

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SABRINA BRITT,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2007-988
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On July 7, 2008, 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, Sabrina Britt, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Respondent filed Exceptions on July 23, 2008. The exceptions were due on July 22, 2008. 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.

EXCEPTIONS

1. Respondent's Exceptions, although untimely, are not stricken. The First District Court of Appeal, in *Hamilton County Board of County Commissioners v. TSI Southeast, Inc.*, 587 So.2d 1378 (Fla. 1st DCA 1991), has ruled:

In the case now before us, despite the language in rule 17-103.200(1) providing that exceptions not filed [with the agency] within fifteen days after the date on which the recommended order is filed 'shall' be rejected, we hold that the Secretary [of DEP] erred

in striking the County's exceptions to the recommended order as untimely, without first considering the County's argument that the late filing was due to excusable neglect, without giving the county notice of intent to strike the exceptions for this reason and according to the County a reasonable opportunity to respond, and without determining that the County waived its right to file exceptions to the recommended order. ... [R]ule 17-103.200 is designed to further the orderly conduct of business, and should be construed as *directory* only. Notwithstanding the mandatory language of rule 17-103.200, the Department had discretion to extend the time for filing exceptions to the recommended order. Id. at 1390. *[emphasis added]*

2. Respondent has never filed exceptions untimely and indicated that there was a miscommunication between attorney and staff which resulted in the exceptions' being mailed rather than hand-delivered, as they had been in the past. The problem has been remedied and will not recur.

RULINGS ON EXCEPTIONS

1. Exception 1 is confusing. It first excepts to the statement in the Recommended Order that "Petitioner intended to use her second election to switch to the Investment Plan and access her funds as soon as possible." This exception states that it is actually a finding of fact "that is not supported by competent substantial evidence in the record."

In Respondent's Pre-hearing Statement, filed on January 23, 2008, in the section labeled "Material Undisputed Facts," the Statement says: "Petitioner made her intent clear that she was relocating out of state and wished to take her accrued benefit out of the FRS." [p. 2] In Respondent's Exhibit 5, which is a transcript of a phone call, on April 5, 2007, between Petitioner and the MyFRS Financial Guidance Line, Petitioner clearly asked "is it possible to take your money out of the Florida retirement system if you are leaving the State of Florida and relocating to another state?" [R-5, lines 20-23] This call is referred to by witness Dan Beard at T-5, lines 3-9, additionally indicating that Petitioner wanted her Florida retirement funds.

However, it appears that the actual exception is contained in the final paragraph of that exception: that while the Petitioner did say she wanted her FRS funds, the “SBA cannot be made to guess as to which was the Petitioner’s true intent – what she said on the phone call and what she indicated on the second election form she submitted.”

The exception is accepted in part and rejected in part. The exception is rejected because the sentence quoted is simply an opening sentence for paragraph 11 and is clearly supported in the record. However, the exception is accepted because of the remainder of the exception: that the SBA cannot be made to guess at the Petitioner’s intentions.

2. Exception 2 excepts to the conclusion of law discussing Rule 19-11.007(6), regarding a grace period for erroneous selections on the second election form. The exception construes the rule as applying to the erroneous choice of either the Investment Plan or the Pension Plan and makes the assumption that the Investment Plan Hybrid Option is included in Rule 19-11.007(6)(a)1. This is incorrect and therefore the exception is rejected.

