

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

CAROL KUDLESKY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1139
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

The entire file in this matter has been carefully reviewed for this Final Order. The entire file consists of the transcript of the hearing; documents entered into evidence at the hearing, both for Petitioner and for Respondent; Respondent's Proposed Recommended Order; post hearing filings made by Petitioner (discussed below, in the Background section); the Recommended Order; Petitioner's "Objections," and Chapter 121, Florida Statutes, and assorted other sections of the Florida Statutes. This Final Order does not include rulings on the several "Objections" filed by Petitioner after the time period for filing exceptions had expired [September 9, 2008].

Background

The hearing on this matter was held on April 16, 2008.

Petitioner filed six documents before the Recommended Order was issued but none were labeled a "Proposed Recommended Order." Petitioner's documents were filed with the Agency Clerk between April 24, 2008 and August 21, 2008. None of these documents contain a Certificate of Service.

Respondent filed a Proposed Recommended Order on June 20, 2008.

On August 25, 2008, the presiding officer submitted her Recommended Order to the Agency Clerk of the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Carol Kudlesky, and upon counsel for the Respondent.

The presiding officer's Recommended Order says, on page 2, that "Respondent filed a Proposed Recommended Order; Petitioner made several additional filings of materials, all of which were considered in my recommendation." Since none of these six documents filed with the Agency Clerk included a Certificate of Service, it is unclear whether all six were sent to the presiding officer.

At the end of the Recommended Order, the presiding officer added:

"NOTICE: THIS IS NOT A FINAL ORDER

All parties have a right to submit written exceptions within 15 days from the date of this Recommended Order, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case."

Fifteen days from August 25, 2008, the date the Recommended Order was filed, was September 9, 2008.

Respondent submitted no exceptions.

Petitioner filed a document labeled "Objections," on September 2, 2008. This document has been treated as a filing of exceptions. This document consists of two pages

labeled "Page 1 of 2" and "Page 2 of 2." In addition, this document contains 13 additional pages, for a total of 15. A copy was provided to Respondent because Petitioner's "Objections" did not contain a Certificate of Service. There have been numerous other filings after September 2, 2008. All of these documents were labeled "Objections" and none contained a Certificate of Service. Therefore, because they were filed after the Recommended Order had been issued and after the deadline for exceptions had expired, these "Objections" are not addressed in this Final Order.

Statutory Background regarding the FRS Investment Plan

In 2000, the Legislature established Part II of Chapter 121, Florida Statutes, which put in place the Public Employee Optional Retirement Program, known today as the FRS Investment Plan. The FRS Investment Plan is one of two retirement plans in the Florida Retirement System. The first plan is a defined *benefit* plan and is now known as the FRS Pension Plan. The FRS Investment Plan is a defined *contribution* plan.

It is clear in the Florida Statutes that "[p]articipation in the optional retirement program [FRS Investment Plan] is in lieu of participation in the defined benefit program [FRS Pension Plan] of the Florida Retirement System." Section 121.4501(3)(a).

Section 121.4501(3)(b) says a participant in the defined benefit plan who chooses to elect to move to the defined contribution plan "shall retain all retirement service earned under the defined benefit retirement program. . . ." However, a defined benefit plan member who chooses to "elect to participate in the [FRS Investment Plan] terminates active membership of the employee in the [FRS Pension Plan]"

Section 121.4501(3)(c) says that a defined benefit employee who elects the defined contribution program may elect to transfer "a sum representing the present value

of the employee's accumulated benefit obligation under the defined benefit program" to the defined contribution program. Section 121.4501(3)(c)2. explains the calculation of the present value.

Section 121.4501(4) sets out the participation dates for enrollment for already-employed participants, that is, people who are already in the FRS Pension Plan, the only plan that was in existence before 2000. In addition, section 121.4501(4) provides enrollment procedures for people hired by certain dates, divided among state employees, district school employees, and local employees.

