

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

KAREN CHITTY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2011-2234
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On May 8, 2012, 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, Karen Chitty, and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. Neither party filed exceptions, which were due on May 23, 2012. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

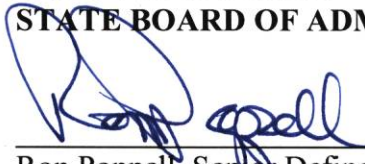
ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. Petitioner’s request that her second election be voided on the basis that she was given deficient advice from Florida Retirement System representatives and her request that she be placed back into the Pension Plan with “full uninterrupted service credit and benefits” hereby are 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 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 7th day of June, 2012, 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
Tallahassee, Florida 32308
(850) 488-4406

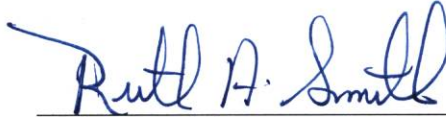
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Gina Jones
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Karen Chitty, pro se, [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 7th day of June, 2012.



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

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GENERAL COUNSEL'S OFFICE

KAREN CHITTY,

Petitioner,

vs.

Case No.: 2011-2234

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on February 22, 2012, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Karen Chitty


Petitioner

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

STATEMENT OF THE ISSUE

The issue is whether the SBA should grant Petitioner's request to void a second election, based on her assertion that she received deficient advice from Florida Retirement System (FRS) representatives, and place her back in the Pension Plan with "full uninterrupted service credit and benefits during the period she was employed by the Volusia County Clerk of Court."

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, Defined Contribution Programs. Respondent's Exhibits R-1 through R-11 and Petitioner's Exhibits P-1 through P-8 were admitted into evidence. Pursuant to a request made during the hearing, Mr. Beard reviewed all available records for any telephone calls between Petitioner and FRS provider ING and found one additional call, a recording of which was provided to Petitioner. By letter of March 7, 2012 Petitioner stated that this call added nothing to her assertions. By order of March 28, 2012, the parties were invited to submit proposed recommended orders on or before April 27, 2012. A transcript of the proceeding was made, filed and provided to the parties, and both parties filed proposed recommended orders.

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed with the Volusia County Clerk of Court, an FRS employer, from August 1996 through February 2007, and was a member of the FRS Pension Plan.

2. On September 26, 2006, Petitioner called the MyFRS Financial Guidance Line regarding a switch from the FRS defined benefit Pension Plan to the FRS defined contribution Investment Plan, and the following exchange occurred:

MS. CHITTY: Okay. Good. And the other question is, is there a number of times in case our situation changes where I can change back to the Pension Plan?

FRS REPRESENTATIVE: No. There's a one-time second election in you're choosing to switch into the Investment Plan.

You cannot switch back once you use your one-time second election.

MS. CHITTY: That was the other thing I wanted to make sure. Okay. Great. That answers my questions then. Thank you so much.

3. On January 19, 2007, Petitioner executed a second election form which was received by Respondent's third party administrator on January 22, 2007. She asserts that she did this because she was told by an FRS representative on the telephone that even though the 2d Election Retirement Form indicated that the second election was irrevocable, there were exceptions, and she would be permitted to switch back to the Pension Plan under certain circumstances. Petitioner was moved to the FRS Investment Plan pursuant to her second election request, and the present value of her Pension Plan benefit was transferred to her Investment Plan account.

4. Petitioner terminated her employment with the Volusia County Clerk of Court on February 1, 2007.

5. Petitioner was re-hired by the Volusia County Clerk of Court in January 2009 and soon learned that she would not be allowed to re-enroll in the FRS Pension Plan.

6. Petitioner's belief that she could always rejoin the Pension Plan if she was rehired by an FRS-participating employer, was based on what she described as a "loophole" in the law. She testified that she had spoken to co-workers who had:

come and gone from the Clerk's office, and some of them said, well, yes, I was able to go into the Pension Plan even though I made my second election. And I talked to Human Resources and I got the same type of, well, it depends on this and depends on that. So I made another phone call. And that one is—basically, that's what I said, I'm not really understanding this, I thought I'd better check and make sure I'm understanding it, and I told them I'm going to be leaving the system, and the way we ended that is, I can just keep the funds frozen if there's a chance that I'm coming back to Florida at some point and would like to get back

into employment. And, again, I thought, *okay, that's it, I'm just going to leave it as it is.*

At the year end – and I'm still in the meantime, having people tell me that, *but they can do it*, and still having been told otherwise.

7. Petitioner does not know whether the co-workers with whom she spoke had taken distributions from their Investment Plan accounts and thus could not have known whether any of those coworkers had been deemed to be retirees by operation of statute. She did learn later that prior to July 1, 2010, if she had taken a distribution after leaving her employment, and then returned to FRS participating employment, she would have been able, in essence, to begin again in the Pension Plan.

8. In 2007, during the time in question here, an FRS participant who had used a second election to switch to the Investment Plan could rejoin the Pension Plan, but only if that participant had taken a distribution (thereby becoming a retiree by operation of statute) and was entering a second career with an FRS participating employer. Petitioner never took a distribution from her retirement account and therefore was not deemed to be a retiree.

