

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SCOTT ELLIS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2009-1568
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On December 8, 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, Scott Ellis, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on December 23, 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

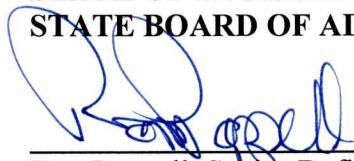
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to rescind his second election and be returned to the Pension Plan without having to pay the "buy back" amount is denied.

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 15th day of January, 2010, 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 TINA JOANDS.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Scott Ellis, 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 15th day of January, 2010.



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

SCOTT ELLIS

Petitioner,

vs.

CASE NO. 2009-1568

STATE BOARD OF ADMINISTRATION,

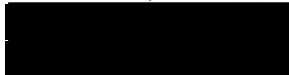
Respondent.

RECOMMENDED ORDER

This cause was heard in an informal proceeding before the undersigned presiding officer on September 15, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Scott Ellis, pro se



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

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether the Petitioner's request to use his second election to switch from the Florida Retirement System (FRS) Investment Plan into the Pension Plan without having to pay the buy back amount should be granted.

PRELIMINARY STATEMENT

On June 18, 2009, Petitioner sent a letter to Governor Charlie Crist requesting that he be allowed to move from the Investment Plan to the Pension Plan without having to pay the buy back amount, as well as setting out several ideas as to how the Florida Retirement System (FRS) could be improved. This letter was forwarded to Respondent State Board of Administration (SBA), and Petitioner's request was denied after investigation. Petitioner then filed a Petition for Hearing requesting the same relief, which resulted in the instant hearing.

Petitioner attended the informal hearing by telephone and testified on his own behalf. Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Respondent's Exhibits R-1 through R-10 were admitted into evidence without objection.

A transcript of the hearing was filed with the agency on October 1, 2009. The parties 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 began employment with Collier County on February 23, 2004. Collier County is an FRS-covered entity.
2. Petitioner filed an enrollment form selecting enrollment in the FRS Investment Plan, which he signed on June 2, 2004. This form advised Petitioner that there would be a cost to switch to the Pension Plan should he choose to do so in the future. This cost is commonly

referred to as the "buy back." After he had worked in his FRS covered position with the County for five years, Petitioner looked into switching to the Pension Plan and discovered that the cost to buy back would be approximately \$ [REDACTED] some \$ [REDACTED] more than the current value of his Investment Plan account.

3. The letter Petitioner submitted to Governor Crist stated in part that he did not select the Pension Plan option because he was not sure that he would remain employed with Collier County for the six years required to vest in that plan (the Investment Plan has only a one year vesting requirement). Petitioner testified to the same effect at hearing. He was aware that he would have to buy back into the Pension Plan if he used his second election to switch plans, but did not know it would be so expensive.

4. Petitioner does not contend that the educational materials advising him of the requirement to buy back to switch to the Pension Plan are misleading. At hearing Petitioner testified, "...I know I have no ground to stand on because it's all purely written in the plan, I can read, I've read all the literature about it, and I know it's all Florida Statute and you've got it all covered." Petitioner's concern is that the amount of the buy back was larger than he anticipated and that the materials did not advise him that the buy back amount could be "significant." The buy back amount is calculated based on the specific employee's actuarial accrued liability.

5. Petitioner initially complained in his Petition for Hearing that he was not informed about the fact that the Pension Plan has a larger employer contribution than the Investment Plan. Petitioner later withdrew this complaint, conceding at hearing that this statement was an error, since in fact, the employer contribution rate for the Investment Plan (9%) is currently higher than for the Pension Plan (8.69%) for the Petitioner's employment classification.

6. Petitioner also stated concerns at hearing that the fees for trades for those participating in the Investment Plan were higher than they should be. Undisputed testimony from Respondent SBA was that the fees for the Investment Plan are lower than the fees charged on the retail market, due to the purchasing power of the Investment Plan, which presently totals approximately \$4.5 billion in assets.

