

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

PAMELA A. LEONE,)
)
 Petitioner,)
)
 vs.) Case No. 2003-147
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
 _____)

FINAL ORDER

On April 11, 2006, the presiding officer submitted his 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, Pamela A. Leone, and upon counsel for the Respondent. Both parties were granted fifteen (15) days to file Exceptions to the Recommended Order. Neither party filed Exceptions. 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

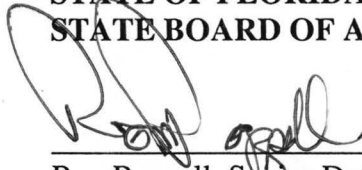
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be permitted to retroactively elect to join the FRS Investment Plan as a participant, is hereby denied.

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.

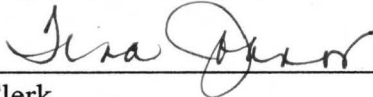
DONE AND ORDERED this 13th day of July, 2006. in Tallahassee, Florida.

**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.



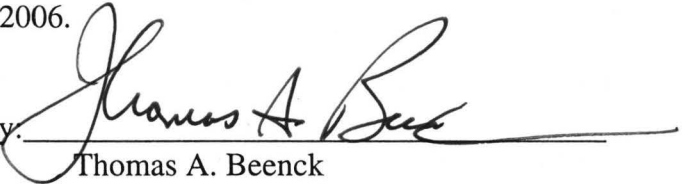
Clerk

7/13/06

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Pamela A. Leone, [REDACTED]; and by hand-delivery Ruth L. Gokel, Assistant General Counsel, State Board of Administration of Florida, 1801 Hermitage Boulevard, Suite 100, Tallahassee, FL 32308; and to Linda Lettera, General Counsel, State Board of Administration of Florida, 1801 Hermitage Boulevard, Suite 100, Tallahassee, FL 32308 this 13th day of July, 2006.

By:



Thomas A. Beenck
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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PAMELA A. LEONE,)
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)
 vs.) Case No. 2003-147
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, the State Board of Administration, by its duly designated presiding officer, Bruce R. Meeks, convened a substantial interest hearing pursuant to Section 120.57(2), Florida Statutes, in this matter on December 3, 2004. A supplemental hearing was conducted on June 24, 2005. Both hearings were held in Tallahassee, Florida.

APPEARANCES

For Petitioner: Pamela A. Leone, Esq., pro se



For Respondent: Ruth L. Gokel, Esq.
Office of the General Counsel
State Board of Administration
1801 Hermitage Blvd.
Tallahassee, FL 32308

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to elect the FRS Investment Plan even though the time period for her election as an existing state employee expired on August 31, 2002, and she terminated state employment on July 15, 2003.

PRELIMINARY STATEMENT

Petitioner filed a Complaint Petition with the State Board of Administration (SBA) on November 4, 2003. Upon investigation of the issues raised by the Petitioner, the SBA denied her request based on their interpretation of the facts and law. The adverse decision was communicated to the Petitioner by letter dated January 5, 2004, which further advised her of her right to a hearing. Petitioner filed a Petition for Hearing on January 29, 2004. By letter entitled Notice of Proceeding, dated February 10, 2004, the SBA reasserted its denial of Petitioner's request and advised her of her right to challenge their decision via administrative hearing. Petitioner chose to present oral evidence via telephonic hearing.

Upon assignment of the instant case, the undersigned issued an Initial Order of Instructions on April 27, 2004. As requested in the initial order, the parties submitted a joint pre-hearing statement of facts, issues and positions.

A Notice of Hearing was issued on June 8, 2004, originally setting September 15, 2004, as the final hearing date. After motions¹ to preclude consideration of certain issues, and extension of time were filed and disposed of, a second Notice of Hearing was issued on September 22, 2004, setting the final hearing for October 22, 2004. Petitioner did not timely appear for the scheduled hearing which resulted in a postponement. Thus, a third notice was issued on November 15, 2004, setting December 3, 2004, as the final hearing date.