Rule 19-11.007(6)(a)1., F.A.C., says that various parties must be notified, in various ways, “before assets are transferred from the FRS Pension Plan to the member’s FRS Investment Plan account.” If someone chooses the Hybrid Option, no assets are transferred. Instead, the member’s Pension Plan funds remain in the Pension Plan for later distribution when the member reaches the required age or time period. The funds contributed by the member’s FRS employer *after* the member exercises his second election and chooses the Hybrid Option, go into the member’s newly-established

Investment Plan account. As noted in the Recommended Order at page 6, paragraph 9, Section 121.4501(3)(c)1 is cited as the source of the Hybrid Option rather than Section 121.4501(3)(b). This is correct. The first sentence in Section 121.4501(3)(c)1. states:

Notwithstanding paragraph (b), each eligible employee who elects to participate in the [PEORP] and establishes one or more individual participant accounts under the optional program *may elect* to transfer to the optional program a sum representing the present value of the employee's accumulated benefit obligation under the defined benefit retirement program [FRS Pension Plan] of the Florida Retirement System. [*emphasis added*]

The Hybrid Option flows out of the sentence above which states that an eligible employee "may elect" to transfer his Pension Plan account to the Investment Plan. But he does not have to. If he transfers his Pension Plan account into the Investment Plan, he is in the Investment Plan for future employer contributions in addition to the amount that he has transferred. If he does not and elects to leave his Pension Plan funds in the Pension Plan, then his funds are frozen in the Pension Plan and his future employer retirement contributions go into the Investment Plan. Under those circumstances, he has elected the Investment Plan Hybrid Option. It is the Investment Plan because his employer contributions are invested in Investment Plan investment options; however, it is a hybrid, because he still has funds in the Pension Plan, frozen, but still in the Pension Plan.

3. Exception 3 is rejected in part and accepted in part. The Recommended Order states that Rule 19-11.007 applies to cases of erroneous selection of the Investment Plan or the Pension Plan and notes that the rule does not apply to the Hybrid Option. This is correct because the rule does not mention the Hybrid Option. The exception is rejected on that basis.

However, the exception is accepted because there is no citation to authority for the SBA to reverse this election. The *Town of Lake Park* and the *Greene v. Gray* cases cited in the Recommended Order stand of the proposition cited but provide no authority for the SBA to reverse Petitioner's erroneous selection.

ORDERED

The Petitioner's request to be allowed to rescind her election of the Investment Plan Hybrid Option and make an election to the Investment Plan is denied. A review of the entire record indicates that she wanted her entire FRS pension funds and she called the FRS Guidance Line for help. None of the conversations addressed which part of the Investment Plan she should choose. She appears not to have read the description of the Hybrid Option on the form, nor the other two statements quoted in the Recommended Order, which would have alerted her to the fact that the Hybrid Option was not the choice that she wanted. Further, Petitioner did not receive her confirmation statement shortly after she made her choice because she had not changed her address with her employer which resulted in the FRS Investment Plan Administrator's sending the confirmation statement to her previous address. Changing addresses is an employee's responsibility.

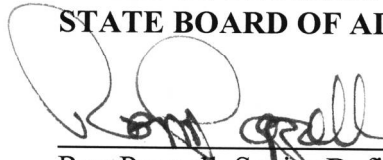
Therefore, Petitioner's request is denied because she failed to read the description of her choices on the Second Election form and because she failed to change her address with her employer.

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 30th day of July, 2008, 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

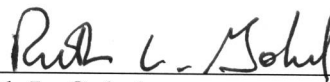
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Sabrina Britt, 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 30th day of July, 2008.



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

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GENERAL COUNSEL'S OFFICE

SABRINA BRITT,

Petitioner,

v.

CASE NO.: 2007-988

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on February 5, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Sabrina Britt, pro se


For Respondent:

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

At issue is whether the Respondent State Board of Administration (SBA) should grant the Petitioner's request to rescind her second election into the Hybrid Option and allow her to file another second election form to transfer all of her Pension Plan assets to the Investment Plan.

Exhibit A

PRELIMINARY STATEMENT

Petitioner was a member of the Florida Retirement System (FRS) Pension Plan. She executed a second election form on May 29, 2007, wherein the box titled "Change from the FRS Pension Plan to the FRS Investment Plan Hybrid Option" was checked. On September 11, 2007, Petitioner filed a Request for Intervention seeking to have this second election rescinded because made in error and have all of her Pension Plan assets placed in the Investment Plan. Respondent investigated and denied this request. Petitioner then filed a Petition for Hearing requesting the same relief, which was transmitted to the undersigned for informal hearing.