Section 121.4501(4)(a) refers to state employees. Section 121.4501(4)a.1. refers to state employees who were already in a regularly established position as of June 1, 2002 and section 121.4501(4)(a)2. refers to state employees who were in a regularly established position after April 1, 2002. Similarly, section 121.4501(4)(b) refers to district school board employees. Section 121.4501(4)(b)1. refers to district school board employees who were already in a regularly established position as of September 1, 2002, and section 121.4501(4)(b)2. refers to district school board employees who were in a regularly established position after July 1, 2002. Finally, section 121.4501(4)(c) refers to local employees. Section 121.4501(4)(c)1. refers to local employees who were already in a regularly established position as of December 1, 2002. Section 121.4501(4)(c)2. refers to local employees who were in a regularly established position after October 1, 2002.

Each of these subparagraphs says that the election is irrevocable "except as provided in paragraph (e)."

Section 121.4501(4)(e) provides that after the initial election for employees, either to elect to remain in the FRS Pension Plan or to elect the FRS Investment Plan, the employee has “one opportunity, at the employee’s discretion, to choose to move from the defined benefit program to the [defined contribution] program or from the [defined contribution] program to the defined benefit program.” This is the Second Election.

If the employee chooses to move from the defined contribution to the defined benefit program, [see 121.4501(4)(e)2. and 3.,] the employee must “buy in” to the defined benefit plan by using a sum “representing the employee’s present value or actuarial accrued liability.” This amount can come from the amounts in his or her accounts in the defined contribution plan and might have to include money from the employee’s own resources.

All of these statutory requirements were in an employee benefit kit sent to all current members of the FRS Pension Plan “at least 90 days prior to the beginning date of the election period for the employees of the respective types of employers.” The “respective types of employers” are state, district school board, and local employers. Section 121.4501(10)(a). “Ninety days prior” means that the educational material was rolled out 90 days prior to June 1, 2002, to inform employees in a regularly established state position, and subsequently to district school board employees in a regularly established position prior to September 1, 2002, and finally to local employees in a regularly established position prior to December 1, 2002. These statutory requirements are being implemented every month to all new employees.

Summarizing this statutory background: the SBA provided written material directly to employees, written material directly to employers; phone contact for

employees and employers with an education provider; phone contact with the third party administrator; and computer services including the written material to every employee. There were workshops offered all over the state of Florida bearing on the new retirement plan and the differences between the new plan [FRS Investment Plan] and the-then current plan [FRS Pension Plan].

RULINGS ON EXCEPTION

Petitioner's "Objections to Final Recommended Order," received by the Agency Clerk on September 2, 2008, raise many issues.

First, Chapter 69, Florida Statutes, "Miscellaneous Procedural Matters," is in Title VI, "Civil Practice and Procedure." This title does not apply to administrative procedure, which is found in Chapter 120 and under which this proceeding was conducted. Chapter 69 does not apply to this proceeding.

Regarding the various statutory provisions in Chapter 121, Part II: Petitioner's Exhibit A was introduced into evidence at the hearing and contains a printout of the 2007 version of Section 121.4501.

Second, Petitioner objects to the website which contains information about the FRS Pension Plan and the FRS Investment Plan and about transferring from one plan to the other. The site on the web where this may be found is at www.MyFRS.com. Click on "FRS Programs" in the upper right hand corner and then choose "Changing Plans." The statutes use the term "election" to go from one plan to another. The Changing Plans comparison uses the term "election" for both kinds of transfers. Petitioner's understanding as stated in this "Objection" that "...wouldn't your pension plan present value be ZERO, since the pension plan has NO value until you are vested, which takes 6

years?” [page 1 of 2] is incorrect. If a participant switches from the Pension Plan to the Investment Plan, the transferred value from the Pension Plan to the Investment Plan is the present value in the Pension Plan. Present value is always less than the actual dollar amount in the Pension Plan because it is calculated assuming that it will grow in the Pension Plan to a certain amount at the participant’s retirement. Therefore, the amount is never zero and always has a value whether the participant is vested or not. If the participant is not vested in the Pension Plan and leaves Florida state government and does not return within five years, the amount is then lost to that participant and reverts to the Trust Fund for use by other participants. Petitioner was in fact vested in her Pension Plan amount because she had worked for nine years.

