

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

THOMAS M. GRESK,)
)
 Petitioner,)
)
 vs.)
)
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
 _____)

SBA Case No. 2020-0292

FINAL ORDER

On November 18, 2020, the Presiding Officer submitted her Recommended Order to the State Board of Administration (“SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the *pro se* Petitioner, Thomas Gresk, and upon counsel for the Respondent. Neither party filed exceptions to the Recommended Order, which were due on December 3, 2020. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s request to be given access to the full balance in his Investment Plan account, which largely consists of unvested Pension Plan funds that were transferred when Petitioner made his second election, is denied. Petitioner was properly enrolled by default

into the Pension Plan when he commenced employment in 2017. While Petitioner claims that his employer failed to provide him with sufficient information as to the differences between the Pension Plan and the Investment Plan, Section 121.021(10), Florida Statutes specifically provides that employers are not agents of the SBA and that, therefore, the SBA, by law, is not responsible for any erroneous information provided by, or the lack of information attributable to, employer representatives.

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 11 day of February 2021, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

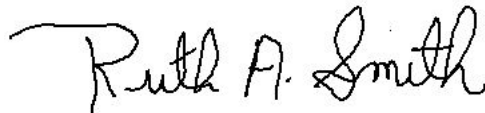
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Thomas Gresk, *pro se*, both by email transmission to [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 11 day of February, 2021.



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

THOMAS M. GRESK,

Petitioner,

vs.

CASE NO. 2020-0292

STATE BOARD OF ADMINISTRATION.

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on September 29, 2020, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner: Thomas M. Gresk, pro se

For Respondent: Ruth Vafek
Ausley McMullen, P.A.
123 S. Calhoun Street
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issues to be determined are (1) whether Petitioner was properly enrolled in the Florida Retirement System (FRS) Pension Plan effective March 1, 2017, and (2) whether Respondent is entitled to “immediate access to the full amount of [his] investment account.”

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner testified on his own behalf, and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-9 were admitted into evidence.

A transcript of the hearing was made, filed with the agency, and provided to the parties on October 13, 2020. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based on my consideration of the complete record in this case and all materials submitted by the parties.

MATERIAL UNDISPUTED FACTS

1. The Petitioner was originally employed in an FRS-eligible position with the Manatee County School Board beginning in August of 2016.
2. At the time Petitioner began this employment, Florida Statutes provided that employees who failed to make an affirmative election during their initial "choice period" would default into the FRS Pension Plan. § 121.4501(4)(a)1, Fla. Stat. (2017).
3. A Benefit Comparison Statement, providing Petitioner with information about FRS plan options and his initial choice period deadline of February 28, 2017, was created and mailed to Petitioner at his address of record, as provided by his employer, on September 20, 2016.
4. As with all FRS-eligible employees, Petitioner also had access to information on MyFRS.com, and toll-free access to the MyFRS Financial Guidance Line.
5. Respondent has no record of receiving any election from Petitioner prior to his choice period deadline of February 28, 2017, and pursuant to statute, he was placed in the

Pension Plan. At the time Petitioner became a member of the FRS Pension Plan, the applicable vesting period was eight years.

6. On March 3, 2017, a Confirmation of Plan Choice Default was mailed to the address provided by Petitioner's employer, advising him that he had been enrolled in the FRS Pension Plan.

7. On March 16, 2020, Petitioner completed a second election form via the MyFRS.com website, electing to change to the FRS Investment Plan.

8. Respondent has not been able to find any record that Petitioner sought additional information from it or its vendors prior to making this second election.

9. Among other information, the online form Petitioner completed to exercise his second election advised as follows (which provisions are also incorporated in Chapter 19-11.007, F.A.C.):

Before using your one-time 2nd Election, be sure you understand the impact of changing from one plan to another. Call the toll-free MyFRS Financial Guidance Line at 1-866-446-9377, Option 2, use the 2nd Election CHOICE SERVICE on MyFRS.com, and review the requirements of Rule 19.11007, F.A.C.

....

You understand, acknowledge, and authorize that any accrued value you may have in the Pension Plan will be transferred to your Investment Plan account as your opening balance and is **subject to the vesting requirements of the Pension Plan.**

(Emphasis added).

10. The Confirmation of 2nd Election that was sent to Petitioner following his election advised him of the option to rescind that election "no later than 4:00 PM EST on the last business day of the month following [his] election month...."

11. Respondent did not receive any request from Petitioner to rescind his second election during the prescribed grace period. The present value of his Pension Plan benefit was

therefore transferred into his Investment Plan account as an opening account balance on April 30, 2020.

