

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MARGARET CARTER)	
)	
Petitioner,)	
)	
vs.)	Case No. 2006-502
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
)	
)	

FINAL ORDER

On June 19, 2007, 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, Margaret Carter, and upon counsel for the Respondent. Both parties filed Proposed Recommended Orders. Respondent filed Exceptions, which were due on July 5, 2007. 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.

RULINGS ON EXCEPTIONS

The seven exceptions filed by Respondent are all accepted. The FRS Investment Plan's Summary Plan Description is available online and says specifically that the Florida Statutes control the operation of the Plan. In addition, everyone has access to the toll-free line to ask any question. In this case, Petitioner could have explained her situation and asked about eligibility and the operable due dates.

Section 121.4501(2)(f), Florida Statutes, defines “eligible employee,” and includes the reference to section 121.012(11), which in turn defines employee as “any person receiving salary payments for work performed in a regularly established position.” Section 121.4501(4)(b)2. discusses school board employees who become “eligible” by reason of employment in a regularly established position after July 1, 2002.

It appears from the record that Petitioner was not informed by the Manatee County School Board that she was terminated. T36. The Manatee County School Board reported Petitioner’s termination in July 2004, not to Petitioner but to the Division of Retirement. The termination was as of May 26, 2004. However, neither Petitioner nor the third party administrator for the FRS Investment Plan knew that Petitioner had been terminated. Resp Exh. 9; T 42 - 45. This is why the FRS Investment Plan processed Petitioner’s election, but then had to reverse it later.

ORDERED


The Recommended Order (Exhibit A) is hereby adopted only as to its Findings of Fact. The Petitioner’s request to have her enrollment into the FRS Investment Plan in July, 2004, be recognized as valid 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.

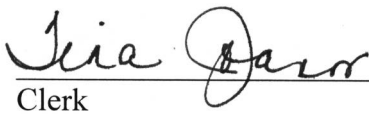
DONE AND ORDERED this 16th day of July, 2007, in Tallahassee, Florida.

**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

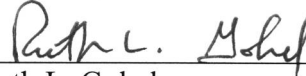
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Margaret Carter, [REDACTED], and by U.S. mail to Brian Newman, Esq. and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, and Anne Longman, Esq., Lewis, Longman, & Walker, P.A., P.O. Box 10788, Tallahassee, FL 32302, this 16th day of July, 2007.



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

MARGARET CARTER,

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

CASE NO.: 2006-5

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RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer for the State Board of Administration (SBA) on March 23, 2007, in Tallahassee, Florida. The Petitioner appeared by telephone and the Respondent in person, as follows:

APPEARANCES

For Petitioner: Margaret Carter, Petitioner


Petitioner

For Respondent: Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

Whether Petitioner's initial attempt to enroll in the Investment Plan was valid.

PRELIMINARY STATEMENT

On January 20, 2006, Petitioner submitted a Request for Intervention asking that her initial attempt (executed July 6, 2004 with a transaction date of July 20, 2004) to elect into the Investment Plan be recognized as valid. The SBA investigated the issues raised by the Petitioner and determined her request could not be honored. Petitioner filed a Petition for Hearing on July 5, 2006, which was ultimately transmitted to the undersigned for informal hearing.

Petitioner testified at the hearing. Respondent presented the testimony of Dan Beard of the SBA. Petitioner's exhibits P1-6 and Respondents exhibits R1-9, consisting of official agency records and communications by and to the Petitioner were admitted into evidence without objection.

A transcript of the proceedings was made, filed and made available to the parties. Respondent timely filed a Proposed Recommended Order and Petitioner timely filed a post-hearing Response.