Third, Petitioner asks in her “Objection” about Section 121.4501(4)(a)1.b. which talks about forfeiting the option to switch to the Investment Plan “within the prescribed time period.” The word “forfeit” is used in connection with the prescribed time period. If an eligible employee does not use the prescribed time period to make an election, the election is completed at the end of the time period. Further, this statutory section refers to paragraph (e). To wit, “except as provided in paragraph (e),” which means that whatever is in paragraph (e) must be read in conjunction with the other paragraphs in that subsection, as Respondent’s counsel pointed out to Petitioner during the hearing. T 62, lines 15 through 20.

Fourth, Petitioner questions the information she received over the telephone on December 12, 2007. By that time, the defined contribution program had been in operation for five years. The folks who answered the Guidance Line and found themselves speaking to someone who had worked for state government for nine years

would have had to assume that the participant had received the written material and in general knew about both plans. Further, in the December 12, 2007, phone call, [R-5, page 5, lines 5 through 5], Petitioner is told by the counselor that the Pension Plan would give her higher benefits than the Investment Plan if she were to continue FRS employment.

Fifth, Petitioner complains that she was not provided with “sufficient education” by her employer. Her understanding that her “employer had a responsibility to provide equal educational opportunities” and that the “SBA had a legal obligation to ensure my employer complied and to ‘police’ every detail concerning this program.” Her understanding is not accurate.

Rule 19-13.003(3) and the Investment Plan Summary Plan Description (SPD) both state that “employers are not agents of the SBA nor the FRS.” Although subsection (2) of the rule and the SPD state some of the responsibilities of employers, there is no statutory enforcement mechanism and there is no statutory obligation for the SBA to ensure employers’ conduct. And further on page 10 of the Recommended Order, the presiding officer said that while there was some evidence that Petitioner’s “employer may have been inadequate to properly inform [Petitioner] . . . Petitioner’s employer is not a party to these proceeding and there is no jurisdiction here as to any remedy against it.”

Sixth, Petitioner states that the “hearing officer also agrees that some of the materials are confusing.” [page 2 of 2} This is not what the presiding officer said. On page 9 of the Recommended Order, the presiding officer said: “The materials provided are voluminous and can be confusing, but I see no evidence that Respondent misled Petitioner in what was provided to her.”

Seventh, The Petitioner's large paragraph on page 2 of 2 is not supported by the record. Instead the record indicates that:

a) Petitioner first became interested in switching plans when her "old resource manager was leaving, and. . . the last thing she said to me was that she was glad she was in the other plan [FRS Investment Plan] so it was because it was a great deal. . . ." T 6, lines 10 through 18; and .

b) Contrary to her assertions in her Petition for Hearing, she did not ask that her switch to the FRS Investment Plan be reversed on the call she made on January 31, 2008, to the Financial Guidance Line. Respondent's Exhibit 6, page 5, lines 6 through 13. The counselor on the line, Don, asked if she had any other questions (page 5, line 6-7).

Petitioner responded: "Okay. I just wasn't able to get in today so I thought I hadn't gone through yet." And Don responded: "No, it [the present value transfer from her Pension Plan account] definitely went over." And Petitioner responded: "Okay." At that point the conversation ended: lines 14 through 19.

c) The next phone call was on February 4, 2008. The counselor was Andrew and the conversation was about returning to work after retirement. Andrew and Petitioner discussed the fact that taking a distribution from the FRS Investment Plan is retirement. [Respondent's Exhibit R-7, page 4, lines 13-14] The rest of the phone conversation centered on employment after retirement and ended amicably. There was no discussion of misunderstanding, misinformation, or upsetment with the FRS Investment Plan.

d) The next and final phone call was two days later, on February 6, 2008. [Respondent's Exhibit R-8] Petitioner said that she had "serious issues with – I am seven days into the Investment Plan. Yeah, one – seven days into the Investment Plan. And I

went into it with the understanding that I would be able to buy back into my pension plan at some point, and I was ill-informed and I want this reversed.” Mark, the counselor, said: “Ma’am, have you brought this up before or is this the first time?” Petitioner said: “That I have brought this up?” Mark said: “Right.” And Petitioner said: “This is the first time.” [page 2, lines 11 through 24] Whereupon, the counselor informed Petitioner about the complaint process and directed her to the proper form.