Petitioner attended the informal hearing by telephone and testified on her own behalf. Respondent attended the hearing in person and presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Respondents Exhibits R-1 through R-7, consisting of official records and documents reflecting contacts with Petitioner, were admitted into evidence without objection. Petitioner did not submit any exhibits.

A transcript of the informal hearing was made, 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 filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner had been a member of the FRS Pension Plan for approximately 17 years. On May 29, 2007, she signed a 2nd Election EZ Retirement Plan Enrollment Form and put a check

in box number three, which requests to move from the Pension Plan to the Investment Plan Hybrid Option. Under the Hybrid Option, a member retains any accrued benefit in the FRS Pension Plan, and future employer contributions are deposited in an FRS Investment Plan account. Petitioner testified, and the record reflects, that she needed money and wished to be able to access funds from her account as soon as possible because she was terminating FRS participating employment and moving out of state, that she could do this only by moving to the Investment Plan, and that she erroneously checked box three for the Hybrid Option, instead of box two, for the Investment Plan.

2. Petitioner's second election form was received and processed by the FRS Investment Plan Administrator, CitiStreet, on May 30, 2007.

3. The second election form contains numerous statements describing the effect of the election made by Petitioner:

- I wish to utilize my one-time 2nd election to . . . change from the FRS Pension Plan to the FRS Investment Plan Hybrid Option. I am retaining any accrued benefit in the FRS Pension Plan with future employer contributions deposited in my FRS Investment Plan account and that my assets will be deposited in the FRS Select Moderate Balanced Fund. I understand that I must have 5 years of Pension Plan service to select this option.
- 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. I understand that this enrollment will constitute my one-time second election, as provided under the FRS; I will have to remain in this retirement plan until my retirement from the FRS.
- I understand that I have elected to change retirement plans to the FRS Investment Plan and that my FRS Pension plan benefit already accrued will remain with the FRS Pension Plan and that a FRS Investment Plan account will be established to receive all future employer contributions.

- Your 2nd election will be final at 4:00 p.m. (Eastern Time) on the day it is received... By submitting this form, you are utilizing your one-time second election to change plans within the FRS. You may review the details of the second election at MyFRS.com.
- A confirmation statement will be mailed to your address of record once your complete form is received and processed. Please allow 2 to 3 weeks to receive it. Your address of record is submitted by your employer to the FRS. Make sure your employer is notified of any address changes.

4. Prior to submitting her second election, Petitioner made several calls to the MyFRS financial guidance telephone service to clarify what actions she would need to take to transfer to the Investment Plan and be able to gain access to her retirement funds. These calls were recorded, and three of them were admitted into evidence at hearing. They all evince the same intent on Petitioner's part: to be able to gain access to her funds as soon as possible. They also reflect that she was told that the way to do this was to use her second election to transfer into the Investment Plan. No mention was made by either Petitioner or the advisors she spoke with on these calls of the Investment Plan Hybrid Option.

5. Respondent's records show that a confirmation statement was mailed to Petitioner at her address of record on or about May 30, 2007, reflecting that she had selected the Hybrid Option.

6. Petitioner's address of record at the time she submitted her second election form for processing had not been changed by her employer to reflect her current address, therefore she never received the confirmation statement. Petitioner testified that she did report her address change to her employer and that she did receive a W-2 form from her employer at her new address, but did not receive a confirmation statement from the SBA showing processing of her second election.

7. Petitioner first realized she had selected the wrong option on her second election form approximately three months after she submitted it for processing. She asserts that because she did not receive a confirmation statement, she did not have a timely opportunity to rectify her mistake.

