

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

MICHAEL PALUMBO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2020-0053
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On July 7, 2020, 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, Michael Palumbo, and upon counsel for the Respondent. This matter was decided after an informal proceeding. 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 July 22, 2020. 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 that he be enrolled retroactively in the Florida Retirement System (“FRS”) Pension Plan, as if he had not initially defaulted into the FRS Investment Plan, hereby is denied. There are no records showing that Petitioner made an affirmative election during his plan choice window.

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 28 day of August, 2020, 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.



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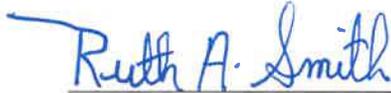
Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent to Michael Palumbo, pro se, both by email transmission at

[REDACTED]

33713; and by email transmission to Deborah Minnis, Esq., [dminnis@ausley.com](mailto:dminnis@ausley.com) and Ruth Vafek [rvafek@ausley.com](mailto:rvafek@ausley.com), [jmcvaney@ausley.com](mailto:jmcvaney@ausley.com), Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 28 day of August, 2020.



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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

MICHAEL PALUMBO,

Petitioner,

vs.

CASE NO. 2020-0053

STATE BOARD OF ADMINISTRATION.

Respondent.

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**RECOMMENDED ORDER**

Pursuant to Section 120.57(2), Florida Statutes, this case was heard in an informal proceeding conducted by telephone on May 18, 2020, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

**APPEARANCES**

For Petitioner: Michael Palumbo, pro se

For Respondent: Ruth Vafek  
Ausley McMullen, P.A.  
123 S. Calhoun Street  
Tallahassee, FL 32302

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner was correctly defaulted into the Florida Retirement System (FRS) Investment Plan after he was hired into an FRS-eligible position on February 23, 2018.

**PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent attended the hearing by telephone and presented the testimony of

Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Petitioner's Exhibit P-1 and Respondent's Exhibits R-1 through R-12 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on June 1, 2020. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. 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. On February 23, 2018 Petitioner became employed with the Florida Department of Juvenile Justice (DJJ) and had a "choice window" through and including November 30, 2018 at 4:00 p.m. EST to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan.

2. Petitioner thought he had submitted to his then-employer, DJJ, the proper paperwork to elect the Pension Plan, but does not know what may have happened to it.

3. The Respondent's Plan Choice Administrator never received an election form from Petitioner.

4. Two hard-copy letters reminding Petitioner of his November 30, 2018 deadline and choice options were mailed to him on August 13, 2018 and October 3, 2018.

5. Five separate emails also were sent to Petitioner at his employer-provided email address, reminding him of his choice period deadline.

6. As with other FRS-eligible employees, Petitioner also had access to information on MyFRS.com, and toll-free access to the MyFRS Financial Guidance Line.

7. Since the SBA Plan Choice Administrator received no election from Petitioner by the November 30, 2018 deadline, Petitioner was enrolled in the Investment Plan, the legislatively-prescribed default.

8. On or about February 13, 2020, after transferring to a high risk position at the Department of Corrections, Petitioner submitted a Request for Intervention asserting that he thought he had submitted a Pension Plan enrollment form to his employer when first employed with DJJ, and requesting to be switched back. Petitioner's request was denied.

9. On March 24, 2020, Petitioner filed a Petition for Hearing requesting the same relief. This administrative proceeding followed.

#### CONCLUSIONS OF LAW

10. Section 121.4501(4)(b), Florida Statutes, provides in relevant part:

With respect to employees who become eligible to participate in the investment plan by reason of employment in a regularly established position commencing on or after January 1, 2018...any such employee shall be enrolled in the pension plan at the commencement of employment and may, by the last business day of the eighth month following the employee's month of hire, elect to participate in the pension plan or the investment plan.

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The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator....

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Except as provided in subparagraph 4., if the employee fails to make an election to either the pension plan or the investment plan during the 8-month period following the month of hire, the employee is deemed to have elected the investment plan and shall default into the investment plan retroactively to the employee's date of employment. The employee's option to participate in the pension plan is forfeited, except as provided in paragraph (f) [regarding second election procedures].

The amount of the employee and employer contributions paid through the date of default to the investment plan shall be transferred to the investment

plan and shall be placed in a default fund as designated by the State Board of Administration.

(Emphasis added).

11. Petitioner asserts that while filling out all required paperwork to begin working at DJJ, he selected the Pension Plan and was told that DJJ human relations would submit and finalize the forms. As stated in his Request for Intervention, he was “under the impression that HR completed the task of finalizing my enrollment.” Even though he then received multiple reminders regarding making his plan election, he did not make an affirmative election, or inquire about his status, until almost two years later.

12. Even if Petitioner were able to prove that DJJ employees misled him in some way, section 121.021(10), Florida Statutes, explicitly provides that “[e]mployers are not agents of the [Department of Management Services], the [State Board of Administration], or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.”

13. Petitioner does have the option, pursuant to Subsection 121.4501(4)(f), Florida Statutes, to switch to the Pension Plan while employed in an FRS-eligible position, although there may be a “buy-in” requirement as determined by actuarial calculations provided by the Department of Management Services (“DMS”).

14. Respondent cannot deviate from the Florida Statutes creating and governing the Florida Retirement System. 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 lacks authority to grant Petitioner's request to enroll him in the Pension Plan retroactively, as if he had not initially defaulted into the Investment Plan, when its records indicate that the Plan Choice Administrator did not receive any affirmative election by Petitioner during his choice window ending November 30, 2018.

**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.

RESPECTFULLY SUBMITTED this 7th day July, 2020.

  
/s/ Anne Longman  
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

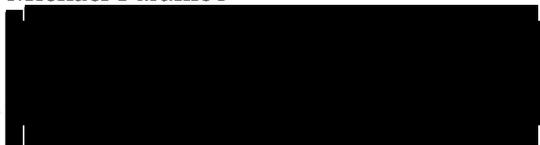
**NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER**

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](mailto:Tina.joanos@sbafla.com)  
[mini.watson@sbafla.com](mailto:mini.watson@sbafla.com)  
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(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Michael Palumbo



and via electronic mail only to:

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