

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

TOMMIE BURKE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2018-0226
	)	
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On April 17, 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, Tommie Burke, 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 May 2, 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**

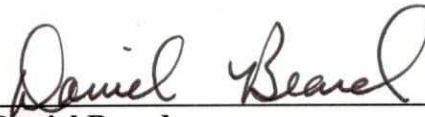
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s request to be allowed to rescind his default into the Florida Retirement System (FRS) Pension Plan so that he could be deemed to have been a member of the FRS Investment Plan from the beginning date of his FRS-covered employment hereby is denied. Petitioner claimed the default occurred without any notice to him. However, he

did receive his Plan Choice Kit, and he had access to numerous educational resources including the MyFRS Financial Guidance Line, to help guide his election.

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 30<sup>th</sup> day of May, 2019, in Tallahassee, Florida.

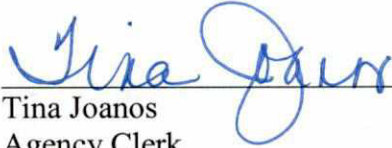
**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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

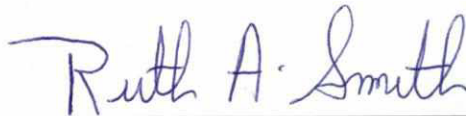
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

  
Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Tommie Burke, pro se, both by email transmission to

   
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 30th day of May, 2019.



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

TOMMIE BURKE,

Petitioner,

vs.

CASE NO. 2018-0226

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 January 30, 2019, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner:

Tommie Burke, 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's default into the defined benefit Pension Plan can be rescinded or reversed to allow him to be accepted as a member of the defined contribution Investment Plan from the date of his Florida Retirement System (FRS)-covered employment.

### **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone, testified on his 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 9 were admitted into evidence without objection.

A transcript of the informal 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 hired by the Jackson County Property Appraiser, an FRS participating employer, on December 1, 2017.
2. Petitioner had until May 31, 2018 to make an initial choice of either the FRS Pension Plan or the FRS Investment Plan.
3. Petitioner called the MyFRS Financial Guidance Line on March 12, 2018 and spoke to an EY Financial Planner. He told the EY Financial Planner that he had received a "brochure" from the SBA that had been returned-to-sender due to an incorrect address. Petitioner was informed that his address was reported by his employer and that he needed to correct his address with his employer who then would report the correct address to the Division of Retirement for input into the IRIS system. Petitioner was asked if he had any other questions and he said that he did not.
4. The "brochure" Petitioner received was the Plan Choice Kit that advises FRS participants of the differences between the Pension Plan and the Investment Plan including the different vesting periods. The Plan Choice Kit also notified Petitioner of his initial election

deadline. The Plan Choice Kit was sent to Petitioner's employer for transmittal to him after it was returned to the SBA with the wrong address.

5. Petitioner did not make an initial election to join the Investment Plan before his initial election deadline expired and so defaulted to the Pension Plan by operation of law.

6. According to the Division of Retirement's IRIS system, Petitioner's address was reported by his employer to the Division of Retirement as [REDACTED]

[REDACTED] This is the address where Petitioner's Plan Choice Kit was originally mailed. Petitioner's address was changed to [REDACTED] as of the June 2018 IRIS report which was posted on July 6, 2018. This address change occurred after Petitioner's initial election deadline expired.

7. Petitioner contacted the SBA soon after he received a notice that he had defaulted to Pension Plan membership. He stated that he wanted to be in the Investment Plan, and a release form was sent to him advising that he could rescind his election under Rule 1911.006(3), Florida Administrative Code. Petitioner timely signed and returned the release to the SBA, but the SBA did not process it because it had erroneously applied the grace period provisions of Rule 19-11.006(3) to his situation although there is no grace period for default plan elections.

8. Petitioner filed a Request for Intervention asking that he be placed in the Investment Plan as his initial plan election. This request was denied and Petitioner filed a Petition For Hearing for the same relief, thus initiating this administrative proceeding.

9. On August 14, 2018, Petitioner submitted a second election form to the SBA to change from the Pension Plan to the Investment Plan, and he is now a member of the Investment Plan effective September 1, 2018.

## CONCLUSIONS OF LAW

10. Pursuant to the Florida Statutes in effect at the time of his initial hire into an FRS-covered position, Petitioner had until May 31, 2018 to make his initial election. §121.4501(4)(a)1, Fla. Stat. (2017)(providing that new FRS-eligible employees have until the end of the fifth month following their date of hire to make an initial election). Because he made no affirmative election to join the Investment Plan before his initial election deadline expired, Petitioner defaulted to Pension Plan membership. § 121.4501(4)(a)1.b, Fla. Stat. (2017). His Petition asserts fundamentally that he “was defaulted into the pension plan without any notice to me.”

11. The facts of this case present numerous irregularities. Initial mailings to Petitioner went to the wrong address, which had apparently been recorded erroneously from a W-2 form. Petitioner did, however, receive his Plan Choice Kit. The FRS generally sends multiple email reminders, but Petitioner had no reported email address until after the choice period expired. All covered employees have access to various educational resources including the toll-free MyFRS Guidance Line, which Petitioner used on March 12, 2018; detailed on-line information at MyFRS.com; and employer human resource offices. Petitioner had health problems during his applicable choice period which may have made it difficult for him to attend to his retirement plan election.

12. In addition, when he learned that he had defaulted into the Pension Plan, Petitioner was then erroneously informed that he could reverse this default, which is not in fact allowed given the express terms of Rule 19-11.006(3), Florida Administrative Code:

(a) If a member files an election with the FRS Plan Choice Administrator and the member realizes that the election was made in error, or if the member has reconsidered the election made, the SBA will consider, on a case-by-case basis, whether the election will be voided, subject to the following requirements:

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

(c) If the request to reverse the election is made timely and the SBA finds that 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. The member will acknowledge that failure to return a signed release by the requested due date will result in the original election being reinstated.

(emphasis added). Because Petitioner did not file an election with the SBA, there is no affirmative action to be rescinded, and this rule is inapplicable.

13. Petitioner asserts that his default into the Pension Plan was not an actual choice, that he would not have made this choice since at his age of 66 it is unlikely that he will work the eight years needed to vest in the Pension Plan, that he was going through a very difficult situation with his health, and that he called the SBA promptly after learning that he had defaulted.

14. Despite this string of unfortunate circumstances, my careful review of the record does not reveal a legal basis for granting Petitioner the relief he requests. Because he did file a valid second election into the Investment Plan, he is now a member of that plan, but because he joined by second election, the contributions he made to the Pension Plan prior to his second election effective date (September 1, 2018) remain subject to the Pension Plan's longer vesting period.

#### **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 17<sup>th</sup> day of April, 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](mailto:Tina.joanos@sbafla.com)  
[mini.watson@sbafla.com](mailto:mini.watson@sbafla.com)  
[Nell.Bowers@sbafla.com](mailto:Nell.Bowers@sbafla.com)  
[Ruthie.Bianco@sbafla.com](mailto:Ruthie.Bianco@sbafla.com)  
[Allison.Olson@sbafla.com](mailto:Allison.Olson@sbafla.com)  
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Tommie Burke



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](mailto:slindsey@penningtonlaw.com)

Counsel for Respondent