

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

| | | |
|--------------------------------|---|------------------------|
| PAUL RUSSELL, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | SBA Case No. 2020-0499 |
| |) | |
| |) | |
| STATE BOARD OF ADMINISTRATION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

FINAL ORDER

On March 22, 2021, 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, Paul Russell, and upon counsel for the Respondent. Both parties timely filed Recommended Orders. Neither party filed exceptions to the Recommended Order, which were due on April 6, 2021. 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 placed into the Pension Plan hereby is denied. Petitioner, who was hired in February 2020, was required, pursuant to Section 121.4501(4)(b)3.a, Florida Statutes, to make a plan choice election within 8 months following his date of hire or else

to be defaulted into the Investment Plan. Despite receiving ample instructions and numerous reminders, Petitioner failed to make an election by the plan choice deadline. Thus, Petitioner was properly placed into the Investment Plan, the legislatively-prescribed default.

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 13th day of April 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

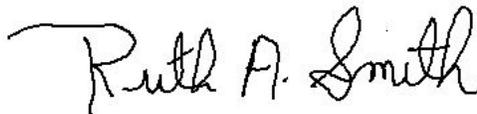
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Paul Russell, *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 13th day of April, 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**

PAUL RUSSELL,

Petitioner,

vs.

Case No. 2020-0499

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on January 26, 2021, 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: Paul Russell, *pro se*



For Respondent: Deborah S. Minnis
Ausley & McMullen, P.A.
Post Office Box 391
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner may be switched from the defined contribution Investment Plan to the defined benefit Pension Plan without using the second election still available to him.

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-5 and Petitioner's Exhibits P-1 through P-2 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on February 11, 2021. The parties both timely submitted proposed recommended orders. The following recommendation is based upon the undersigned's consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED MATERIAL FACTS

1. Petitioner began Florida Retirement System (FRS) covered employment with the Orange County School Board on February 24, 2020. As with all new members, Petitioner was temporarily placed in the Pension Plan and had an eight month period to choose to participate in either the Pension Plan or the Investment Plan. Petitioner's choice period expired on November 30, 2020 at 4:00 p.m. Eastern Time.

2. A Benefit Comparison Statement containing information relating to, among other things, the November 30, 2020 choice period deadline, was mailed to Petitioner on April 21, 2020, at the address on file and contained in this record.

3. Petitioner failed to make an affirmative initial election within the mandated choice period. In accordance with controlling law, he defaulted into membership in the Investment Plan. This was his initial election.

4. Respondent sent Petitioner two reminder letters on August 10, 2020 and November 10, 2020. Respondent also sent five reminder emails to Petitioner at

127974@ocps.net, the email address on file, on June 22, 2020, July 15, 2020, September 8, 2020, October 1, 2020, and November 25, 2020.

5. Petitioner confirms that the street address and email address above are valid, but asserts that at some point his physical mailbox was destroyed and that there was a delay in receiving his work laptop from the Orange County School District, resulting in his not receiving any of these multiple reminders.

6. Petitioner states that he did receive the first letters from Respondent but did not act on them.

7. Petitioner still has the option of using a second election to transfer from the Investment Plan to the Pension Plan, but will have to pay any additional amount actuarially determined due to accomplish this.

CONCLUSIONS OF LAW

8. Section 121.4501(4)(b)1, Florida Statutes authorizes employees hired into FRS eligible positions after 2018 to be initially enrolled in the Pension Plan, and requires them to elect to participate in either the Pension Plan or the Investment Plan by the last business day of the eight-month following the employee's month of hire.

9. Section 121.4501(4)(b)3.a, Florida Statutes states that if an employee fails to make an election within the eight-month period following the month of hire, he or she is deemed to have elected to participate in the Investment Plan and shall be defaulted into the Investment Plan retroactively to the date of employment. Once an employee has defaulted into the Investment Plan, the only option available to participate in the Pension Plan is to exercise the second election under section 121.4501(4)(f), Florida Statutes.

10. Paragraph (f) of that section, in pertinent portion, provides as follows:

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.** Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. **Effective July 1, 2005, such elections are 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 when the election is received by the third-party administrator. ...

(Emphasis added).

11. The evidence of record demonstrates that Petitioner knew or had adequate notice of his choice period deadline and did not take timely action to make an affirmative initial election and therefore defaulted into the Investment Plan.

12. There is no statutory provision authorizing a switch from the Investment Plan to the Pension Plan without using a second election and paying the "buy-in" amount. Petitioner carries the burden of demonstrating compliance with all applicable statutory requirements before being granted the relief requested. Young v. Dep't of Community Affairs, 625 So. 2d 831 (Fla. 1993); Dep't of Transp. v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

13. Respondent SBA, as an administrative entity of the State of Florida, has only those powers conferred upon it by the legislature. See, e.g., Pesta v. Dep't of Corrections, 63 So.3d 788 (Fla. 1st DCA 2011). The Florida Administrative Procedure Act expressly provides that statutory language describing the powers and functions of such an entity are to be construed to extend "no further than...the specific powers and duties conferred by the enabling statute." §§ 120.52(8) and 120.536(1), Fla. Stat.

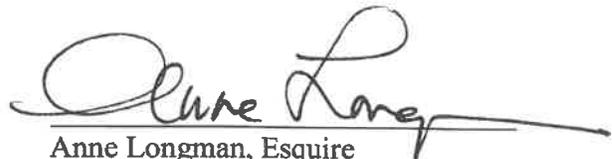
14. Respondent is not authorized to depart from the requirements of these statutes when exercising its jurisdiction and has no power to enlarge, modify, or contravene the authority granted to it by the legislature. State, Dept. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco v. Salvation Ltd., Inc., 452 So. 2d 65, 66 (Fla. 1st DCA 1984); 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").

15. Respondent does not have the authority to transfer Petitioner to the Pension Plan without submission of the required second election documentation.

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 22nd day of March 2021.



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

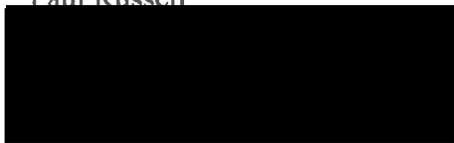
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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:

Paul Russell



and via electronic mail only to:

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Ruth E. Vafek, Esquire
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