

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

THOMAS W. RENZO,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1405
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On June 17, 2009, 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, Thomas W. Renzo, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on July 2, 2009. 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 rescind his second election and be returned to the Pension 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 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.

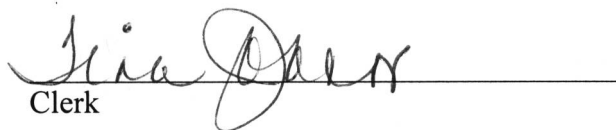
DONE AND ORDERED this 16th day of July, 2009, in Tallahassee, Florida.

**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

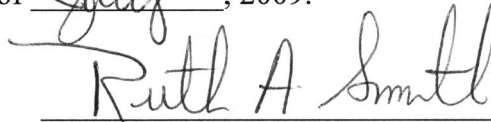
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Thomas W. Renzo, 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 16th day of July, 2009.



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

THOMAS W. RENZO,
Petitioner,

v.

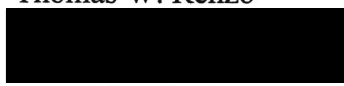
CASE NO.: 2008-1405

STATE BOARD OF ADMINISTRATION,
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on February 17, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Thomas W. Renzo

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 Respondent State Board of Administration (SBA) should grant Petitioner's request to rescind his second election into the Florida Retirement System (FRS)

Exhibit A

Investment Plan and return to the Pension Plan.

PRELIMINARY STATEMENT

Petitioner filed a Request for Intervention dated December 11, 2008 requesting to switch from the Investment Plan to the Pension Plan. Petitioner's request was investigated and denied by Respondent by letter of December 24, 2008, and this informal hearing ensued.

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management and Compliance for the State Board of Administration. Respondent's Exhibits R-1 through R-3 were admitted into evidence without objection.

A transcript of the informal hearing was 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 submitted a proposed recommended order; Petitioner made no further submittals.

UNDISPUTED MATERIAL FACTS

1. Petitioner defaulted into the FRS Pension Plan effective December 1, 2002.
2. Petitioner executed a 2nd Election Retirement Plan Enrollment Form on November 23, 2007 requesting to change to the FRS Investment Plan from the FRS Pension Plan.
3. Respondent's third party administrator, ING, received Petitioner's enrollment form on November 27, 2007.

4. Consistent with Petitioner's 2nd Election Retirement Plan Enrollment Form, the Petitioner was switched from the FRS Pension Plan to the FRS Investment Plan effective December 1, 2007.

5. The enrollment form states:

I understand that my one-time 2nd Election is irrevocable and that I must remain in the plan I chose in Section 1 until my FRS-covered employment ends and I retire. I understand that I can find a description of my rights and responsibilities under the FRS Pension Plan and the FRS Investment Plan in the respective Summary Plan Descriptions, Florida Statutes, and Administrative Rules available through the MyFRS Financial Guidance Line ... or at MyFRS.com.

(Emphasis in original.)

6. On December 31, 2007, assets representing the present value of Petitioner's FRS Pension Plan were transferred to his newly-created FRS Investment Plan account.

7. In December 2008, Petitioner requested Respondent allow him to switch back to the FRS Pension Plan from the FRS Investment Plan so that he could enter the Deferred Retirement Option Program (DROP).

CONCLUSIONS OF LAW

8. The SBA cannot deviate from the Florida Statutes creating and governing the Florida Retirement System and Petitioner's rights and responsibilities under them. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The SBA's 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).

9. Movement between the Pension Plan (also known as the defined benefit program) and the Investment Plan (formally known as the Public Employee Optional Retirement Program) 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.

10. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans after their initial election period runs. After defaulting into the Pension Plan in 2002 during his initial choice period, Petitioner had only one other opportunity to change plans, which he used in November, 2007. He therefore has no elections remaining.

11. 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 cannot rescind his second election because he failed to do so within the window provided by the above rule. The rescission window is approximately 30 days after election; here, Petitioner's request to rescind came approximately one year after election.

12. It is unfortunate that Petitioner's life circumstances have changed since he made his irrevocable switch into the Investment Plan, but the SBA simply has no authority to allow him to change back to the Pension Plan. Petitioner contended at hearing that his initial default into the Pension Plan was not a true election because he did not literally elect anything. It is true that the second election may be mis-named in cases where the participant has defaulted into the Pension Plan, but whatever it is called, the applicable statute gives only an initial choice period and one further opportunity to move between the retirement programs, and Petitioner has exhausted both of these opportunities.

13. The SBA lacks the statutory authority to allow Petitioner to rescind his election.

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 17th day of June, 2009.



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 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

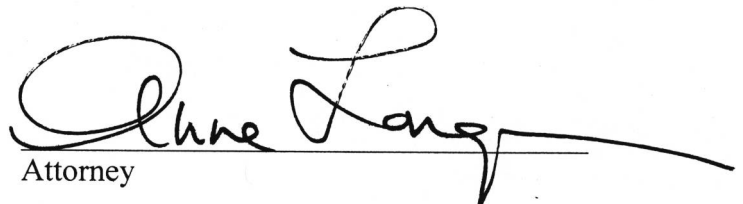
This 17th day of June, 2009.

Copies furnished to:

Thomas W. Renzo


Petitioner

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent


Attorney