Eighth: Also in this “Objection,” Petitioner asks for the exact length of the phone recordings and attaches a three-page paper, from 1995, by Steve Cain, addressing computer editing of recorded phone conversations. Petitioner says: “I cannot and will not imply anything I cannot prove.” [Page 2 of 2] However, Petitioner’s request regarding the length of the phone calls is denied because the hearing is over. She should have asked for this information at the hearing and asked for permission to have the recordings analyzed.

The record does not reveal what happened between February 4 and February 6, 2008. However, after February 6, Petitioner had a totally different attitude and had consulted with an attorney, as reflected in her Request for Intervention, the Petition for Hearing, the hearing on April 16, 2008, and the resulting filings of documents. [Petitioner’s Objection, received September 2, 2008, by the SBA’s Agency Clerk, page 2 of 2]

Ninth, and finally, Petitioner says, at the end of page 2 of 2, in large, bold type: “Your findings [presiding officer’s findings] are unjust, arbitrary, clearly erroneous and an abuse of discretion because you AGREE with my main points of contention.” A careful reading of the Recommended Order shows that this assertion is not true.

This exception [Objection] is rejected in its entirety for all of the reasons stated above.

IT IS, THEREFORE, ORDERED

A) The Findings of Fact in the Recommended Order are hereby adopted in their entirety.

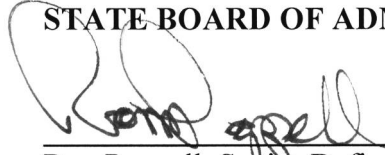
B) The Conclusions of Law in the Recommended Order are hereby adopted in their entirety.

C) The Petitioner's request to rescind her second election into the FRS Investment Plan is denied.

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 200, 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. [In response to Petitioner's request on page 2 of 2 in her "Objections." the appropriate District Court of Appeal is the First District Court of Appeal in Tallahassee. The First District is the proper district for the State Board of Administration and is also the proper district for Clay County. See Sections 26.25 and 35.06, Florida Statutes.]

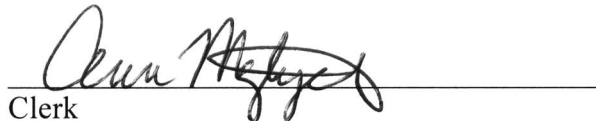
DONE AND ORDERED this 4th day of November, 2008, in Tallahassee,
Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
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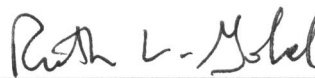
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order
was sent by U.S. mail (confirmation requested) to Carol Kudlesky, pro se, [REDACTED]
[REDACTED], and by U.S. mail to Brian Newman and
Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O.
Box 10095, Tallahassee, Florida 32302-2095, this 4th day of November,
2008.



Ruth L. Gokel
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL KUDLSEKY,

Petitioner,

v.

CASE NO.: 2008-1139


STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on April 16, 2008, in Tallahassee, FL. The appearances were as follows:

APPEARANCES

For Petitioner:	Carol Kudlesky  Petitioner
For Respondent:	Brandice D. Dickson, Esquire Pennington, Moore, Wilkinson, Bell & Dunbar, P.A. 215 S. Monroe Street, Suite 200 Tallahassee, Florida 32301

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STATEMENT OF THE ISSUE

The issue is whether the Respondent, State Board of Administration (SBA) should grant the Petitioner's request to rescind her second election into the Investment Plan.

PRELIMINARY STATEMENT

On February 6, 2008, Petitioner filed a Request for Intervention seeking to have her second election into the Investment Plan rescinded. After an investigation by the SBA, that request was denied, and Petitioner then filed a Petition for Hearing requesting the same relief. The Petition was transmitted to the undersigned for informal hearing.

Petitioner attended the hearing in person and testified on her own behalf. Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Petitioner's Exhibits P-A through P-H and Respondent's Exhibits R-1 through R-8 were admitted into evidence without objection.

