

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MARYANNE TANGUAY-HIGGINS,)
)
 Petitioner,)
)
 vs.)
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
 _____)

SBA Case No. 2016-3550

FINAL ORDER

On May 25, 2016, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Maryanne Tanguay-Higgins, 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 June 9, 2016. 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 her post-employment request to transfer from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan hereby is denied. While Petitioner asserted that her employer failed to inform her of her retirement plan

options prior to termination, the SBA by law clearly is not responsible for any erroneous information that an FRS-participating employer provides to its employees. There is no statutory authority that would allow the SBA to place Petitioner in the FRS Investment Plan when Petitioner failed to file a timely second 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.

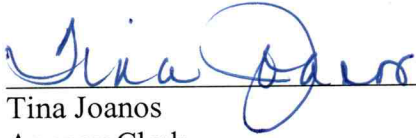
DONE AND ORDERED this 15th day of June 2016, in Tallahassee, Florida.

**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 Maryanne Tanguay-Higgins, pro se, both by email transmission,

 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 15th day of June, 2016.



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

MARYANNE TANGUAY-HIGGINS,

Petitioner,

vs.

Case No.: 2016-3550

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 March 28, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Maryanne Tanguay Higgins, pro se



For Respondent: Brandice D. Dickson, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

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

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 1 through 5 were admitted into evidence with the understanding that Petitioner could object to them after a more thorough review. I have received no objection from Petitioner since the hearing.

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

MATERIAL UNDISPUTED FACTS

1. Petitioner enrolled in the Florida Retirement System in October 2002.
2. Petitioner had until March 31, 2003 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan.
3. Having failed to make an affirmative election to join the Investment Plan, she defaulted to Pension Plan membership effective April 1, 2003.
4. Petitioner's FRS employment terminated on June 30, 2015.
5. Petitioner filed a Request for Intervention on January 26, 2016 asserting that the first time she was made aware that she could make a second plan choice election was by her financial advisor after her termination.
6. Petitioner's Request for Intervention was denied by Respondent on February 1, 2016, and a timely Petition for Hearing was filed that initiated this administrative proceeding.

7. During the investigation into Petitioner's Request for Intervention, Respondent sought out any telephone calls between Petitioner and the MyFRS Financial Guidance Line, and searched for copies of all Petitioner's election forms, and found no second election.

8. Petitioner does not assert that she executed and submitted a 2nd Election Retirement Plan Enrollment Form; she asserts that her employer's human resources representative was new and did not properly inform her of her options prior to her termination date.

9. Petitioner has over 12 years of service and is vested in her FRS Pension Plan account.

CONCLUSIONS OF LAW

10. 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)

11. The procedure for making a second election is governed by Rule 19-11.007, Florida Administrative Code which 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.

12. It is undisputed that Petitioner did not submit a second election form. To the extent Petitioner believes she was not properly informed of her choices prior to her termination, Petitioner does not contend she relied to her detriment on any act or statement of the Respondent SBA. She asserts instead that her termination was mishandled by her employer and that she was not informed about the existence of a second election form that could be used to move to the Investment Plan as long as she was still actively working.

13. Pursuant to section 121.4501(10)(h), Florida Statutes, all FRS employers are obligated to regularly communicate the existence of the two retirement plans and the plan choice

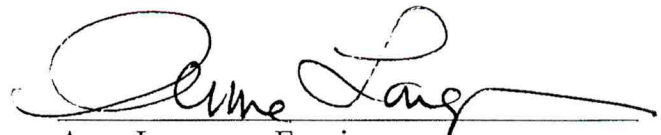
as part of their personnel functions. The SBA rules at 19-13.003(2), Florida Administrative Code place a duty on all employers to educate employees at least annually about plan choice and deadlines. There appears to be no affirmative requirement that employees be counseled during a termination process, and section 121.021(10), Florida Statutes expressly states that employers in the FRS system are not agents of the SBA, and that the SBA is not responsible for any erroneous information an employer may provide.

14. Petitioner carries the burden to demonstrate compliance with all applicable statutory and rule requirements to make a valid election into the Investment Plan. See 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). It is unfortunate that Petitioner may not have been terminated by an orderly process, but Respondent has no statutory authority to place Petitioner into the Investment Plan without a timely second election having been made, and the relief Petitioner has requested therefore must be denied.

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 25th day of May, 2016.



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
alongman@llw-law.com

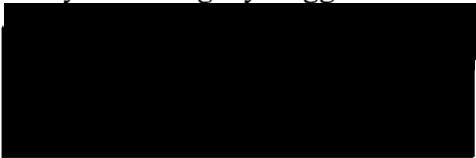
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Maryanne Tanguay-Higgins


Petitioner

and via electronic mail only to:

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

Counsel for Respondent