UNDISPUTED MATERIAL FACTS

1. Petitioner was hired by the Manatee County School Board ("School Board") on January 24, 2004, in the middle of the 2003/2004 school year. The School Board is now, and for all periods relevant to this case has been, a participating employer in the Florida Retirement System ("FRS").
2. After Petitioner was hired, she received a pamphlet from the School Board explaining the Florida Retirement System which stated that she had to make her plan selection by 4:00 p.m. Eastern Time, on the last business day of the fifth month following her month of hire. (P-2) That date was June 30, 2004. This pamphlet does not mention any requirement that the election be made during a time of active employment.
3. At the end of the school year, Petitioner hoped to be reemployed for the following

school year. In May, 2004 she received a pay check that included a number of small checks for the summer months showing deduction of health insurance payments and retirement. (TR-13), but she did no active work for the School Board in June or July, 2004. (TR 16-17)

4. Petitioner received a letter from FRS dated June 23, 2004 (P-3) which stated in bold type: "Choice Period Deadline: July 30, 2004." This letter did not mention any requirement that she be actively working when making her choice between the two available retirement plans.

5. On July 6, 2004, Petitioner signed an enrollment form choosing the FRS Investment Plan. (P-4) She received a Plan Choice Confirmation Statement (P-5) showing that she had elected to enroll in the Investment Plan and transfer the present value of her FRS Pension Plan benefit, with a transaction date of July 20, 2004.

6. In July, 2004, Petitioner was notified that she was terminated by the School Board effective retroactive to May 26, 2004.

7. The School Board rehired Petitioner on September 13, 2004 for the 2004/2005 school year. She was given a "new hire" FRS election deadline of March 31, 2005 and made another election into Investment Plan on March 14, 2005. .

8. Petitioner testified that she always planned to join the Investment Plan, was never told that she had not made a valid first election into the Investment Plan and realized her first election had been invalidated only when she got an FRS statement in September, 2005. (TR 7)

9. The SBA has determined that her first election was not valid because she was not actively employed at the time she made the election, and therefore did not meet the legal requirements for Investment Plan membership. (R-6) The SBA has not asserted that this election was not timely. Her second election into the Investment Plan on March 14, 2005, has been recognized as valid.

10. Dan Beard, the SBA Director of Policy, Risk Management, and Compliance, testified that it is the agency's normal practice to have the third party administrator process participant elections without regard to whether the employee meets the eligibility criteria for making that election. (TR 42-43). During the lag time between the filing of the election and an employer's payroll reports being filed, it may be determined that an employee was not eligible to make the election, and the agency will invalidate the election. (Tr. at 42-43).

CONCLUSIONS OF LAW

11. FRS eligible employees may elect to participate in either the FRS defined benefit program (the "Pension Plan") or the Public Employee Optional Retirement Program, (the "Investment Plan"). The Pension Plan has a 6 year vesting requirement while the Investment Plan has a 1 year vesting requirement.

12. Eligibility for the Investment Plan is controlled by Part II of Chapter 121, Florida Statutes, including, in pertinent part, section 121.4501(3)(a):

(a) Participation in the Public Employee Optional Retirement Program is limited to eligible employees. Participation in the optional retirement program is in lieu of participation in the defined benefit program of the Florida Retirement System.

"Eligible employee," is defined at section 121.4501(2)(f):

(f) "Eligible employee" means an officer or employee, as defined in s. 121.021(11)

Section 121.021(11) states:

(11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position ...

Section 121.021(52) states:

(52) "Regularly established position" is defined as follows:

(b) In a local agency (district school board ...) the term means a regularly

established position which will be in existence for a period beyond 6 consecutive months, except as provided by rule.

Section 121,4501(4)(c)2 , on participation and enrollment states:

2. With respect to employees who become eligible to participate in the [Investment Plan] by reason of employment in a regularly established position with a local employer commencing after October, 2002:

a. Any such employee shall, by default, be enrolled in the defined benefit retirement program...and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the [Investment Plan].