A transcript of the informal hearing was made, filed with the agency and made available to the parties, who were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a Proposed Recommended Order; Petitioner made several additional filings of materials, all of which were considered in my recommendation.

UNDISPUTED MATERIAL FACTS

1. Petitioner is an employee with the Clay County Health Department, a Florida Retirement System (FRS) participating employer, and was fully vested in the Pension Plan.
2. On December 12, 2007, Petitioner called the MyFRS Financial Guidance Line and spoke with an Ernst & Young advisor named Juan, asking for information about the Investment Plan. At the time she called, she was logged on to the MyFRS website, and Juan "mirrored" her session so that they were both looking at the same website screens while they spoke.

3. Petitioner asked about the portability of her retirement assets if she were to switch to the Investment Plan. She was advised of the investment choices she could make if she elected to switch to the Investment Plan, was told that she could switch to the Investment Plan on line and that the election would take effect upon receipt of the election, and was offered a comparison between staying in the Pension Plan and switching to the Investment Plan. During this conversation, Petitioner indicated that she was not planning on leaving the FRS, but that times were uncertain. She was told that sticking with the Pension Plan at this point in her career (she was 42 at the time) would be better for her unless she was leaving the FRS and not coming back.

4. On December 13, 2007, the Ernst & Young financial advisor, Juan, after making several attempts, was able to reach Petitioner by telephone. He had been reviewing his notes, and called to be sure she understood that if she switched into the Investment Plan and wished to take a distribution, she would have to be terminated for three calendar months before she could do so. Petitioner stated that she knew the election was effective immediately and that she could not move her money for three months.

5. On December 28, 2007 the Petitioner again logged onto the MyFRS website and made an online second election to enroll in the FRS Investment Plan.

6. This second election was received by CitiStreet, the FRS Plan Administrator, on that same day, and the first day of the following month, January 1, 2008, became Petitioner's Investment Plan effective date.

7. A confirmation statement was mailed to the Petitioner in early January confirming her switch to the Investment Plan. The statement advises:

This is your final Plan Choice Election under the Florida Retirement System. You must remain in the FRS Investment Plan until your retirement from FRS-covered employment.

This statement also informed Petitioner that pursuant to her election of the Investment Plan, the "estimated present value of your Pension Plan benefit will be transferred to your Investment Plan account by the end of the month..." that if she had any questions about the statement she should call the MyFRS Financial Guidance Line and that she was responsible for "timely notifying the Plan Administrator of errors in this statement."

8. On either January 30 or 31, 2008 the present value of the Petitioner's Pension Plan benefit was transferred to her Investment Plan account.

9. On January 31, 2008, the Petitioner called the MyFRS Financial Guidance Line and spoke with Don of Ernst & Young. During this call, Petitioner stated, "I switched from the pension to the investment [plan]" and wanted to know at what point she would be able "to buy back into the pension plan if [she] chose to?" She was advised, "At no point. Once you make your election, it is the second and final election," and stated, "Okay, Even if I left state employment?" She asked whether her second election had already "gone through" and the following exchange was had:

MyFRS FINANCIAL ADVISOR: Well, by my record it has.

MS. KUDLESKY: It has gone through?

MyFRS FINANCIAL ADVISOR: Yes, it has. You were effective as of January 1st in the plan, but you won't see the funds until the end of January, which is today, or you could call CitiStreet. And then by, I believe by next, let's see what do you have access to, advisor service and the manage my benefit service, so you already have access, yes.

MS. KUDLESKY: I do. As of today I have access to that?

MyFRS FINANCIAL ADVISOR: Yes.

MS. KUDLESKY: Okay.

MyFRS FINANCIAL ADVISOR: And I'm looking at your, your total was \$ [REDACTED]

MS. KUDLESKY: Okay.

MyFRS FINANCIAL ADVISOR: So, that is what you – yeah, that is what you have in your account right now.

MS. KUDLESKY: Okay.

MyFRS FINANCIAL ADVISOR: All right. Any other questions for me today?

MS. KUDLESKY: Okay. I just wasn't able to get in today so I thought I hadn't gone through yet.

