

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ABNER LOPEZ,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3796
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On March 27, 2017, 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, Abner Lopez, and upon counsel for the Respondent. This matter was decided after an informal proceeding. 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 April 11, 2017. 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 he did not file a second election form prior to termination, hereby is denied. While Petitioner stated he believes that he

was not properly informed of his retirement plan options prior to termination, there was no evidence produced to suggest that Petitioner relied to his determinant on any acts or statements of the SBA, or that Petitioner was provided with any false or misleading information.

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.

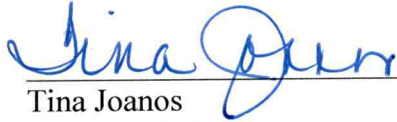
DONE AND ORDERED this 28th day of April, 2017, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

Joan B. Haseman

Joan B. Haseman
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 Abner Lopez, [REDACTED] and by U.P. [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 28th day of April, 2017.



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

ABNER LOPEZ,

Petitioner,

v.

CASE NO.: 2016-3796

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 January 31, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Abner Lopez, pro se



For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner's request to switch from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan should be granted.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. He was assisted by an interpreter, Silvana Lopez, provided by Ernst & Young. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Also in attendance was Marc Mancuso, a Supervisor with Ernst & Young. Respondent's Exhibits 1 through 8 were admitted into evidence without objection. During the hearing, it became clear that Petitioner does speak and understand English, and the hearing proceeded with the interpreter available and translating as needed.

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 enrolled in the Florida Retirement System in June 2000 and was in the defined benefit Pension Plan.
2. When the defined contribution Investment Plan began, Petitioner had until February 28, 2003 to make an initial election to join the Investment Plan.
3. He did not make an affirmative election to join the Investment Plan and so defaulted to continued Pension Plan membership effective March 1, 2003.
4. Petitioner's employment with Seminole County terminated on March 2, 2016.
5. At 2:55 p.m. on March 2, 2016, (his last day of FRS-covered employment) Petitioner called the MyFRS Financial Guidance Line and requested a Spanish interpreter. A follow-up call from a Spanish interpreter occurred at 4:42 p.m. Petitioner was advised during this call that a second election must be made before 4:00 p.m. on the last day of employment, and a

second election form was emailed to him at the email address he provided. At that time, Petitioner was unsure as to what his last day of FRS-covered employment was. Petitioner's FRS employer later verified that his last day of employment was indeed March 2, 2016.

6. Petitioner has never submitted a second election form to the SBA's third party administrator nor has he attempted to make a second election via the MyFRS.com website. Petitioner asserts that during the 15 years of his FRS employment, he was never informed about the Investment Plan or how it works with regard to withdrawing a distribution.

CONCLUSIONS OF LAW

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

(g) 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)(g), Fla. Stat. (2015)

8. The procedure for making a second election is governed by Rule 19-11.007, Florida Administrative Code. That rule states, in pertinent part:

(3) General Procedures.

(a) All members who wish to change their FRS retirement plan using their 2nd election must use a 2nd election enrollment form or, if moving from the FRS Pension Plan to the FRS Investment Plan or FRS Investment Plan Hybrid Option,

may do so online by accessing the Second Choice Service at MyFRS.com. There are two types of enrollment forms. The "2nd Election Retirement Plan Enrollment Form" Form ELE-2, rev. 06/14,

<http://www.flrules.org/Gateway/reference.asp?No=Ref-04394>, which is hereby adopted and incorporated by reference. This form allows the member to select different investment fund options if the member is changing from the FRS Pension Plan to either the FRS Investment Plan or the FRS Investment Plan Hybrid Option. Alternatively, the member can complete the "2nd Election EZ Retirement Plan Enrollment Form," Form ELE-2EZ, rev. 06/14,

<http://www.flrules.org/Gateway/reference.asp?No=Ref-04397>, which is hereby adopted and incorporated by reference. By completing this form, the member is choosing to have the employer and employee contributions and any transfers from the FRS Pension Plan invested in an age appropriate retirement date fund as provided under the Plan provisions. The member may change the investment selection at any time after the FRS Investment Plan or the FRS Investment Plan Hybrid Option account is activated. Activation occurs when contributions are deposited to the member's FRS Investment Plan account.

(b) Both forms are available by calling the toll-free number for the MyFRS Financial Guidance Line: 1(866) 446-9377, Option 4 or for members who are deaf, hard of hearing, or speech-impaired: TRS 711; or by using the MyFRS.com website and clicking on Resources and then on Forms.

(c) Elections made by form must be mailed to the FRS Plan Choice Administrator, P. O. Box 785027, Orlando, Florida 32878-5027; or faxed toll-free to 1(888) 310-5559.

19-11.007(3), F.A.C.

9. It is undisputed that Petitioner did not submit a 2nd Election Form. Petitioner believes he was not properly informed of his choices prior to his termination, but does not contend he relied to his detriment on any act or statement of Respondent, nor does the record give any indication that he did so rely or that he received any false or misleading information.

10. Petitioner faults Respondent's MyFRS Financial Guidance Line representative for returning his call after 4:00pm, which was the deadline to make a switch between plans. It is unfortunate that Petitioner was unable to submit a second election before 4 pm on his last day of FRS employment, but I see no evidence of any fault of Respondent SBA or any of its third-party providers, including the MyFRS Guidance Line. The Guidance Line and exhaustive on-line

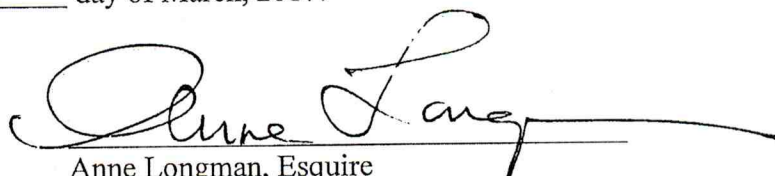
resources were available to Petitioner long before his last day of work, and it was Petitioner's obligation to use those resources to implement his retirement preferences.

11. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement when exercising its jurisdiction, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of those statutes 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 DCA1998). Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements to make a valid election into the Investment Plan. Young v. Department of Community Affairs, 625 So.2d 837 (Fla. 1993); Department of Transportation v. J.W.C., 396 So.2d 778 (Fla. 1st DCA 1981).

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 27th day of March, 2017.



Anne Longman, Esquire
Anne Longman
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
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Abner Lopez



Petitioner

and via electronic mail only to:

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
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