

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

DEAN MIHALKO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2010-1861
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On August 25, 2011, the presiding officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that a copy was served upon counsel for the Petitioner and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. Neither party filed exceptions, which were due on September 9, 2011. 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. The Petitioner's request he be allowed to transfer from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan, effective as of the date of his initial election to join the FRS Investment Plan and without paying the statutorily-required "buy-back" amount, hereby 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 20<sup>th</sup> day of September, 2011, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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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.

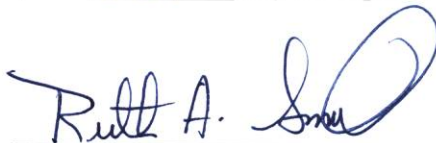


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Gina Jones  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS to William N. Swift, Esq., William N. Swift, P.A., 901 Martin Downs Blvd., Suite 207, Palm City, Florida 34990, 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 20th day of September, 2011.

A handwritten signature in blue ink that reads "Ruth A. Smith". The signature is written in a cursive style with a large, looped "S" at the end.

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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

DEAN MIHALKO,

Petitioner,

vs.

Case No.: 2010-1861

STATE BOARD OF ADMINISTRATION,

Respondent.

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**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 January 24, 2011 and June 21, 2011, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: William N. Swift, Esq.  
WILLIAM N. SWIFT, P.A.  
901 Martin Downs Blvd. Ste 207  
Palm City, Florida 34990

For Respondent: Brian A. Newman, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
Post Office Box 10095  
Tallahassee, Florida 32302-2095

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GENERAL COUNSEL'S OFFICE

**EXHIBIT A**

### **STATEMENT OF THE ISSUE**

As articulated by Petitioner's counsel, there are two issues in this matter: 1) is Petitioner entitled to transfer into the Florida Retirement System (FRS) Pension Plan from the FRS Investment Plan as of the date of his initial election, based on his assertion that he was not informed that he could enter the Deferred Retirement Option Plan (DROP) only from the Pension Plan and not from the Investment Plan; and 2) if so, what amount must he pay to effectuate this switch.

### **PRELIMINARY STATEMENT**

On July 5, 2010, Petitioner submitted a letter to the Florida Division of Retirement requesting to be transferred to the Pension Plan without paying any amounts in addition to the value of his Investment Plan account. The Division of Retirement forwarded Petitioner's request to the SBA, which investigated his complaint and denied his request by letter of July 23, 2010 from Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, which stated that the only way Petitioner could now transfer into the Pension Plan would be to use his second election and pay the required buy-in amount.

Petitioner filed a Petition for Hearing on August 13, 2010, which initiated this proceeding. Petitioner's attorney notified of his appearance on October 15, 2010, and on that same date filed a motion seeking to have the case transferred to the Division of Administrative Hearings, asserting discovery of "disputed issues of material fact.....specifically fraud in the inducement by the state pension administrators regarding the right to "DROP" that prevented Petitioner from making an informed election regarding his pension choices." Petitioner did not explain how he was "fraudulently induced" in his motion. The SBA filed a response that same day, requesting that this case continue as a proceeding not involving disputed issues of material



fact. Petitioner's motion was denied by Order of October 19, 2010, but he was specifically allowed to renew his request to transfer the case to the Division of Administrative Hearings at the informal hearing.

The informal hearing began on January 24, 2011; Petitioner and his counsel attended by telephone. Testimony was received from Petitioner and from Daniel Beard. A transcript of Petitioner's February 20, 2003 telephone call to the MyFRS Financial Guidance Line was admitted without objection as Joint Exhibit 1. I requested that Respondent search for and file recordings of any other calls from Petitioner to the MyFRS Financial Guidance Line, and any other documents relevant to Petitioner's request, and invited Petitioner to state how he wished to proceed based on the documents produced after the January 24<sup>th</sup> hearing.

Respondent filed supplemental exhibits on April 1, 2011. Petitioner was given ten days to respond to the supplemental exhibits but filed no response. The hearing was reconvened on June 21, 2011 and Joint Exhibit 1 and Respondent's Exhibits 1 through 17 were admitted into evidence. Petitioner agreed to file an affidavit in response to Respondent's exhibits within ten days. Petitioner timely filed an affidavit in response to Respondent's Exhibits to which Petitioner responded on July 15, 2011.

Transcripts of the proceedings of January 24, 2011 and June 21, 2011 were filed with the agency and made available to the parties. Both parties filed proposed recommended orders. I have taken all submissions to date into account in making my recommendation.

## UNDISPUTED MATERIAL FACTS

1. Petitioner became a member of the FRS when he began employment with the Martin County Sheriff's Office on July 2, 2001.