MyFRS FINANCIAL ADVISOR: No, it definitely went over.

MS. KUDLESKY: Okay.

MyFRS FINANCIAL ADVISOR: All right.

MS. KUDLESKY: All right. Thank you.

MyFRS FINANCIAL ADVISOR: My pleasure. Have a great evening.

MS. KUDLESKY: You too. Bye.

MyFRS FINANCIAL ADVISOR: Bye bye.

[Tr. at 31-35; Ex. R-6].

By the time the Petitioner called the MyFRS Financial Guidance Line on January 31, 2008, the present value of her Pension Plan benefit had been transferred to her new Investment Plan account. After learning this fact, Petitioner did not in any way indicate during this call that she was dissatisfied, that she had made a mistake or that she wanted to rescind her second election.

10. On February 4, 2008, Petitioner again called the MyFRS Financial Guidance Line. She stated that she was in the Investment Plan, asked about returning to work after retirement and had an extended discussion with the advisor about the requirements for various scenarios involving returning to work after retiring. She again did not mention any dissatisfaction with having switched plans.

11. On February 6, 2008, Petitioner once again called the Guidance Line, and spoke with Mark. She stated that she was seven days into the Investment Plan and had "serious issues" with it, and that she thought she would be able to buy back into her pension at some point. Mark asked whether she had brought this up before or if this was the first time. Petitioner stated: "This is the first time." The advisor then informed her how to make a complaint.

12. In her Request for Intervention executed February 6, 2008, Petitioner requests assistance because of a misunderstanding and includes a statement that she never intended to "surrender her state pension." In its response of February 14, 2008, from Dan Beard, Respondent SBA stated: "Your Investment Plan election became final and irrevocable at 4:00 p.m. (Eastern Time) on December 28, 2007. Therefore, we cannot honor your request to void your FRS Investment Plan election." The next paragraph of this letter continues:

Please note that Chapter 19-11,007(6) Florida Administrative Code, provides members who have made a second election a grace period to rescind their election. Unfortunately, you would have had to have notified the FRS no later than January 31, 2008 in order to take advantage of this provision. We have reviewed your January 31, 2008 call to the MyFRS Financial Guidance Line. You did not indicate during this call that you wanted to rescind your 2nd election processed on December 28, 2007.

13. Petitioner has not asserted that there is any error in the transcript of her January 31, 2008 call with Ernst & Young, which was admitted into evidence without objection. My review of

that transcript is consistent with the Respondent's; Petitioner made no mention during that call of wanting to undo her second election.

14. Based on the undisputed facts of record, it appears that Petitioner first learned of the existence of a grace period with regard to a second election through Mr. Beard's letter. In her Petition for Hearing dated March 3, 2008, she asserts "insufficient disclosure of grace period" as a reason for allowing her to rescind her second election.

15. Petitioner testified at the hearing that her decision to switch from the Pension Plan to the Investment Plan was based on the belief she could buy back into the Pension Plan at a later date and that doing so would not disturb the "vested" nature of her benefit within the Pension Plan.

16. Petitioner attributes her mistaken understanding to inadequate assistance from her employer, misleading educational materials and forms from Respondent and its third party administrators and incomplete assistance from MyFRS Financial Guidance Line counselors.

CONCLUSIONS OF LAW

17. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes (2007). That section states, in pertinent part:

(e) After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, 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 defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. Eligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay.

§ 121.4501(4)(e), Fla.Stat. (2007).

18. FRS members are allowed only one opportunity to switch plans. Because the Petitioner used her one-time second election in December 2007, she has exhausted the opportunity to move between plans.

19. Rule 19-11.007, Florida Administrative Code provides a grace period for rescission of second elections as follows:

(6) Grace Period.

(a) If a member files an election with the TPA and the employee realizes that the election was made in error, the SBA will consider, on a case-by-case basis, whether the election will be voided, subject to the following requirements:

1. Member Elects the FRS Investment Plan. The SBA must be notified, by a telephone call to the toll free number: 1(866)446-9377, or by e-mail, or by written correspondence directly to the SBA, to the TPA, or to the Division of Retirement, before assets are transferred from the FRS Pension Plan to the member's FRS Investment Plan account. This transfer occurs no later than the last business day of the month following the election month.

