

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

EMILIO SAUMA,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2020-0281
)	
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On November 16, 2020, 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, Emilio Sauma, and upon counsel for the Respondent. Neither party filed exceptions to the Recommended Order, which were due on December 1, 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 to be placed into the Pension Plan hereby is denied. Petitioner previously been a member of the Pension Plan up through 2001, when he no longer was employed in an FRS-eligible position. Petitioner was re-hired into an FRS-eligible

position in August 2019, and was provided with ample instructions and reminders that he was required to make a plan choice. He failed to do so by the plan choice deadline, and properly was 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 __11__ day of February 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

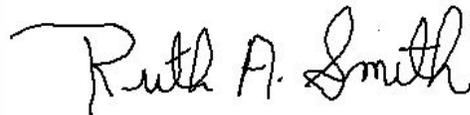
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Emilio Sauma, *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 11 day of February, 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

EMILIO SAUMA,

Petitioner,

vs.

CASE NO. 2020-0281

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on September 20, 2020, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration. The appearances were as follows:

APPEARANCES

For Petitioner: Emilio Sauma, *pro se*

For Respondent: Ruth Vafek
Ausley McMullen, P.A.
123 South Calhoun Street (32301)
PO Box 391
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 rehired into an FRS-eligible position on August 28, 2019.

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 were admitted into evidence.

A transcript of the hearing was made, filed with the agency, and provided to the parties on October 6, 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. The Petitioner was employed by the Miami-Dade County School Board, in an FRS-eligible position, from 1993 through 2001. At that time, the Pension Plan was the only retirement program available for eligible employees.
2. In 2002, the Investment Plan became available for employees participating in the Florida Retirement System. Ch. 2000-169, Laws of Fla. Petitioner was not employed in an FRS-eligible position at that time.
3. The Petitioner began new employment with the Miami-Dade County School Board in August of 2019.
4. Petitioner had an initial choice window with a deadline of May 29, 2020 by 4:00 p.m. Eastern Time, to elect either the Pension Plan or the Investment Plan.
5. A Benefit Comparison Statement, providing Petitioner with information about the two plan options and his deadline, was created and mailed to Petitioner at his address of record, as provided by his employer, on October 21, 2019. This address is the same as that provided by Petitioner on his Request for Intervention and Petition for Hearing.

6. Two letters reminding Petitioner of his choice deadline were subsequently mailed to him on February 10, 2020 and May 11, 2020.

7. Five separate emails were sent to Petitioner at his email address of 200616@dadeschools.net, on December 20, 2019; January 15, 2020; March 5, 2020; April 1, 2020; and May 28, 2020, reminding him of his choice period deadline.

8. 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.

9. Respondent has no record of Petitioner calling the MyFRS Financial Guidance Line prior to his May 29, 2020 deadline.

10. Since the Plan Choice Administrator received no election from Petitioner by the deadline and he was not employed in a Special Risk Class position, Petitioner was enrolled in the Investment Plan, the legislatively-prescribed default.

11. On or about July 20, 2020, Petitioner submitted a Request for Intervention requesting that he be placed back into the Pension Plan, which was denied.

12. On August 4, 2020, Petitioner filed a Petition for Hearing reiterating his request, and this administrative proceeding followed.

CONCLUSIONS OF LAW

13. Petitioner states that he should be re-enrolled in the FRS Pension Plan because he did not realize he needed to make an affirmative election to avoid being enrolled in the Investment Plan.

14. 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, **or who did not complete an election window before**

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.

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

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.)

15. Pursuant to the express terms of the governing statute, Petitioner's Pension Plan election must have been received by the Plan Choice Administrator on or before the May 29, 2020 end of his initial election period. There is no record evidence that any election by Petitioner was made and received as required by Section 121.4501(4)(f).

16. Rule 19-11.006(2)(f), F.A.C. provides in pertinent portion:

The enrollment by form or electronic means shall be complete and the election shall be final if all the required information is clearly indicated and if the enrollment is **received** by the Plan Choice Administrator by 4:00 p.m. (Eastern Time) on the last business day of the 8th month following the date of hire. The form shall be transmitted via mail, courier, online or by fax, as provided on the form. It is the responsibility of the member to ensure that the enrollment form is received by the Plan Choice Administrator no later than 4:00 p.m. (Eastern Time) on the last business day that the member is earning salary and service credit, or the last business day of the 8th month following the date of hire, whichever first occurs.

(Emphasis added.)

Nor is there any record evidence of deficiency in informing Petitioner of the requirement to make an election or default to the Investment Plan.

17. As an administrative entity of the State of Florida, Respondent 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.

18. The applicable statute requires that Petitioner in this action be enrolled in the FRS Investment Plan by default following the May 29, 2020 expiration of his initial choice period.

19. Respondent is not authorized to depart from the requirements of Chapter 121, Florida 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”).

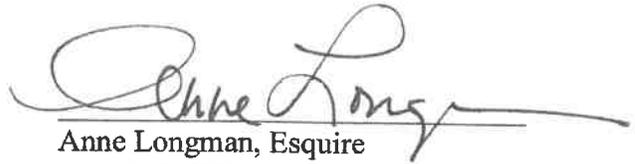
20. It is unfortunate that Petitioner, as a returning FRS employee, was not aware that he was required to make an election or default to a plan that he would not otherwise have chosen, and his testimony that he was unaware of this requirement was credible, but there is no evidence of record that proper procedures were not followed here. Respondent does not have

the authority to allow Petitioner to enroll in the FRS Pension Plan retroactively, and cannot grant the relief requested.

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 16th day of November 2020.



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:

Emilio Sauma



and via electronic mail only:

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