The hearing was convened on the afternoon of December 3, 2004. Petitioner and her four witnesses appeared by telephone. Counsel for Respondent and two of Respondent's witnesses were present in the hearing room in Tallahassee, Florida. Two additional witnesses for Respondent appeared by telephone.

Petitioner presented her own testimony and called four witnesses: Mitchell A. Cohen, Esq. (an Office of the Attorney General [OAG] employee and former employee of the Department of Health); Serena Carroll, Esq. (former OAG employee); Leonard Jackson, Esq. (OAG employee); and Cari Stevens; (former OAG employee).

Respondent presented the testimony of four witnesses: Walter Kelleher, Director of Policy, Risk Management, and

Compliance, for the SBA's Office of Defined Contribution Programs (FRS Investment Plan); Cathy Christensen, personnel director for the Office of the Attorney General; Debba White, Project Manager for Enterpulse, an SBA vendor; and Leola Thompson, Client Director for CitiStreet, the FRS Investment Plan Administrator.

LIST OF EXHIBITS

Respondent's Composite Exhibit 1. Ten newspaper articles published in South Florida, which discussed the new defined contribution retirement plan within the Florida Retirement System: Miami Herald articles dated 9/27/00, 2/27/01, 2/28/01, 11/3/01, 11/15/01 & 11/24/02; Palm Beach Post articles dated 6/3/00, 4/25/02 & 9/15/02; and a South Florida Sun-Sentinel article dated 4/25/02.

Exhibit 2. Benefit Comparison Statement for Petitioner.

Exhibit 3. Affidavit of Debba White.

Exhibit 4. Affidavit of Leola Thompson.

Exhibit 5. Affidavit of Cathy Christensen.

At hearing, the Hearing Officer took official recognition (i.e., judicial notice) of the applicable law, specifically: Chapter 121, Florida Statutes (2002); and Section 90.406, Florida Statutes.

After hearing testimony, the presiding officer offered an opportunity for the parties to file proposed recommended orders and stated that the proposed recommended orders would be accepted no later than February 1, 2005.

Petitioner and Respondent stated that they both would submit proposed recommended orders. Petitioner and Respondent both waived the usual time periods. The presiding officer then set a minimum of 30 days after the receipt of the proposed recommended orders as the date for the rendition of his Recommended Order. Finally, the procedures and timeframes for filing exceptions, responses to exceptions, and appeal to a district court of appeal were discussed.

The hearing transcript (Tr.) was received on January 3, 2005, and was sent by priority mail to Petitioner on January 4, 2005.

On January 6, 2005, Petitioner filed a Motion to Reopen Testimony, citing newly discovered pertinent witnesses. Respondent filed a motion in opposition on January 11, 2005; to which Petitioner in turn replied on January 14, 2005. The presiding officer entered an Order to reopen testimony on January 28, 2005.

A Notice of Hearing for Additional Testimony was issued on June 1, 2005, setting June 24, 2005, as the supplemental hearing date.

On June 17, 2005, Respondent filed a Motion to Preclude Testimony of Michelle Schreifels, one of Petitioner's listed witnesses, on the grounds that the

witness refused to grant a release to allow a portion of a tape recorded call she had with a representative on the toll-free FRS financial guidance line to be played at the hearing. Respondent's counsel argued that the recording contained a prior inconsistent statement which she could use to impeach Ms. Schreifels anticipated testimony. Petitioner filed a response in opposition on June 20, 2005. As a result, a motion hearing was held just prior to the supplemental hearing on June 24, 2005. The undersigned ruled that Witness Schreifels would be allowed to testify at the supplemental hearing.

Petitioner presented her own testimony and called three witnesses: Darren Edwards, Esq. (former OAG employee); Michelle Schreifels, Esq. (OAG employee); and Gabrielle Sauvear, Esq. (OAG employee). Respondent did not present any witnesses. Proposed recommended orders (PROs) were set to be received by the presiding officer no later than September 12, 2005.

The supplemental hearing transcript (S.Tr.) was received on July 18, 2005, with a copy sent forthwith to Petitioner via U.S. mail.