2. On February 20, 2003, Petitioner called the MyFRS Financial Guidance Line and spoke with an Ernst & Young representative about the differences between the Pension Plan and the Investment Plan, because the period for him to make an initial election was coming to an end. The Ernst & Young representative explained to Petitioner that the Pension Plan had a six year vesting requirement, the Investment Plan had a one year vesting requirement and that the Pension Plan would be better if he retired in state service at age 55. Petitioner stated that he was looking for other employment and was unsure whether he would remain employed by an FRS-covered agency for the six years necessary to vest in the Pension Plan. He evinced a clear preference for the Investment Plan, particularly after he learned that he could actively manage his investments among the offerings of that plan. He was advised that he would still have a one-time option to switch back to the Pension Plan, but that it might cost him additional money to buy back into the Pension Plan, and that it was always better to buy back earlier in a career, because the cost would be less. Petitioner did not ask during this call whether he would be eligible for the DROP program if he elected to join the Investment Plan, and no FRS counselor mentioned the DROP program. When the Ernst and Young representative asked if Petitioner had received the materials mailed to him, he replied: "I probably did. I just didn't (inaudible)."

After an extensive discussion, the call was transferred to a CitiStreet representative so Petitioner could make his election. Mr. Mihalko was able to find his assigned personal identification number on the materials that had been provided by FRS to him by mail, and he made the election to join the Investment Plan during the February 20, 2003 call.

3. The Plan Choice Kit that Respondent issues to FRS members before the initial election deadline states that Investment Plan members are not entitled to participate in DROP. Petitioner states, however, that he never received the Plan Choice Kit, and therefore I have not considered nor decided whether he did or did not, as I do not find this to be material to my recommendation.

4. Petitioner requested and received a buy-in calculation from the Division of Retirement on or about April 19, 2010 and learned that he would be required to pay an estimated [REDACTED] to buy into the Pension Plan at that time. This estimate would have required Petitioner to pay approximately [REDACTED] in addition to the value of his Investment Plan account to switch to the Pension Plan at that time.

#### CONCLUSIONS OF LAW

5. Section 121.4501(4)(e)2, Florida Statutes requires FRS Investment Plan participants to buy into the Pension Plan if they wish to switch to that defined benefit plan. Section 121.4501(4)(e)2. provides:

If the employee chooses to move to the defined benefit program, the employee must transfer from his or her optional retirement program [Investment Plan] account and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the defined benefit program and service in the [Investment Plan]. Benefit commencement occurs on the first date the employee would become eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the Florida Retirement System defined benefit plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the defined benefit plan, the then-present value of such accrued benefit shall be deemed part of the required transfer amount



described in this subparagraph. The division shall ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary.

6. Petitioner was advised during his February 2003 call to the MyFRS Financial Guidance Line that there could be a cost associated with his transfer to the Pension Plan, and that this amount would likely be more as he approached retirement age. The SBA has no statutory authority to waive the buy-in requirement imposed by Section 121.4501(4)(e)2., Florida Statutes.

7. To the extent Petitioner contends that his buy-in amount was not calculated properly by the Division of Retirement, this issue is not within the jurisdiction of this proceeding before the State Board of Administration. The Pension Plan buy-in amount is calculated by the Division of Retirement. As such, any errors Petitioner believes to have occurred in the calculation of his Pension Plan buy-in estimate must be addressed directly with the Division of Retirement. §121.4501(4)(e)2, Fla. Stat.

8. As set out in his Amended Proposed Recommended Order, the crux of Petitioner's claim is that the mandatory buy-in should be waived in this instance because he was not advised in 2003 that he would not be entitled to participate in DROP as a member of the Investment Plan, even though SBA materials routinely provided and available to participants clearly state that Investment Plan members are ineligible for DROP.

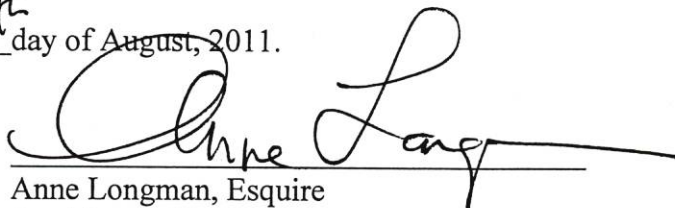
9. Even though I assume for purposes of this proceeding that Petitioner did not receive a Plan Choice Kit prior to making his 2003 election, I see no way that this posited fact can, seven years later, render his initial election voidable, and Petitioner has cited no authority for this proposition. See, State Board of Administration v. Huberty, 46 So. 3d 1144 (Fla. 1st DCA 2010)(Investment Plan member could not return to Pension Plan without paying required buy-in six years after making the decision to join the Investment Plan).

10. Likewise, the fact that the Financial Guidance Line representative did not discuss DROP, especially when no questions about it were posed by Petitioner, is not legally sufficient to allow him to void his initial election. The facts of Petitioner's case do not constitute the exceptional circumstances under which equitable estoppel will be applied against a state agency, as, inter alia, there was here no representation as to a material fact that is contrary to a later-asserted position. See, Salz v. Dept. of Admin., Div. of Retirement, 432 So.2d 1376 (Fla. 3rd DCA 1983).

**RECOMMENDATION**

Having considered the relevant undisputed facts of record, I recommend that the Respondent, State Board of Administration issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of August, 2011.



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.

9/9/11

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

Copies furnished to:

Dean Mihalko



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