)  
Attorneys for Respondent

  
Attorney