On September 8, 2005, Petitioner filed a Motion for Extension of Time to File PRO; on September 24, 2005, she filed another motion to extend. Both motions were granted,

and PROs from both parties were received on October 3, 2005.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the hearings and the entire record compiled herein, the following relevant findings of fact are made:

1. Petitioner was a state employee, hired by the Office of the Attorney General (OAG) in December of 2001. She served as an attorney in the Fort Lauderdale office of the OAG. She resigned from the OAG on July 15, 2003.

2. Pursuant to Section 121.4501(4)(a)1., Florida Statutes (2002), Petitioner was "an eligible employee who [was] employed in a regularly established position on June 1, 2002, by a state employer [i.e., OAG]." ²

3. Respondent is the state entity charged by the Legislature, pursuant to Section 121.4501(1), Florida Statutes, to establish and administer the FRS Investment Plan (a defined contribution plan), officially known as the Public Employee Optional Retirement Program.

4. When the implementation of the FRS Investment Plan began, there were approximately 650,000 existing state, school board, and local government employees who were eligible to choose the new plan. The first statutory election period was for state and university employees

(i.e., Group 1), and began on June 1, 2002, and continued until August 31, 2002. Petitioner was included in this group.

5. Section 121.4501(10), Florida Statutes, mandated a multimedia formatted education component to provide employees impartial and balanced information about plan choices. The education component was required to be available to employees at least 90 days prior to the beginning date of the election period.

6. Respondent's Witness Walter Kelleher testified that the legislature directive to provide an education component with multimedia formats commenced on February 25, 2002, with a huge public relations campaign to inform employees about the new defined contribution plan and their choices. The individual components included:

a) Mailing Retirement Choice Kits to each eligible employee's home address. The Retirement Choice Kits were mailed (first class) in a white 10" x 13" envelope with blue writing. The contents included: an informational cover letter; a personalized Benefit Comparison Statement; a step-by-step guide to making a retirement choice; a choice booklet that provided deadlines, vesting information and details on what happens after a choice is made; a sheet entitled "What's the Difference" which was a side-by-side comparison of the two plans; a publication called "Keys to Retirement Planning and Investing" that discussed some of the basic strategies for long-term investing; a Choice Service Postcard that described services that were available on the MyFRS.com website; retirement workshop registration and scheduling information; an investment fund summary that discussed

the different funds available in the new plan; a plan choice enrollment form; and a service and privacy statement.

b) The MyFRS.com website dedicated exclusively to providing retirement information. Additionally, many employers who maintained their own websites and electronic bulletin boards posted information on the new plan.

c) Informational monthly newsletters and email, intended to be shared with employees, were sent by the SBA to employers.

d) A toll-free financial guidance line was available to obtain unbiased retirement and financial planning information.

e) Over 2,900 retirement workshops were held throughout the state. Over 22,600 Group 1 employees attended workshops.

f) The existence of the new FRS Investment Plan was also highly publicized in the news print media throughout the state.

g) As employees approached the end of their choice period, at least one reminder notice was sent by first class mail urging them to make an election decision.

h) Finally, a default letter was sent to employees who failed to make an election decision during the choice period. The default letter informed the employee that his or her membership in the FRS Pension Plan (a defined benefit plan) was retained.

Tr. 78-84.

7. As permitted by statute, the SBA contracted with CitiStreet, as the third party administrator, to send approximately 650,000 Retirement Choice Kits to all eligible FRS employees by first class mail. CitiStreet also sent out the reminder letters (after receiving an

electronic data file from another SBA vendor, Enterpulse) and default confirmation letters (available from an automatically loaded Division of Retirement data file), as appropriate. These mailing were described as routine business functions. Tr. 100-117.

8. The personalized BCS statements, reminder notices and default letters were electronically archived by Enterpulse for future referencing. As a result, it is possible to research those files to determine when a particular document was generated for mailing and the address to which it was mailed. Tr. 87-88, 104-105.

9. For those Retirement Choice Kits which were returned by the United States Postal Service as undeliverable, CitiStreet handled them in two ways. If the Kit was returned with a forwarding address on it, CitiStreet sent it out again to the new address. If the Kit was returned with no forwarding address, CitiStreet determined which agency the employee worked for and then sent the Kit to that agency for delivery to the employee. Tr. 117-118.