CONCLUSIONS OF LAW

7. Movement between the two FRS plans is governed by Section 121.4501(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. Effective July 1, 2005, such elections shall be effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except that the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

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

2. If the employee chooses to move to the defined benefit program, **the employee must transfer from his or her Public Employee Optional Retirement Program 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 Public Employee Optional Retirement Program. 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.

3. Notwithstanding subparagraph 2., an employee who chooses to move to the defined benefit program and who became eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a state employer after June 1, 2002; a district school board employer after September 1, 2002; or a local employer after December 1, 2002, must transfer from his or her Public Employee Optional Retirement Program account and, from other employee moneys as necessary, a sum representing that employee's actuarial accrued liability.

§ 121.4501(e), Fla.Stat. (emphasis added).

8. Rule 19-11.007, Florida Administrative Code states, in pertinent part:

19-11.007. Second Election Enrollment Procedures for the FRS Retirement Programs.

...

(h) For members transferring to the FRS Pension Plan, the election may require a personal payment if the member's account balance was less than the calculated amount required to buy back into the FRS Pension Plan. Such payment, if necessary, must be received by the date determined by the Division. If the required amount is not received by the Division by the date due, the election will be voided. The member will receive notification and proper instructions from the Division detailing where and in what form to send any personal payments.

Rule 19-11.007, F.A.C. (emphasis added).

9. As the governing statutes make clear, Florida Retirement System members have a one-time opportunity to switch from the Investment Plan to the Pension Plan. § 121.4501(e), Fla.Stat. That section further advises FRS members who wish to use their one-time second election to switch from the Investment Plan to the Pension Plan that they will have to buy back into the Pension Plan with the money in their Investment Plan account. Id. If there are

insufficient funds in the Investment Plan account, the member will have to make up the difference from other financial resources in order to complete the transaction. Id. This information is also included in educational materials and forms available to FRS participants.

10. Like every other new member of the FRS, the Petitioner was faced with the decision of whether to enroll in the FRS Investment Plan, with its one year vesting requirement or the Pension Plan, which has a six year vesting requirement. Petitioner made the decision to join the Investment Plan instead of the Pension Plan because he was not sure whether he would work for Collier County long enough to meet the Pension Plan's six year vesting requirement. If he had enrolled in the Pension Plan and not worked in FRS covered employment for six years, he would have left his position with nothing.

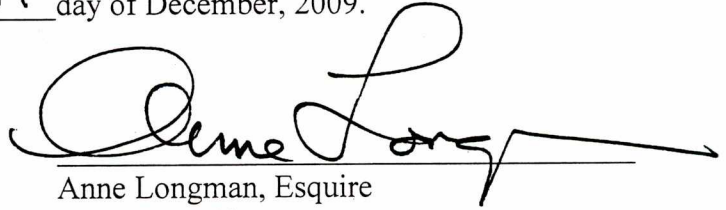
11. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). In charging the buy back amount to Petitioner, Respondent is applying the statute as it does in all cases.

12. Petitioner may be correct in his statement that the Investment Plan is "too risky for the average guy," but this is a plan that has been duly created by statute, and the statute is clear that employees who wish to use their second election to switch from the Investment Plan to the Pension Plan must buy back into the Pension Plan.

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 8th day of December, 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

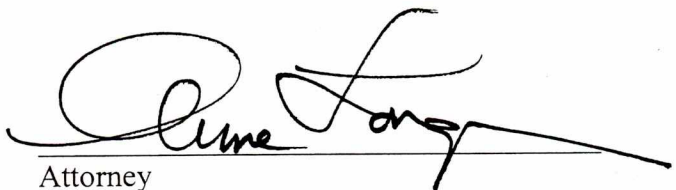
This 8th day of December, 2009.

Copies furnished to:

8 [REDACTED]

Naples, Fl 34119
Petitioner

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Attorneys for Respondent



Attorney