STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

TRISHA FITZGERALD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2017-0384
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

On April 23, 2018, 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, Trisha Fitzgerald, 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 by April 16, 2018, 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 she be allowed to use her second election to transfer from the Florida Retirement System ("FRS") Investment Plan to the FRS Pension Plan without having to pay the statutorily-required "buy-in" amount hereby is denied. Petitioner had claimed that she was placed in the FRS Investment Plan in 2003 without her consent. However, Petitioner was mailed quarterly statements for almost fifteen years setting forth

her FRS Investment Plan holdings. Petitioner could not produce any documentary evidence that her 2003 FRS Investment Plan election was made without her knowledge or consent.

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 11th day of May, 2018, 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 Trisha Fitzgerald, pro se, by email to: Fitzget.tf@gmail.com and by UPS 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 11th day of May, 2018.

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

TRISHA FITZGERALD,

Petitioner,

vs. CASE NO. 2017-0384

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 February 7, 2018, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Trisha Fitzgerald, pro se
[redacted]
Petitioner

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

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner can use her second election to switch from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan without having to pay the "buy in" amount calculated as a result of the requested transaction.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's exhibits R-1 through R-12 were admitted into evidence. Petitioner's objection to R-7 and R-12 is noted; the material set out therein is not necessary to my recommended conclusions of law.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with the Palm Beach County School Board, an FRS-participating employer, in August 2002.

2. Petitioner had until January 31, 2003 to choose between membership in either the FRS defined contribution Investment Plan or the FRS defined benefit Pension Plan.

3. On January 31, 2003, Petitioner called the MyFRS Financial Guidance Line. Respondent's records show that during that call with a Plan Choice Administrator, Petitioner made a verbal election to the Investment Plan, establishing a February 1, 2003 effective date for her membership in the Investment Plan. Respondent's records also show quarterly statements sent to Petitioner which reflect her Investment Plan membership.

4. Almost 15 years later, on December 1, 2017, Petitioner filed a Request for Intervention asking that she be allowed to use her second election to be put into the Pension Plan without having to pay any buy-in amount over the current value of her Investment Plan account. Petitioner stated that she has no recollection of having used her initial election to choose the

Investment Plan and that the Respondent's placement of her in the Investment Plan was an "error made by the computer or human data entry."

5. Respondent informed Petitioner that it had no statutory authority to waive the "buy-in" provision and therefore could not grant her request. On December 14, 2017 Petitioner filed a Petition for Hearing seeking the same relief, and this administrative proceeding followed.

6. Petitioner testified at hearing that she and her husband met with a financial advisor in November 2017, showed her FRS Investment Plan quarterly statements to him, and at that time learned that she was in the Investment Plan. Petitioner admits that she received the FRS Investment Plan quarterly statements from the Respondent at her address of 10250 Woodford Bridge Street in Tampa, Florida, where she has lived since 2007. Petitioner stated at hearing that when she received those statements, she simply put them in a file, and did not know she was in the FRS Investment Plan until November 2017 when so informed by her financial adviser.

7. Petitioner has taken no action with regard to her FRS retirement plan since 2003. Between 2007 (the first time quarterly statements were mailed to her current address) and 2017 (when Petitioner filed her Request for Intervention which began this administrative proceeding) she took no action to correct what she now says was an erroneous placement.

CONCLUSIONS OF LAW

8. Movement from the Investment Plan to the Pension Plan is governed by section 121.4501(4)(g)2., Florida Statutes, which provides in pertinent part:

> (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.

1. If the employee chooses to move to the investment plan, the provisions of subsection (3) govern the transfer.

2. If the employee chooses to move to the pension plan, the employee must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan. Benefit commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. The division must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

...

§ 121.4501(4)(g), Fla.Stat. (2014)(emphasis added).

9. Rule 19-11.007(3)(d), Florida Administrative Code, provides:

For members transferring to the FRS Pension Plan, if the member's Investment Plan account balance was less than the calculated amount required to buy back into the FRS Pension Plan, the election will require a personal payment. The member will receive notification and proper instructions from the Division detailing where and in what form to send any personal payments. Such payment, if necessary, must be received by the

date determined by the Division. If the required amount is not received by the Division by the date due, the election will be voided.

10. At the time Petitioner made her election to join the Investment Plan, she had access to educational resources including the Plan Choice Kit, the toll-free MyFRS Financial Guidance Line, the MyFRS.com website, and the FRS Investment Plan Summary Plan Description. These educational resources inform members that they have a one-time opportunity to switch from the Investment Plan to the Pension Plan, but that they must "buy-in" to the Pension Plan using the money in their Investment Plan account, and that if the buy-in cost exceeds the value of their Investment Plan account, they must make up the difference with other financial resources in order to complete the transaction.

11. The action complained of here, Petitioner's placement into the Investment Plan, occurred more than five years prior to the Petitioner's complaint at bar having been submitted. Pursuant to Section 121.4501 (8)(g), Florida Statutes, Respondent's action is presumed to have been taken at Petitioner's request and with her full knowledge and consent. That section states:

> (g) The state board shall receive and resolve member complaints against the program, the third-party administrator, or any program vendor or provider; shall resolve any conflict between the third-party administrator and an approved provider if such conflict threatens the implementation or administration of the program or the quality of services to employees; and may resolve any other conflicts. The third-party administrator shall retain all member records for at least 5 years for use in resolving any member conflicts. **The state board, the third-party administrator, or a provider is not required to produce documentation or an audio recording to justify action taken with regard to a member if the action occurred 5 or more years before the complaint is submitted to the state board. It is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member and with the member's full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.**

§ 121.4501(8)(g), Fla.Stat.

12. Petitioner has not been able to produce documentary evidence or an audio recording demonstrating that the action taken by Respondent in 2003 was taken without her knowledge and

consent. Rather, all of the documentary evidence, including 14 years of quarterly statements from the Investment Plan, demonstrates that Petitioner elected the Investment Plan, knew or should have known that she was in the Investment Plan, and never took timely action to switch or undo her election. As a matter of law, Petitioner is correctly placed in the Investment Plan. *Marin Crowe v. State Board of Administration*, State Board of Administration Case No.: 2017-0282 (Recommended Order March 14, 2018, Final Order April 4, 2018)(petition dismissed where petitioner in 2017 denied having made an election into the Investment Plan in 2009 despite having received quarterly statements and testifying she never opened the statements).

13. Petitioner asserts also that her first election, which she denies having made, was not effective because it is shown by Respondent records as occurring at 4:27 on January 1, 2003, 27 minutes after the applicable 4 p.m. deadline. The time of the election is not material to this matter; Petitioner disputes that she ever verbally elected the Investment Plan at all. I conclude that the undisputed facts including the years of quarterly statements she received, the Respondent's records of her initial choice, and the operation of section 121.4501(8)(g) discussed above, establish as a matter of law that Petitioner is in the Investment Plan and must use her second election and pay the buy-in amount.

14. There is no statutory provision allowing movement from the Investment Plan to the Pension Plan without using a second election and paying the buy in amount. Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements before being granted the relief requested. 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). Petitioner's frustration with her current situation is understandable, but in the absence of any record evidence to support her position, Respondent's initial action stands.

15. Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes 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 Chapter 121 are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See 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).

16. Respondent does not have the authority to waive the statutorily-mandated Pension Plan buy-in, and therefore cannot grant the relief requested in the Petition for Hearing.

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 23d day of April, 2018.

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
nell.bowers@sbafa.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:
Trisha Fitzgerald

[redacted]

Petitioner

and via electronic mail only to:

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

Counsel for Respondent