10. Respondent's Witness Cathy Christensen, personnel director for the OAG, testified that when undeliverable Retirement Choice Kits were forwarded to her agency by CitiStreet, the Kits were forwarded to still-active

employees via interoffice mail. If the employee had separated employment and if the OAG had an address different from the one on the envelope, then the envelope would be readdressed and mailed. Tr. 130-131.

11. Witness Christensen also testified that an archival search of the OAG's electronic bulletin board (commonly referred to as the "AG Net"), which is available to all OAG employees, revealed that a notice dated March 25, 2002, was posted to inform employees of the education workshops being held at that time regarding the investment and pension plans and also to direct them to other resources. Ms. Christensen did not have any information regarding how long the notice remained on the AG Net. Tr. 128-129, 132.

12. Petitioner's Retirement Choice Kit was mailed to Petitioner, to her then-current and still-current address in Coral Gables, by first class mail, sometime after the BCS was printed on May 22, 2002. Ex. 2.

13. Petitioner testified that she did not receive the Choice Kit. Tr. 55.

14. Petitioner was sent a letter in mid-August, 2002, reminding her that she had until August 31, 2002, to make a choice between the FRS Pension Plan and the FRS Investment Plan.

15. Petitioner testified that she did not receive the reminder letter. T 55.

16. Petitioner was sent a default confirmation letter between October 31, 2002 and November 7, 2002, noting that the August 31, 2002, deadline had passed and, as a consequence, she had been defaulted into the FRS Pension Plan.

17. Petitioner testified that she did not receive the default confirmation letter. T 55, 119.

18. Petitioner also testified that she seldom looked at the AG Net because her workload was so voluminous, her unit was understaffed, and there were hundreds of documents on the AG Net system. Specifically, she never saw anything on the AG Net about retirement plan options. Tr. 56-57.

19. Petitioner testified that she did not recall reading any newspaper articles which discussed the state's new defined contribution plan, although she was a subscriber to the Miami Herald newspaper. Tr. 58-59.

20. Petitioner testified that she had been a licensed stockbroker for almost ten years and it would have been in her financial best interest to choose a retirement plan with one-year vesting versus one with six-year vesting, given the opportunity to do so. Furthermore, she testified

that she never intended to have a long tenure with the OAG.
Tr. 54-56.

21. Petitioner argued strongly that the Legislature should not have provided an election by default measure. Further, she argued that the choice kits should have been sent by certified mail. Further still, Petitioner argued that the default measure and regular U.S. mail (i.e., non-certified mail) were intentionally utilized by the State of Florida to subvert Petitioner's right to choose the FRS Investment Plan. Tr. 62, 65-71.

22. Petitioner testified that she only became aware of the existence of the FRS Investment Plan in July or August of 2003 through a chance conversation with a colleague and fellow University of Miami alumnus, Mitchell Cohen. Tr. 13-15, 55.

23. Petitioner stated that her employer and the SBA did not fulfill their duty to inform her of her right to choose between investment plans. There was no in-house meeting where a supervisor/manager or personnel office staff informed her of the existence of the FRS Investment Plan. Tr. 57, 64, 66.

Petitioner's Witness Mitchell Cohen³

24. Mr. Cohen testified that as a Department of Health employee during the choice period he was not

provided official notice of the existence of the FRS Investment Plan, but rather learned about it through a co-worker. He also corroborated Petitioner's testimony that she first learned of the Investment Plan during a conversation they had in July or August of 2003. Tr. 13-18, 22-23.

Petitioner's Witness Serena Carroll

25. Ms. Carroll testified that she never received any official notice of the existence of the FRS Investment Plan. She first heard of the Plan from Petitioner about six weeks prior to the hearing.⁴ No information was conveyed by her employer, and she did not use the AG Net because of her heavy workload. However, she also testified that she was aware of the AG Net and her responsibility to check it daily.

26. On cross-examination, Ms. Carroll testified that the address that Respondent sent her Retirement Choice Kit and election reminder letter to was, indeed, her correct address. However, she testified that she did not receive the mailings. Further, she testified that she does not read the newspaper and no co-workers ever mentioned anything about a retirement workshop to her.