8. Respondent denied Petitioner's request to rescind her erroneous second election because the grace period set out in Rule 19-11.007(6) Florida Administrative Code had passed by the time the Respondent made her request.

CONCLUSIONS OF LAW

9. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(e), Florida Statutes (2006). 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. ...

1. If the employee chooses to move to the Public Employee Optional Retirement Program, the applicable provisions of this section shall govern the transfer.

§ 121.4501(4)(e), Fla.Stat. (2006). This statute does not mention a "hybrid option," but section 121.4501(3)(c)4, provides that the SBA is to establish procedures for transferring amounts from the Pension Plan to the Investment Plan by rule. The opportunity for a member to remain a part of the Pension Plan (also called the defined benefit retirement program) and to participate in the Investment Plan (also called the Public Employee Optional Retirement Program) going forward, appears to be

derived from section 121.4501(3)(b), Florida Statutes. Rule 19-11.007, Florida Administrative Code, Second Election Enrollment Procedures for the FRS Retirement Programs, at (2)(b) refers to this as the "FRS Investment Plan Hybrid Option." (The rule cites to section 121.4501(3)(c)1, Florida Statutes rather than 121.4501(3)(b) as the source of the hybrid option, but the meaning of the hybrid option seems clear.)

10. 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.

11. There is no dispute in this case as to the fact that Petitioner intended to use her second election to switch to the Investment Plan and access her funds as soon as possible. The above rule allows the SBA to consider, on a case-by-case basis, whether an election will be voided, when the employee realizes that an election was made in error. If the member uses the second election to erroneously elect the Investment Plan, Rule 19-11.007 at subsection (6)(a)1 applies. If the member

uses the second election to erroneously elect the Pension Plan, subsection (6)(a)2 applies. Neither of the rule subsections applies by its express terms to the situation in this case, where the member elected the FRS Investment Plan Hybrid Option in error, so the ability of the Respondent to consider, on a case by case basis, whether the election will be voided, is subject to no further requirements.

12. Pension statutes are to be construed liberally in favor of the intended recipients. Bd. of Trustees, etc. Firefighters' Pension Plan v. Town of Lake Park, 966 So.2d 448 (Fla. 4th DCA 2007), citing Greene v. Gray, 87 So.2d 504, 507 (Fla. 1956).

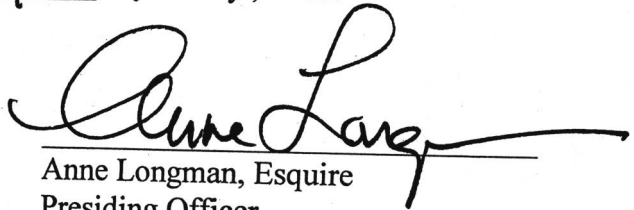
13. It is undisputed that Petitioner wished to and intended to use her second election to transfer her Pension Plan assets to the Investment Plan so that she could receive moneys as soon as possible. It is also clear that the second election form she filed indicated the Investment Plan Hybrid Option, and was erroneously filled out.

14. The grace period provision of the second election rule at §19-11.007(6)(a), Florida Administrative Code does not create a time bar to the relief sought in this circumstance, as those time bars are applicable only to erroneous choice of either the Investment Plan or the Pension Plan.

RECOMMENDATION

In light of the undisputed fact that Petitioner made an erroneous second election which did not reflect her intention, the Respondent's stated rule policy of allowing members to have an election voided when made in error and the absence of any time bar in the rule applicable to this circumstance, I recommended that the Respondent allow Petitioner's second election to be voided so that she can transfer to the Investment Plan, if she still desires to do so.

RESPECTFULLY SUBMITTED this 7th day of July, 2008.



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 should be filed with the Agency Clerk of the State Board of Administration. 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 7th day of July, 2008.

Copies furnished to:

Sabrina Britt



Petitioner

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.

Post Office Box 10095
Tallahassee, Florida 32302-2095

Respondent