13. Section 121.4501(8)(a), Florida Statutes obligates the SBA to administer the Investment Plan. The agency is not authorized to depart from the requirements of this statute when exercising its jurisdiction, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.); its construction and application of Chapter 121, Florida Statutes, 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). It is not clear in this case that SBA acted in strict accord with its statutes.

14. The SBA determination that Petitioner's initial election of the Investment Plan may not be honored rests on the single word "receiving" in the definition of "officer or employee" in section 121.021(11), Florida Statutes, as this seems to be the only basis cited for inferring a requirement that the employee be actively working at the time of making an initial election into the Investment Plan. Particularly with regard to teachers hired on an emergency basis or for parts of the school year, it is foreseeable and even likely that new employees could make an election within the prescribed statutory period, but after their active employment had ended.

15. Respondent asserts that it is not able to honor Petitioner's request because it is constrained by the statutes it administers. If the SBA is committed, for institutional reasons, to its

stated reading of these statutes, the result it has reached is within the range of its discretion. If not, an alternate reading of the cited statutes, more in keeping with the purpose of the FRS and of the Investment Plan, is available. Petitioner became eligible to participate in the Investment Plan when she was hired January 24, 2004. At that point, she was enrolled by default in the Pension Plan, as required by section 121.4501(4)2., Florida Statutes. That same section gives the employee a specified period of time within which to make an election into the Investment Plan: by the last business day of the fifth month following the month of hire, or in this case, by June 30, 2004. Id. at 2.a. Petitioner became eligible for the Investment Plan by receiving salary payments, apparently in a regularly established position, per §121.4501(4)(c)2, Florida Statutes. Once she became eligible, she had until the last business day of the fifth month following her month of hire to elect into the Investment Plan, as the statute contains no express requirement that she be actively working at the time of this election. Overall eligibility is tied to actively working, but once eligibility is established, election into the Investment Plan appears to be tied only to a timely election. SBA has not asserted that Petitioner's election into the Investment Plan was untimely, even though it apparently was outside the statutory period (but within the time set out in the communication she received from FRS).

16. If this reading is not acceptable from a policy perspective, and Respondent wishes to adhere to its finding that it may not, as a matter of law, honor Petitioner's initial election, then the question of whether it is estopped to assert this position arises: was Petitioner entitled to rely on the communication she received stating that she had until July 30, 2004 to make her election? Estoppel is a mixed question of law and fact, and would turn, in this case, on facts not in evidence regarding the nature and details of the Petitioner's contract with the School Board and the exact content of all the materials available to her and received from the SBA and its providers, among other things.

These questions cannot be answered in this forum and would require the matter to be referred to the Division of Administrative Hearings for a formal hearing.

RECOMMENDATION

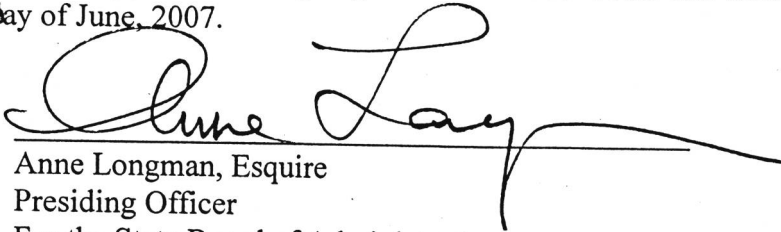
Because there does not appear to be any express statutory authority requiring that an employee who has become eligible to participate in the Investment Plan be actively at work when an election is made under section 121.4501(4)(c)2.a., Florida Statutes, I recommend that an Order be entered honoring Petitioner's initial election into the Investment Plan, with the effective date of her enrollment being the date of her hire, January 24, 2004, per rule 19-11.006(3)(a), Florida Administrative Code.

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 the Recommended Order should be filed with the Agency Clerk of the State Board of Administration.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Recommended Order has been furnished by U.S. Mail this 19th day of June, 2007.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 10788
Tallahassee, FL 32302

Filed with:
Agency Clerk
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Copies furnished:

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