Petitioner's Witness Leonard Jackson

27. Petitioner's Witness Jackson testified that he recalled having a conversation with the Petitioner wherein she asked him whether he was aware of a retirement program that offered one-year vesting. He could not remember the timeframe of the conversation or whether it was by phone or in person. But, his conversation with Petitioner was the first occasion that he recalled learning of the FRS Investment Plan. Tr. 38-40.

28. When asked whether he received any documentation from the State of Florida about the Investment Plan prior to his conversation with Petitioner, Witness Jackson stated, "I don't remember receiving anything on it. Nothing that - I really don't remember receiving anything on it." Tr. 40.

29. On cross-examination, Mr. Jackson testified that the address that Respondent sent his Retirement Choice Kit and election reminder letter to was, indeed, his correct address. Regarding receipt of such information, he stated, "Actually, I don't remember if I received it or not. I mean, I received a great deal of literature from the State of Florida, so I do not remember, to be honest with you. . . . I remember receiving - I believe that I did receive literature from the State of Florida about my pension, but

at the time I wasn't really concerned because I knew I was going to do the default program. So I really didn't pay any attention to whatever letter I received with regards to that. . . . Yes, I just intended to remain in whatever pension plan the State of Florida had me in. I really wasn't too concerned of any special plans at the time, to be honest with you." Tr. 42. Additionally, he testified that he did not remember speaking to any state employees about a workshop on retirement and he did not read any newspaper articles about the new plan. Tr. 42-43.

Petitioner's Witness Cari Stevens

30. Petitioner's Witness Stevens testified that she first learned of a retirement plan with one-year vesting through a conversation she had with Petitioner six or seven weeks before the hearing. However, she also testified that after she spoke with Petitioner "a few weeks ago [she] went through some materials that [she] still had from the Attorney General's office. . . ." She indicated that she discovered a booklet that discussed vesting within five years. She also recalled "receiving something where I was able to make choices as to how I wanted my investment money invested, whether I wanted a certain percentage in one thing or a certain percentage in another thing." Tr. 45.

31. Petitioner stated that no information regarding a one-year vesting plan was conveyed to her by her employer, and she did not use the AG Net because of her heavy workload. Tr. 45-46.

32. On cross-examination, Ms. Stevens testified that the address that Respondent sent her Retirement Choice Kit to shortly after May 22, 2002, when her BCS was printed was, indeed, her correct address at that time. She could not recall if she informed her employer of an address change in July or August 2002. Tr. 47-48.

33. Regarding receipt of the Retirement Choice Kit, Witness Stevens stated "I'm not going to say I didn't receive it, because I honestly don't remember" Regarding receipt of the election reminder letter sent toward the end of August 2002, Witness Stevens stated, "I don't recall. Not that I recall. I can honestly say, not that I recall. I was not aware until several weeks ago that there was a thing such as a one-year investment plan." The witness also did not recall receiving a default confirmation letter around October or early November 2002. Tr. 50-51.

Petitioner's Witness Darren Edwards

34. Petitioner's Witness Edwards testified that he definitely first learned of a retirement plan with one-year

vesting from a fellow assistant attorney general, although he did not know whether it was from "[Petitioner] or Serena Carroll or . . . others." S.Tr. 12-13.

35. On cross-examination, Mr. Edwards testified that his home address was correctly listed on Respondent's records. However, he did not receive a mailing described as the Retirement Choice Kit or reminder letters, nor did he recall seeing a default confirmation letter. Further, Mr. Edwards testified that he did not hear two election reminder messages that Respondent stated were left on his home answering machine approximately six weeks prior to the end of his choice period. Respondent stated that there were no conversations with his colleagues about retirement workshops, and he rarely looked on the AG Net unless specifically directed by a superior to do so. S.Tr. 12-21.

