

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

VANESSA KUZMIN,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2018-0271
)	
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On January 23, 2019, the Presiding Officer submitted her 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, Vanessa Kuzmin, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on February 7, 2019. 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. In April 2018, Petitioner had given a signed second election form to her financial advisor with instructions to file the form later at her direction. On June 3, 2018, at Petitioner's direction, Petitioner's financial advisor unsuccessfully attempted to send Petitioner's second election form to the Plan Choice Administrator prior to Petitioner's termination date. There is no indication that Petitioner's financial advisor made another attempt to submit a second election form on Petitioner's behalf. The SBA, by law, is not responsible for the failure of any FRS employer, its agents, its employees or any other party on their behalf to properly complete any activities required by law to change retirement plans.

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 25th day of February 2019, in Tallahassee,

Florida.

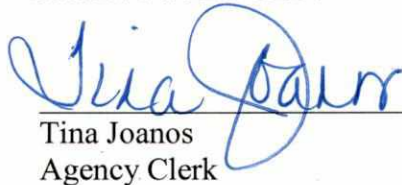
**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard

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

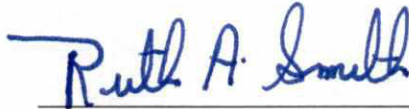
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Vanessa Kuzmin, pro se, both by email transmission to [REDACTED] and by U.P.S. to [REDACTED]; and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 25th day of February, 2019.

[REDACTED]


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

VANESSA KUZMIN,

Petitioner,

vs.

Case No. 2018-0271

STATE BOARD OF ADMINISTRATION,


Respondent.

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 October 22, 2018, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Vanessa Kuzmin, pro se


For Respondent:

Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner may transfer from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan pursuant to a second election form which she executed and gave to her financial advisor, but which was never received by the SBA's Plan Choice Administrator.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, 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 1 through 5 were admitted into evidence without objection.

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

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by Miami Dade County Public Schools (MDCPS), an FRS participating employer, in 2006 and had until August 31, 2007 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan. Petitioner defaulted into the Pension Plan effective September 1, 2007.

2. Because of a family move, Petitioner decided to transfer from the Pension Plan to the Investment Plan so that as an Investment Plan member, she could take a partial lump-sum withdrawal to use as a down-payment on a new house in North Carolina. Petitioner understood that to change plans she was required to submit a second election form to the SBA before she terminated FRS-covered employment. On or about April 6, 2018, Petitioner executed a 2d Election Retirement Plan Enrollment Form, and left it with her financial advisor to be filed later at her direction.

3. Prior to her resignation on June 8, 2018, Petitioner asked her financial advisor to fax the second election form for her to the Respondent's third party administrator, to effectuate

a switch from the Pension Plan to the Investment Plan. Petitioner's financial advisor attempted to fax her form to the SBA on June 3, 2018.

4. On July 18, 2018, over a month after her June 8, 2018 resignation from MDCPS, Petitioner called the MyFRS Financial Guidance line to check on the status of her Investment Plan account and was advised that no second election form had ever been received from her. Petitioner submitted a Request for Intervention asking to be placed in the Investment Plan based on the 2nd Election Retirement Enrollment Form that she executed in April 2018 and left with her financial advisor.

5. Neither Respondent nor its third party administrator has any record of a second election being submitted by, or on behalf of, Petitioner prior to her June 8, 2018 resignation date. It appears that Petitioner's financial advisor's fax system did not transmit when he attempted to fax Petitioner's second election to the SBA on June 3, 2018.

6. Respondent investigated all faxes received by its third party administrator on June 3, 2018 and did not find any blank faxes received nor any that were three pages, as was Petitioner's second election form. Petitioner's Request for Intervention was denied by Respondent on August 6, 2018, and a timely Petition for Hearing was filed which initiated this administrative proceeding.

CONCLUSIONS OF LAW

7. Participation and enrollment into the Investment Plan are governed by Section 121.4501(4)(f), Florida Statutes. That section states:

(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)

8. The procedure for making a second election is governed by Rule 19-11.007, Florida Administrative Code, which reiterates this requirement, stating in pertinent part that:

(2) 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. Members on an unpaid leave of absence or terminated members cannot use their 2nd election until they return to FRS-covered employment. Employees of an educational institution on summer break cannot use their 2nd election during the full calendar months of their summer break. For example, if the last day of the school term is May 21st and the first day of the new school term is August 17th, the employee may not file a 2nd election in the calendar months of June or July. The beginning of the school term is determined by the employer. In general terms, this means that the 2nd election can only be made and processed during the month in which 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 of the month the member is actively employed and earning salary and service credit.

Rule 19-11.007(2), Fla. Admin. Code. (emphasis added).

9. This rule reiterates and is consistent with the statutory requirements enumerated above, and provides notice that a valid second election is made only when there is an election submitted and processed by the SBA's third party administrator that was made while the

employee was earning service credit. The facts here show that no second election was received by the SBA's third party administrator, and that Petitioner's financial advisor was informed electronically on June 3, 2018 that the second election form he attempted to deliver on Petitioner's behalf was—regretfully—not delivered. There is no indication between the June 3, 2018 notification to Petitioner's advisor of a system failure and Petitioner's June 8, 2018 resignation date, of another attempt to submit a second election form. The rule cited above makes it the responsibility of the employee to ensure that any second election is timely received by the SBA Plan Choice Administrator.

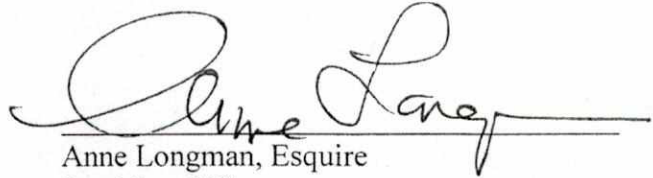
10. Petitioner, as the party seeking affirmative relief in this administrative proceeding, has the burden to demonstrate entitlement to the relief requested. Young v. Department of Community Affairs, 625 So. 2d 837 (Fla. 1993); Florida Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). She cannot meet her burden here because she did not meet the statutory criteria to make a second election when she attempted to switch plans. It is unfortunate that Petitioner has not been able to carry out her plan for her retirement assets, but there is no remedy available to her in this tribunal.

11. Because Respondent lacks the statutory authority to place Petitioner into the Investment Plan without a timely election having been made with the SBA Plan Choice Administrator, the Petitioner's request cannot be granted.

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 23^d day of January, 2019.



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
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
Liz.stevens@sbafla.com
(850)488-4406

COPIES FURNISHED via mail and electronic mail to:

Vanessa Kuzmin



Petitioner

and via electronic mail only to:

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent