

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

STEVEN ZIDE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2018-0334
	)	
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On January 30, 2019, 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, Steven Zide, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on February 14, 2019. 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**

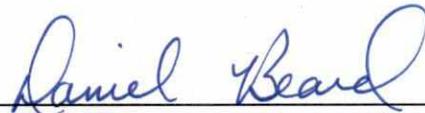
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s request to be allowed to transfer from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan, even though he is not currently employed in an

FRS-covered position, hereby is denied. Petitioner had separated from FRS-covered employment in June 2002, which was prior to the time that the FRS Investment Plan originally was implemented for school board employees such as Petitioner.

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 25<sup>th</sup> day of February 2019, in Tallahassee,  
Florida.

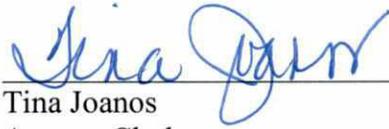
**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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

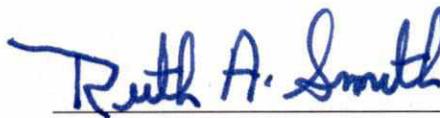
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent to Steven Zide, pro se, both by email transmission to [REDACTED] and by U.P.S. to [REDACTED]; and by email transmission to Brian Newman, Esq. ([brian@penningtonlaw.com](mailto:brian@penningtonlaw.com)) and Brandice Dickson, Esq., ([brandi@penningtonlaw.com](mailto:brandi@penningtonlaw.com)) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 25<sup>th</sup> day of February, 2019.



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

STEVEN ZIDE,

Petitioner,

vs.

Case No. 2018-0334

STATE BOARD OF ADMINISTRATION,

Respondent.

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on December 4, 2018, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Steven Zide, pro se

For Respondent: Brandice D. Dickson, Esquire  
Pennington, P.A.  
Post Office Box 10095  
Tallahassee, Florida 32302-2095

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner should be allowed to transfer from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan, although he is not now employed in an FRS covered position.

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone, 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 1 through 4 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

## **MATERIAL UNDISPUTED FACTS**

1. Petitioner was employed first by the Miami-Dade County School Board and then by the Broward County School Board, both FRS participating employers, from September 1993 – June 2002. He was a member of the defined benefit Pension Plan.

2. After the Florida Legislature created the defined contribution Investment Plan, Respondent SBA mailed a MyFRS Financial Guidance Program Benefit Comparison Statement dated April 4, 2002 to Petitioner advising him that the FRS was implementing the “new FRS Investment Plan” and that he had to “make your choice [between the Pension Plan and the Investment Plan] between 9/1/2002 and 11/30/2002.”

3. Petitioner separated from his position with the Broward County School Board in June 2002. He therefore was not employed in an FRS position during the above-referenced applicable enrollment period in 2002.

4. Petitioner is a vested member in the Pension Plan with 8.50 years of service. He is not presently employed in an FRS-participating position.

5. Petitioner requested he be able to switch from the Pension Plan to the Investment Plan since he had not been informed of the Investment Plan in 2002 at the time he separated employment. Petitioner's request was denied because, at all times during his employment, the FRS offered only the Pension Plan. The Investment Plan, originally called the Public Employee Optional Retirement Program, had yet to be open for membership to school board employees.

6. Petitioner timely filed a Petition for Hearing which initiated this administrative proceeding.

#### **CONCLUSIONS OF LAW**

7. The FRS now has two plans: the Pension Plan and the Investment Plan. The Pension Plan pre-dated the Investment Plan and members of the Pension Plan were given the option of joining the Investment Plan when it was implemented.

8. The Florida Legislature implemented the Investment Plan in 2002. It divided FRS-participating employers into three groups for purposes of offering their employees enrollment in the Investment Plan: (1) state; (2) school board; and (3) local government. Petitioner's FRS-participating employer was among the school board group. In 2002, participation in the Investment Plan by an employee of a school board district was achieved by the employee filing an election form between September 1, 2002 and November 30, 2002. See § 121.4501(4)(b)1.a., Fla.Stat. (2002).

9. Because the Petitioner terminated his employment in June 2002, he was not allowed to join the Investment Plan, as he was not an employee during the enrollment/election period.

10. For reference, the 2002 version of Section 121.4501(4), Florida Statutes is reprinted in full below:

**(4) Participation; enrollment.**

(a)1. With respect to an eligible employee who is employed in a regularly established position on June 1, 2002, **by a state employer:**

a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. **The election must be made in writing or by electronic means and must be filed with the department and the personnel officer of the employer within 90 days after June 1, 2002,** or, in the case of an active employee who is on a leave of absence on June 1, 2002, within 90 days after the conclusion of the leave of absence. This election is irrevocable, except as provided in paragraph (e). Upon making such election, the employee shall be enrolled as a participant of the Public Employee Optional Retirement Program, the employee's membership in the Florida Retirement System shall be governed by the provisions of this part, and the employee's membership in the defined benefit program of the Florida Retirement System shall terminate. The employee's enrollment in the Public Employee Optional Retirement Program shall be effective the first day of the month for which a full month's employer contribution is made to the optional program.

b. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed 90 days is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a state employer commencing after June 1, 2002:

a. Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement of employment, and may, within 180 days after employment commences, elect to participate in the Public Employee Optional Retirement Program. The employee's election must be made in writing or by electronic means and must be filed with the personnel officer of the employer. The election to participate in the optional program is irrevocable, except as provided in paragraph (e).

b. If the employee files such election before the initial payroll is submitted for the employee, enrollment in the Public Employee Optional Retirement Program shall be effective on the first day of employment.

c. If the employee files such election within 180 days after employment commences, but after the initial payroll is submitted for the employee, enrollment in the optional program shall be effective on the first day of the month for which a full month's employer contribution is made to the optional program.

d. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed 180 days is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

3. For purposes of this paragraph, "state employer" means any agency, board, branch, commission, community college, department, institution, institution of

higher education, or water management district of the state, which participates in the Florida Retirement System for the benefit of certain employees.

(b)1. With respect to an eligible employee who is employed in a regularly established position on September 1, 2002, **by a district school board employer:**

a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. **The election must be made in writing or by electronic means and must be filed with the department and the personnel officer of the employer within 90 days after September 1, 2002,** or, in the case of an active employee who is on a leave of absence on September 1, 2002, within 90 days after the conclusion of the leave of absence. This election is irrevocable, except as provided in paragraph (e). Upon making such election, the employee shall be enrolled as a participant of the Public Employee Optional Retirement Program, the employee's membership in the Florida Retirement System shall be governed by the provisions of this part, and the employee's membership in the defined benefit program of the Florida Retirement System shall terminate. The employee's enrollment in the Public Employee Optional Retirement Program shall be effective the first day of the month for which a full month's employer contribution is made to the optional program.

b. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed 90 days is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a district school board employer commencing after September 1, 2002:

a. Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement of employment, and may, within 180 days after employment commences, elect to participate in the Public Employee Optional Retirement Program. The employee's election must be made in writing or by electronic means and must be filed with the personnel officer of the employer. The election to participate in the optional program is irrevocable, except as provided in paragraph (e).

b. If the employee files such election before the initial payroll is submitted for the employee, enrollment in the Public Employee Optional Retirement Program shall be effective on the first day of employment.

c. If the employee files such election within 180 days after employment commences, but after the initial payroll is submitted for the employee, enrollment in the optional program shall be effective on the first day of the month for which a full month's employer contribution is made to the optional program.

d. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed 180 days is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

3. For purposes of this paragraph, "district school board employer" means any district school board that participates in the Florida Retirement System for the benefit of certain employees, or a charter school or charter technical career center that participates in the Florida Retirement System as provided in s. 121.051(2)(d). (c)1. With respect to an eligible employee who is employed in a regularly established position on December 1, 2002, **by a local employer:**

a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. **The election must be made in writing or by electronic means and must be filed with the department and the personnel officer of the employer within 90 days after December 1, 2002,** or, in the case of an active employee who is on a leave of absence on December 1, 2002, within 90 days after the conclusion of the leave of absence. This election is irrevocable. Upon making such election, the employee shall be enrolled as a participant of the Public Employee Optional Retirement Program, the employee's membership in the Florida Retirement System shall be governed by the provisions of this part, and the employee's membership in the defined benefit program of the Florida Retirement System shall terminate. The employee's enrollment in the Public Employee Optional Retirement Program shall be effective the first day of the month for which a full month's employer contribution is made to the optional program.

b. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed 90 days is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a local employer commencing after December 1, 2002:

a. Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement of employment, and may, within 180 days after employment commences, elect to participate in the Public Employee Optional Retirement Program. The employee's election must be made in writing or by electronic means and must be filed with the personnel officer of the employer. The election to participate in the optional program is irrevocable, except as provided in paragraph (e).

b. If the employee files such election before the initial payroll is submitted for the employee, enrollment in the Public Employee Optional Retirement Program shall be effective on the first day of employment.

c. If the employee files such election within 180 days after employment commences, but after the initial payroll is submitted for the employee, enrollment in the optional program shall be effective on the first day of the month for which a full month's employer contribution is made to the optional program.

d. Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed 180 days is deemed to have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

3. For purposes of this paragraph, "local employer" means any employer not included in paragraph (a) or paragraph (b).

(d) Contributions available for self-direction by a participant who has not selected one or more specific investment products shall be allocated as prescribed by the board. The third-party administrator shall notify any such participant at least quarterly that the participant should take an affirmative action to make an asset allocation among the optional program products.