Petitioner's Witness Michelle Schreifels

36. When asked how she first came to know about a one-year vesting retirement program, Witness Schreifels responded, "I found out about any type of vesting program through you [i.e., Petitioner] when I heard about this action being brought. Otherwise, I didn't know there were various vesting programs." When asked whether she received any documents in the mail supporting a one-year vesting plan, Ms. Schreifels responded, "I don't recall. I don't

remember." Although she indicated that she spoke with Ernst & Young representatives on the toll-free financial guidance line, she still does not know what is going on. S.Tr. 22-25.

37. On cross-examination, Ms. Schreifels testified that her home address was correct as listed on Respondent's records. When asked whether she received the Retirement Choice Kit, which would have been mailed shortly after the BCS was printed on July 17, 2003, Ms. Schreifels responded, "I don't recall receiving it or not receiving it." S.Tr. 26-27. When asked whether she was aware that, in fact, she was a member of the FRS Investment Plan, she responded "I know I'm part of the retirement plan, but I wouldn't know any other details." S.Tr. 29. Further, she stated "[Q]uite honestly I would have quit this job a year ago, if I knew I could vest a year ago." S.Tr. 31.

38. Both the relevance and veracity of Witness Schreifels is suspect. It became apparent during the hearing that she had indeed joined the FRS Investment Plan, but was confused about the fact of her membership in the Investment Plan - that, of course, features one-year vesting. S.Tr. 27, 29, 31. She refused to consent to playing a 2½ minute excerpt of one of her recorded financial guidance line phone calls at the hearing -

although she was assured that no personal information was contained therein. S.Tr. 27-30. Similarly, Ms. Schreifels refused to answer a question about whether she used a computer to go online to get information about the retirement plans. Her reasoning: "Because we are prohibited from using the Internet, I would rather not answer that question. We are prohibited from using the Internet during work hours for non-work purposes, and I would not like to incriminate myself one way or another." S.Tr. 32-33.

Petitioner's Witness Gabrielle Sauvear

39. When asked about her knowledge of a one-year vesting plan, Witness Sauvear testified that "I had not heard about the one-year vesting plan prior to being told by one of my coworkers. . . . I think it may have been [Petitioner]." S.Tr. 36. Further, she added, "It is very inappropriate to find out something so important to our employment, that it's being done by word of mouth and not through formal notice." S.Tr. 38.

40. On cross-examination, Ms. Sauvear testified that her home address was correct as listed on Respondent's records. When asked whether she remembered receiving the Retirement Choice Kit sometime in June or July 2002, she responded, "No, I do not recall." Regarding the OAG's electronic bulletin board, Ms. Sauvear testified that " . . .

. I wasn't even aware that we had the AG Net or we had, you know, the Intranet to use for those purposes. I was not informed of that. . . . No, not at the time [of the choice period]." S.Tr. 38-40.

41. Witness Sauvear testified that when she learned of the Investment Plan she and other staff members went to their supervisor for more information. She contended that she was forbidden from directly contacting the Attorney General's personnel office. Instead, she had to ask questions through her supervisor and when she got no response, she did not ask further. S.Tr. 39-43.

42. It is dispositive that Petitioner and her witnesses all testified that the addresses of record - of where Respondent's agents mailed the Retirement Choice Kits, election reminder letters and default confirmation letters - were accurate for the relevant time periods. It is not dispositive that such mailings were uncertified and without return receipt requested. With approximately 650,000 existing employees participating in the three initial retirement choice periods, such would have been a very costly proposition. Finally, the Legislature did not mandate certified or return receipt mailings.

CONCLUSIONS OF LAW

43. The State Board of Administration has jurisdiction over the subject matter of, and parties to, this action pursuant to Sections 120.569, 120.57, and 121.4501, Florida Statutes.

44. The parties were duly noticed pursuant to Chapter 120, Florida Statutes.

45. The Petitioner has the burden of proof, by a preponderance of the evidence, in these proceedings to prove she is entitled to retroactively elect the FRS Investment Plan as a terminated state employee. Florida Dep't of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). See also Subsection 120.57(1)(j), Florida Statutes.

46. The essence of Petitioner's claim is that she did not receive official notice of the existence of the FRS Investment Plan in a timely manner to allow proper election.

