

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ITA NEYMOTIN,)	
)	
Petitioner,)	
)	SBA Case No. 2017-0416
vs.)	DOAH Case No. 18-1198
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER OF DISMISSAL WITH PREJUDICE

On August 28, 2018, Administrative Law Judge (“ALJ”) D.R. Alexander from the Division of Administrative Hearings (“DOAH”) submitted his Order Closing File and Cancelling Hearing (hereafter “Order”) to the Respondent, State Board of Administration (“SBA”), a copy of which is attached as Exhibit A. The Order states that the ALJ has no jurisdiction to grant the relief requested by Petitioner. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

BACKGROUND

On December 20, 2017, the Petitioner, a member of the Florida Retirement System (“FRS”) Investment Plan since 2003, had submitted a request for intervention with the SBA asking that she be allowed to transfer to the FRS Pension Plan without being required to pay the \$109,000 buy-in amount she would owe as required under Section 121.4501(4)(f), Florida Statutes. Petitioner claimed in her request that she never had been advised that members of the FRS Investment Plan are not eligible to participate in the DROP Program. The SBA denied her request, and Petitioner submitted a request

for an informal administrative hearing. Prior to the informal hearing, which was scheduled to be held on March 8, 2018, Petitioner filed a Motion to Dismiss the Informal Hearing and requested that the case be transferred to DOAH, citing the existence of a variety of disputed issues of material fact. In her motion, Petitioner claimed, *inter alia*, that she never was advised from 2003 forward that she could buy in to the FRS Pension Plan or that there could be costs if she were to transfer to the FRS Pension Plan. The SBA had no objection to the case being transferred to DOAH. As such, on March 6, 2018, the Presiding Officer issued an order granting the Petitioner's motion to dismiss the informal hearing and allowing the transfer of the case to DOAH.

On August 16, 2018, the SBA filed a Motion to Relinquish Jurisdiction claiming that Petitioner would be unable to produce any evidence that would overcome the statutory presumption that her 2003 initial FRS Investment Plan election was made with her full knowledge and consent. As such, there are no material facts in dispute. On August 27, 2018, Petitioner filed a response to the SBA's motion, agreeing with the SBA's request that DOAH relinquish jurisdiction, but disagreeing with the SBA's reasoning. Petitioner still claimed that Petitioner did not voluntarily elect to participate in the FRS Investment Plan. Petitioner also asserted that she was never advised that she could switch to the FRS Pension Plan and that had she been made aware of that option, she may have decided to switch plans earlier thereby incurring a much lower buy-in amount. However, Petitioner, in her response, indicated her agreement with the dismissal of the case based on lack of subject matter jurisdiction.

DISCUSSION

Generally, when choosing between circuit court and administrative forums, there is a duty to first exhaust administrative remedies before turning to a court of general jurisdiction. *Department of General Services v. Willis*, 344 So.2d 580 (Fla. 1st DCA 1977). The rationale for this requirement is that there is an “impressive arsenal” of administrative remedies that may prevent a court action. *Id.* at 590. However, the exhaustion principle has certain exceptions, one of which occurs when there is a lack of authority in the administrative agency to grant the relief requested. *Id.* at 591. It has been held that the SBA has no authority to waive the buy-in amount mandated by Section 121.4501(4)(f)2., Florida Statutes. *See, e.g., State Board of Administration v. Huberty*, 46 So.3d 1144 (Fla. 1st DCA 2010); *Dean Mihalko v. State Board of Administration*, Case No. 2010-1861 (SBA September 20, 2011). Further, the calculation of the dollar amount of the buy-in is not made by the SBA and, therefore, cannot be challenged in an administrative proceeding *before the SBA*. *Neil Burton v. State Board of Administration*, Case No. 2014-3202 (SBA April 30, 2015).

Petitioner was offered the opportunity to litigate any matters involving disputed issues of material fact before DOAH, such as the issue as to whether or not her decision to join the FRS Investment Plan was fully-informed. However, Petitioner chose not to do so, and agreed that DOAH lacks the jurisdiction to provide her with the relief she is seeking.

As such, Petitioner should be foreclosed from raising in the future with the SBA any claim that currently is ripe and with the SBA’s power to determine. *See, Florida Department of Transportation v. Juliano*, 801 So.2d 101, 105 (Fla. 2001) in which the

court held that the doctrine of res judicata bars not only issues that were actually raised, but also those that could have been raised but that were not raised in the first case; and *Alderwoods Group, Inc. v. Garcia*, 119 So.3d 497 (Fla. 3d DCA 2013), in which the court recognized that the doctrine of res judicata is applicable to prior administrative proceedings.

Although a dismissal of a complaint for lack of jurisdiction does not operate as an adjudication on the merits, "... it is proper to designate such a dismissal as being 'with prejudice' in order to preclude it from being refiled in that court where there is a lack of jurisdiction." However, such dismissal does not operate to bar the filing of a suit thereon in a separate cause in a court having jurisdiction. *Miami Super Cold Co. v. Giffin Industries, Inc.*, 178 So.2d 604, 605 (Fla. 3d DCA 1965).

As such, indicating the dismissal is with prejudice will not prevent Petitioner from bringing a claim in another forum that either the SBA or DOAH lacked jurisdiction to resolve. *See, Felder v. State, Dept. of Management Services, Div. of Retirement*, 993 So.2d 1031 (Fla. 1st DCA 2008).

ORDERED

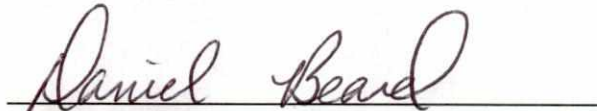
The Order Closing File and Cancelling Hearing is adopted in its entirety and is incorporated herein by reference. Petitioner's matter hereby is dismissed with prejudice.

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 28th day of November, 2018, 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
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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 via electronic mail to Leonid Kremenchuker, Esq., Counsel for Petitioner, leo@99legal.com, and by UPS to Kremenchuker Law Group, 12811 Kenwood Lane, Suite 106, Ft. Myers, Florida 33907; and by electronic mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, brian@pennington.com and brandi@pennington.com, this 28th day of November, 2018.



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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ITA NEYMOTIN,

Petitioner,

vs.

Case No. 18-1198

STATE BOARD OF ADMINISTRATION,

Respondent.

ORDER CLOSING FILE AND CANCELING HEARING

On August 16, 2018, Respondent filed a Motion to Relinquish Jurisdiction with a Recommendation of Dismissal (Motion). On August 27, 2018, Petitioner filed her response. Petitioner does not oppose relinquishing jurisdiction to the agency, but disagrees with the "reasoning for doing so." She agrees, however, that the undersigned lacks jurisdiction to grant the requested relief, and dismissal will allow her to pursue the claim in a court of competent jurisdiction. Having determined that the undersigned has no jurisdiction to grant the relief requested by Petitioner, the Motion is granted, the final hearing on September 28, 2018, is canceled, jurisdiction in this matter is relinquished to the agency for the entry of a final order, and the file is hereby closed.

DONE AND ORDERED this 28th day of August, 2018, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of August, 2018.

COPIES FURNISHED:

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