12. On or about May 29, 2020, Petitioner's employment with the Manatee County School Board ended. At that time he had accumulated four years of service credit, far short of his eight year vesting period.

13. On or about July 29, 2020, Petitioner submitted a Request for Intervention asserting his belief that "this situation is a result of the school administration's negligence and incompetence" and requesting one of "two possible outcomes" namely, either "[i]mmediate access to the full amount of [his] investment account [or] [c]ontinued employment as an instructor [with MCSB] until [he] reach[es] the eight year vestment period." Petitioner's request was denied.

14. On or about August 18, 2020, Petitioner filed a Petition for Hearing, again asserting that when he began FRS-eligible employment he "never heard of a pension benefit...and the management of the school never mentioned it." He again requested access to the full amount in his Investment Plan account. This administrative proceeding followed.

CONCLUSIONS OF LAW

15. Petitioner's default into the Pension Plan was mandated by Section 121.4501(4)(a)1, Florida Statutes (2017), which provided in pertinent part as follows:

With respect to an eligible employee who...is initially employed in a regularly established position after the close of the initial election period but before January 1, 2018, **such employee shall, by default, be enrolled in the pension plan** at the commencement of employment 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. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator....

....

b. **An employee who fails to elect to participate in the investment plan within the prescribed time period is deemed to have elected to retain**

membership in the pension plan, and the employee's option to elect to participate in the investment plan is forfeited.

(Emphasis added.)

16. Because Petitioner did not make an affirmative election to participate in the Investment Plan by the statutory deadline (in his case, February 28, 2017), he was deemed to have elected to remain in the Pension Plan. As an administrative agency of the state, Respondent SBA does not have authority to modify or circumvent the law, which is what would be required to retroactively enroll Petitioner in the Investment Plan as of the beginning of his eligible employment.

17. Nor is Respondent authorized to declare Petitioner vested in his Investment Plan account, consisting of the present value of his Pension Plan transferred to the Investment Plan as the accumulated benefit obligation, because he has not met the statutory vesting requirements.

18. Section 121.4501(4)(f), Florida Statutes, provides in relevant part:

(f) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, 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 pension plan to the investment plan or from the investment plan to the pension plan.

....

1. If the employee chooses to move to the investment plan, the provisions of subsection (3) govern the transfer.

The referenced subsection (3) of 121.4501 provides in pertinent part that an eligible employee transferring from the Pension Plan to the Investment Plan shall:

...transfer to the investment plan a sum representing the present value of the employee's accumulated benefit obligation under the pension plan....

....

1. For purposes of this subsection, the present value of the member's accumulated benefit obligation is based upon the member's estimated

creditable service and estimated average final compensation under the pension plan....

Section 121.4501(6)(c)1, Florida Statutes, mandates that this opening balance remain subject to the employee's vesting requirement under the Pension Plan, which in this case was eight years of service credit.

19. Petitioner in this instance has only accumulated four years of service credit, and Respondent may not grant Petitioner the requested "immediate access" to the "full amount" in his Investment Plan account.

20. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency "is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction").

21. Respondent does not have authority to undo Petitioner's default initial enrollment in the Pension Plan or to ignore the applicable Pension Plan vesting requirements as would be required to give him full access to the opening balance portion of his Investment Plan account.

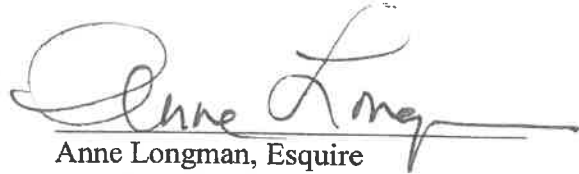
22. Petitioner has asserted that his employer failed to inform him of his FRS options, or even eligibility, when he first entered FRS-eligible employment with the school board, and he did not realize he was enrolled or had the option of choosing the Pension Plan or Investment Plan until early 2020. Section 121.021(10), Florida Statutes, explicitly provides that "[e]mployers are not agents of the Department of Management Services], the [State Board of Administration], or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers." It is

unfortunate if Petitioner acted or failed to act based on his employer's conduct, but this cannot, by law, be attributed to Respondent SBA.

RECOMMENDATION

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

DATED this 18th day of November 2020.



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 OF RIGHT TO SUBMIT EXCEPTIONS: 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. Any exceptions 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 via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
mini.watson@sbafla.com
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:
Thomas M. Gresk



Petitioner

and via electronic mail only to:

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