47. Section 90.406, Florida Statutes, states:

Routine practice.—Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

48. There exists a plethora of caselaw on this subject. The Florida Supreme Court, in Brown v. Giffen Industries, Inc., 281 So. 2d 897, 900 (Fla. 1973), held that "reliance on the presumption of mailing on the basis of normal office procedure was reasonable and proper, in light of the total lack of contrary evidence by petitioner." In the Brown case, although "there [was] no evidence as to the actual act of mailing or to the receipt of the letters . . . ", the Court stated that under the facts, "[t]o expect such evidence would be totally unreasonable." Id. At 899-900.

49. "Recognizing that a requirement of proof on such an issue would place an impossible burden on any business, a general presumption has arisen in the courts that the ordinary course of business or conduct was followed in a particular case absent a contrary showing. It follows, by another equally broad presumption, that mail properly addressed, stamped, and mailed was received by the addressee, and proof of general office practice satisfies the requirement of showing due mailing." Id. Accord, Snell v. Mayo, 84 So. 2d 581 (Fla. 1956); Home Ins. Co. v. C & G Sporting Goods, Inc., 453 So. 2d 121 (Fla. 1st DCA 1984); Insurance Co. of North America v. Sunrise Catering, 447 So. 2d 431 (Fla. 1st DCA 1984); Star Lakes Estates

Ass'n. Inc. v. Auerbach, 656 So. 2d 271 (Fla. 3rd DCA 1995); Scutieri v. Miller, 584 So. 2d 15 (Fla. 3rd DCA 1991); Moses v. Bystrom, 489 So. 2d 834 (Fla. 3rd DCA 1986); Getelman v. Levey, 481 So. 2d 1236 (Fla. 3rd DCA 1985); Brake v. State, Unemployment Appeals Com'n, 473 So. 2d 774 (Fla. 3rd DCA 1985); Berwick v. Prudential Property and Cas. Ins. Co., 436 So. 2d 239 (Fla. 3rd DCA 1983); Levey v. Getelman, 408 So. 2d 663 (Fla. 3rd DCA 1981); Scott v. Johnson, 386 So. 2d 67 (Fla. 3rd DCA 1980); Milros-Sans Souci, Inc. v. Dade County, 296 So.2d 545 (Fla. 3rd DCA 1974); W.T. Holding, Inc. v. State Agency for Health Care Admin., 682 So. 2d 1224 (Fla. 4th DCA 1996); Camerota v. Kaufman, 666 So. 2d 1042 (Fla. 4th DCA 1996); Allstate Ins. Co. v. Eckert, 472 So. 2d 807 (Fla. 4th DCA 1985); and Progressive American Ins. Co. v. Kurtz, 518 So. 2d 1339 (Fla. 5th DCA 1987).

50. I conclude that the Respondent demonstrated that printed material, particularly the Retirement Choice Kit, was sent to Petitioner in conformity with routine practice. Testimony of Respondent's witnesses/agents from Enterpulse and CitiStreet demonstrated not only routine practice but also demonstrated definitively that a particular piece of printed material could be searched and retrieved from

archived electronic files and shown to have been mailed on or about a particular date.

51. Further, testimony from the personnel director of the OAG showed that it was routine practice for the OAG to additionally ensure that the Retirement Choice Kit was delivered to all employees who were still working for that agency, by either delivering the Kits by interoffice mail or by forwarding the Kits to an updated home address on file - when such undelivered Kits were returned to CitiStreet and subsequently forwarded to the OAG.

52. The routine practice presumption is not absolute, but rather is a rebuttal presumption. "Such a presumption requires the trier of fact to assume the existence of the presumed fact unless credible evidence sufficient to sustain a finding of the non-existence of the presumed fact is determined without regard to the presumption." Berwick at 240. Stated differently, once the Respondent successfully made a prima facie showing that notice of the existence of the FRS Investment Plan and the right of retirement plan election was provided by mail to Petitioner, the burden of producing evidence shifted to Petitioner to prove otherwise. I conclude that Petitioner did not meet her burden.