(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, 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. 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.

4. Employees' ability to transfer from the Florida Retirement System defined benefit program to the Public Employee Optional Retirement Program pursuant to paragraphs (a) through (d), and the ability for current employees to have an option to later transfer back into the defined benefit program under subparagraph 2., shall be deemed a significant system amendment. Pursuant to s. 121.031(4), any such resulting unfunded liability arising from actual original transfers from the defined benefit program to the optional program shall be amortized within 30 plan years as a separate unfunded actuarial base independent of the reserve stabilization

mechanism defined in s. 121.031(3)(f). For the first 25 years, no direct amortization payment shall be calculated for this base. During this 25-year period, such separate base shall be used to offset the impact of employees exercising their second program election under this paragraph. It is the legislative intent that the actuarial funded status of the Florida Retirement System defined benefit plan is neither beneficially nor adversely impacted by such second program elections in any significant manner, after due recognition of the separate unfunded actuarial base. Following this initial 25-year period, any remaining balance of the original separate base shall be amortized over the remaining 5 years of the required 30-year amortization period.

§ 121.4501(4), Fla.Stat. (2002)(emphasis added.)

11. Thus, in 2002, the election periods for participation/enrollment in the FRS Investment Plan were as follows:

- a. State employees: June 1, 2002 - August 31, 2002;
- b. School board employees: September 1, 2002 – November 30, 2002; and
- c. Local employees: December 1, 2002 – February 28, 2003.

12. As such, Respondent's October 1, 2018 letter to Petitioner outlining the election periods is correct, Petitioner fell into the "school board employee" category, and the election period spanning September 1, 2002 – November 30, 2002 applies. This comports with the FRS Financial Guidance Program Benefit Comparison Statement provided to Petitioner on April 4, 2002 which advised him of that election period.

13. The current version of Section 121.4501(4), Florida Statutes memorializes the election periods applicable during the roll out of the Investment Plan in 2002-2003 and mandates that members, like Petitioner, who did not participate in the initial election period are to remain in the Pension Plan. Should those employees desire to switch from the Pension Plan to the Investment Plan, they must become re-employed and make an election to join the Investment Plan within six months of their date of hire. The current version of Section 121.4501(4), Florida Statutes states:

**(4) Participation; enrollment.--**

(a) 1. Effective June 1, 2002, through February 28, 2003, a 90-day election period was provided to each eligible employee participating in the Florida Retirement System, preceded by a 90-day education period, permitting each eligible employee to elect membership in the investment plan. An employee who failed to elect the investment plan during the election period remained in the pension plan. An eligible employee who was employed in a regularly established position during the election period was granted the option to make one subsequent election, as provided in paragraph (f). **With respect to an eligible employee who did not participate in the initial election period or 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. The election to participate in the investment plan is irrevocable, except as provided in paragraph (f).

§ 121.4501(4), Fla. Stat. (2018)(emphasis added)

14. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and the SBA's construction and application of those statutes are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA1998).

15. As the party seeking affirmative relief in this administrative proceeding, Petitioner has the burden to demonstrate entitlement to the relief requested. Young v. Department of Community Affairs, 625 So. 2d 837 (Fla. 1993); Florida Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). He was not covered by the statutory criteria to make an initial election during the roll-out of the FRS Investment Plan as he was not employed during the applicable election period. He has not

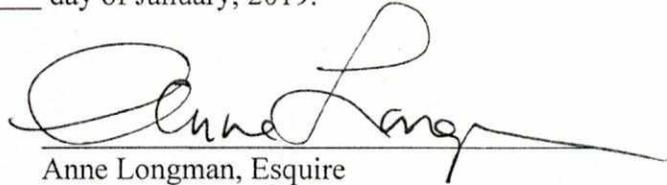
met the statutory criteria to switch plans as he is not currently employed with an FRS participating employer, although this avenue is still open to him.

16. Respondent lacks the statutory authority to place Petitioner into the Investment Plan without a timely election having been made.

### 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 30<sup>th</sup> day of January, 2019.



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

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