2. Member Elects the FRS Pension Plan. The SBA must be notified no later than the last business day of the month following the election month.

Rule 19-11.007, F.A.C. Petitioner could not have met the requirements of the above rule by anything she said during her January 31, 2008 call to the MyFRS guidance line because by that time, the assets from the Pension Plan had already transferred to her Investment Plan account.

20. Even if Petitioner had been within the applicable time frame prescribed for seeking to have her second election voided under § 19-11,007(6), F.A.C., there is no dispute as to what was said during her phone call of January 31, 2008, and nothing in that call could be construed as a request to have her election voided. The same is true of her call on February 4, 2008. In her call of February 6, 2008, she states that this is the first time she has raised the issue of voiding her second election. I

conclude based on the undisputed facts that Petitioner made no request to void her second election within the time frame set out by the grace period rule.

21. Petitioner asserts that she is entitled to relief because the Respondent either misled her with its educational materials or did not clearly inform her that she had the right to rescind her second election. There is no question that the Respondent provides multiple, detailed opportunities to learn about FRS offerings, choices and requirements via print, its website and telephone resources. The materials provided are voluminous and can be confusing, but I see no evidence that Respondent misled Petitioner in what was provided to her. In fact it appears that an Ernst & Young counselor went out of his way to assure that Petitioner had not misunderstood what he had said to her in a previous call.

22. I fully accept Petitioner's contention that it would be preferable for the grace period, if one is in fact available, to be disclosed in plain language in the election materials and forms, rather than simply being made available by reference to the SBA rules governing the Public Employee Optional Retirement Program (the Investment Plan). I cannot determine, however, under the circumstances presented by this case, that the lack of such a disclosure misled Petitioner, as she did not evince any desire to undo her second election until after the period provided by Rule 19-11.007 had already elapsed. Although it does not expressly refer to a grace period, the Second Election Plan Choice Confirmation Statement mailed to Petitioner does advise that the statement should be reviewed, to call the Guidance Line with any questions, and "you are responsible for timely notifying the Plan Administrator of errors in this statement." The wording of this admonition is consistent with the stated intent of the rule to permit the SBA to void an election when "the employee realizes that the election was made in error." §19-11.007(6)(a), F.A.C.

23. Petitioner also asserts and has presented some evidence to the effect that the educational opportunities offered by her employer, the Clay County Health Department, may have been inadequate to properly inform her about available retirement options and requirements. While there is no evidence here to the contrary, Petitioner's employer is not a party to these proceedings and there is no jurisdiction here as to any remedy against it.

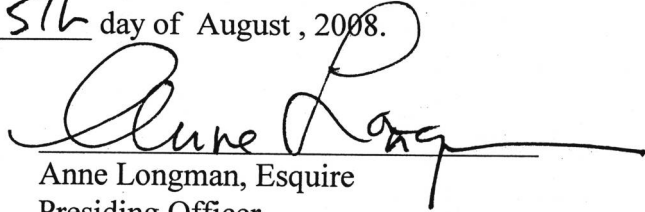
24. There does not appear to be any statutory authority under which Respondent SBA can legally grant the relief requested by the Petitioner, and agencies have only those powers conferred on them by statute. See e.g. East Cent. Regional Wastewater Facilities Operation Bd. v. City WPB, 659 So. 2d 402,404 (Fla. 4th DCA 1995); Gardinier Inc. v. Florida Dept. Pollution Control, 300 So. 2d 75,76 (Fla 1st DCA 1974).

25. It is unfortunate that Petitioner elected to switch to the Investment Plan when she would clearly prefer now to be in the Pension Plan, but she has not in fact lost any assets and still has the opportunity to retire with a substantial benefit.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I can find no basis on which the relief requested by Petitioner can be granted. I therefore recommend that the Respondent, State Board of Administration issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 25th day of August, 2008.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

NOTICE: 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, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 25th day of August, 2008.

Copies furnished to:

Carol Kudlesky



Petitioner

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