53. Petitioner sought to introduce the testimony of seven witnesses who all stated that they learned of the existence of the Investment Plan through co-workers. Namely, in most cases, from the Petitioner only weeks before the hearing was set - which is separately troubling. This testimony is unpersuasive for several reasons. Not the least being that the same presumption of notice, due to routine practice, that applies to Petitioner also applies to her witnesses. In addition, four witnesses testified that they "did not remember" or "could not recall" receiving the Retirement Choice Kit and other mailings. In the Home Ins. Co., the court specifically found that testimony that witnesses "did not recall receiving [] letters . . . was not competent to prove the negative." Id. at 123. (emphasis in original).

It is quite reasonable that persons would not recall receiving mail sent years earlier - especially, if such was treated as "junk mail" and never even opened. Nonetheless, non-recollection of receipt of mail by others does not bolster Petitioner's case.

54. Petitioner and her witnesses who worked at the OAG testified that they did not routinely look on the AG Net because of heavy workloads. In the age of electronic and digital information, I conclude that an electronic

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bulletin board, intranet or, even, email are appropriate means to communicate with employees. See generally, Ch. 282, Part I (Information Resources Management Act of 1997), Florida Statutes.

55. The Respondent fulfilled its statutory obligation to provide Petitioner with impartial and balanced information about plan choices in multimedia formats during the relevant periods of time. See supra ¶ 6.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is:

RECOMMENDED that the State Board of Administration enter a Final Order denying Petitioner's request to elect to retroactively join the FRS Investment Plan.

DONE and ENTERED this 11th day of April 2006, in Tallahassee, Leon County, Florida.



Bruce R. Meeks, Esq.
Presiding Officer
State Board of Administration
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Filed with the Agency Clerk of the State Board of Administration this 11th day of April 2006.

ENDNOTES

1/ On August 17, 2004, Respondent filed a Motion to Preclude Consideration of Issues relating to Certain Witnesses and Petitioner's Promotion in the Office of the Attorney General. Petitioner did not respond. The Hearing Officer ruled on the motion on September 2, 2004. He ordered that the Motion to Preclude be granted as to issues relating to Office of the Attorney General operations and be denied as to Petitioner's request to call witnesses.

Petitioner filed a Motion for Extension of Time, on September 9, 2004, asking that the final hearing be rescheduled due to the after effects of Hurricane Frances. The motion was granted on September 10, 2004.

2/ The law further provided that:

a. Any such [state] employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. The election must be made in writing or by electronic means and must be filed with the third-party administrator by August 31, 2002, or, in the case of an active employee who is on a leave of absence on April 1, 2002, by August 31, 2002, or within 90 days after the conclusion of the leave of absence, whichever is later. This election is irrevocable, except as provided in paragraph (e). Upon making such election, the employee shall be enrolled as a participant of the Public Employee Optional Retirement Program, the employee's membership in the Florida Retirement System shall be governed by the provisions of this part, and the employee's membership in the defined benefit program of the Florida Retirement System shall terminate. The employee's enrollment in the Public Employee Optional Retirement Program shall be effective the first day of the month for which a full month's employer contribution is made to the optional program.

b. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed time period is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and

the employee's option to elect to participate in the optional program is forfeited.

Section 121.4501(4)(a)1., Florida Statutes (2002).

3/ Mitchell Cohen previously filed a complaint against the SBA. Petitioner cites Mr. Cohen's case as favorable precedent. However, it is not as his case was settled prior to hearing when his employer conceded error in maintaining outdated information regarding retirement plans in their satellite offices. The facts of his case were different and the issue of notice was not reached.

4/ On direct examination when asked whether she had prior official knowledge of the FRS Investment Plan, Witness Carroll testified, "No, the first thing I heard about that was about six weeks ago when you and I discussed it." Tr. 24. Subsequently though, on redirect examination, Petitioner asked, "Ms. Carroll, as you stated before, you found out about this program about six or seven months ago, when I as an employee told you about it, right?" To which Witness Carroll answered, "That's correct." Tr. 35. Since her testimony is inconsistent, less credibility is given to Ms. Carroll's response to Petitioner's leading question on redirect examination.

Copies furnished:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the entity (i.e., State Board of Administration) that will issue the Final Order in this case.