9. Although Petitioner testified that someone she spoke to after calling the MyFRS Financial Guidance Line confirmed that she could “freeze” her Investment Plan account upon termination of employment, there is no recorded telephone call to that effect. Mr. Beard testified that the Petitioner could have been speaking with a Division of Retirement representative in 2007, but those calls to the MyFRS Financial Guidance Line are not recorded. All calls between Petitioner and the Guidance Line other than any that may have involved the Division of Retirement have been retrieved, transcribed and placed in the record of this proceeding. There is a discussion of “freezing” of her account, but it takes place during the call of September 28, 2006, and is not in the context of the Investment Plan (see discussion below.)

10. On September 12, 2011, some five years after being placed in the Investment Plan, Petitioner requested Respondent rescind her second election and put her back in the Pension Plan. That request was denied and Petitioner filed the Petition which resulted in this hearing.

CONCLUSIONS OF LAW

11. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes. 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. (2006).

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

13. It is clear that Petitioner diligently attempted to learn about and fit within the operation of the applicable statutes at the time she initially left FRS covered employment in 2007, and it is equally clear that she did not learn about the crucial fact that would have allowed her to re-enter the Pension Plan: that she had to have “retired” by operation of statute by having taken a distribution from her Investment Plan account. So Petitioner submitted a second election form, and acknowledged that it was a one-time irrevocable election, but believed that there were

circumstances that would allow her to get back into the Pension Plan, despite what the form said. She was correct as to her general belief, but mistaken as to the circumstances required to produce the result she wished.

14. Petitioner recognizes that she has the burden of proof in this proceeding, and asserts that she has met this burden by demonstrating that she was given deficient advice by FRS representatives. My review of the record indicates, however, that there was nothing factually inaccurate in the advice she received. She has testified that someone she reached through the MyFRS Financial Guidance Line told her that she could rejoin the Pension Plan, and I do not doubt the truth of her recollection, especially as this was a true statement in 2007 – although only under certain specific circumstances.

15. In essence, Petitioner appears to be arguing that FRS representatives had a duty to inform Petitioner that if she retired by taking a distribution from her Investment Plan account and then later began a second career by returning to work with an FRS covered employer, she would be allowed to be in the Pension Plan. But my review of the recorded telephone calls indicates that she was given accurate factual answers to all the questions she asked. In particular, during the call of September 28, 2006, after explaining that she would be leaving the state with nine years in the Pension Plan and might want to return to state service, Petitioner asked about what triggered “technically retiring,” and was told that the definition of retirement under the FRS was when she actually began collecting a benefit. So the information given in this call included the premise that she might be collecting a benefit and therefore “retiring.” This is the call in which Petitioner mentions freezing her account in case she comes back to Florida and wants to re-enter FRS service. This call does not mention the Investment Plan, using the second election or switching plans.

16. In the call of January 18, 2007, Petitioner confirmed that she was moving out of state, and had determined that moving to the Investment Plan “was probably the only way I could take it with me at my age.” The advisor on the phone confirmed that the Investment Plan would allow her to leave her money in the investment account to grow tax deferred or roll it over to another retirement system. She was also advised to consult a tool on the FRS web site that would help her determine the right choice for her. There was nothing in this information that was erroneous.

17. Petitioner used her only opportunity to switch plans in 2007 when she submitted her second election form asking to move to the Investment Plan from the Pension Plan. Despite being told by the MyFRS Financial Guidance counselor that using that election would result in exhaustion of opportunities to switch plans, and despite the form itself cautioning users of the same result, Petitioner signed the form and requested to switch plans.

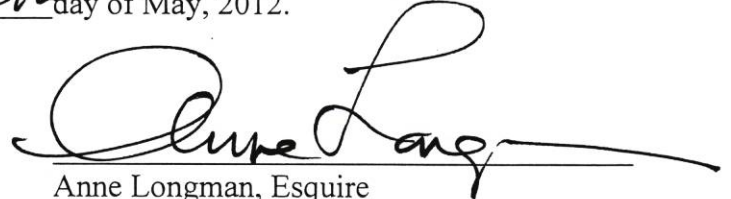
18. The SBA cannot deviate from the statutes that govern the FRS. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled 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 DCA 1998).

19. Petitioner's frustration with the result of her decision to switch plans in 2007 is understandable, especially in light of her attempts to take advantage of the state of the law at that time. But after reviewing the record carefully, I cannot find that she was misled or given factually inaccurate information; rather, it appears that every question she asked was answered correctly, but that the specific question which would have led her to the outcome she now wishes was not posed, and the SBA has no authority now to grant her request.

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 8th day of May, 2012.



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

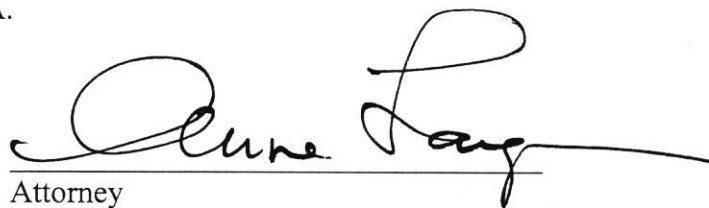
This 8th day of May, 2012.

Copies furnished to:

Karen Chitty



Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301


Attorney