

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

ROBIN HIGGINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2020-0344
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On February 5, 2021, the Presiding Officer submitted her Recommended Order to the State Board of Administration (“SBA” or “Respondent”) in this proceeding. The Recommended Order indicates that copies were served upon the *pro se* Petitioner, Robin Higgins, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner made no further filings. No exceptions to the Recommended Order, which were due February 20, 2021, were filed. 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 she be allowed to rescind her 2002 Investment Plan election, or to currently make a second election from the Investment Plan to the Pension Plan retroactively to 2002 without the payment of a buy-in amount, hereby is denied. Petitioner had claimed that she was placed in the Investment Plan in 2002 without her knowledge and consent. Yet, Petitioner was unable to produce any evidence to support

her assertion. There is no statutory requirement that Petitioner's 2002 Investment Plan election be documented by her signature.

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 30 day of March, 2021, 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 Robin Higgins, *pro se*, both by email transmission at [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. ([dminnis@ausley.com](mailto:dminnis@ausley.com)) and Ruth Vafek, Esq. ([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 30 day of March 2021.



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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**

ROBIN HIGGINS,

Petitioner,

vs.

Case No. 2020-0344

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, on December 14, 2020, 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:	Robin Higgins, <i>pro se</i> 
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 is a valid member of the Florida Retirement System (FRS) defined contribution Investment Plan given her assertion that she did not make an initial election of that plan in 2002.

**EXHIBIT A**

## **PRELIMINARY STATEMENT**

All parties attended the hearing by telephone. Petitioner testified on her 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-8 and Petitioner's Exhibit 1 were admitted into evidence.

A transcript of the hearing was made, filed with the agency, and provided to the parties on December 30, 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.

## **MATERIAL UNDISPUTED FACTS**

1. The Petitioner began employment with the Pinellas County School System, an FRS-participating employer, in an FRS eligible position, in September 1997. At that time, the defined contribution Pension Plan was the only retirement program available for eligible employees, and thus Petitioner was in the Pension Plan.

2. Petitioner has been employed by FRS-participating employers continuously from 1997 through the present.

3. The Investment Plan was created by the Florida Legislature in 2002, and became available for employees participating in the Florida Retirement System. Petitioner had a choice window from September 1, 2002 through November 30, 2002 to remain in the Pension Plan or switch to the Investment Plan.

4. The Petitioner elected to participate in the Investment Plan via a telephone call to the customer contact center of the Investment Plan Plan Choice Administrator on November 30, 2002. Petitioner became a member of the Investment Plan effective December 1, 2002.

5. Petitioner states that she does not remember making this call of November 30, 2002, which is understandable given the passage of time, but that she would not have made such an election.

6. A Plan Choice Confirmation Statement dated December 2, 2002 was sent to the Petitioner confirming her election to change from the Pension Plan to the Investment Plan. This document specifically advised Petitioner that she had elected to change from the FRS Pension Plan to the FRS Investment Plan. Petitioner also completed a Beneficiary Designation Form for FRS Investment Plan Members, signed May 7, 2004, showing her beneficiary designations to her Investment Plan account.

7. Beginning at least as early as 2004, the SBA sent or otherwise made available to Petitioner quarterly "FRS Investment Plan" statements.

8. In May 2004, Petitioner updated her beneficiary designation for her Investment Plan account

9. Petitioner states that when investigating going into the FRS Deferred Retirement Option Program (DROP), which is available only to Pension Plan members, she learned for the first time that she was in the Investment Plan, which she does not recall choosing.

10. Petitioner's assertions here do not create a material dispute of fact, as the 18 year course of dealing between the Petitioner and Respondent shows consistent confirmation that she was in the Investment Plan.

## CONCLUSIONS OF LAW

11. Section 121.4501(a)1.a, Florida Statutes, authorizes the election to switch from the Pension Plan to the Investment Plan to be “made in writing or by electronic means.” Respondent has construed this provision as permitting employees to make such elections by telephone conversations. This construction is consistent with the plain meaning of the statute. See *State Board of Administration v. Huberty*, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); *Marinak v. State Board of Administration*, No. 20-0740 (Fla. Div. Admin. Hrgs. July 27, 2020).

12. Respondent’s records demonstrate that the action complained of, Petitioner’s placement in the Investment Plan, occurred more than five years prior to the submission of Petitioner’s complaint.

13. Pursuant to Section 121.4501(8)(g), Florida Statutes, the Respondent’s action is presumed to have been taken at Petitioner’s request and with her full knowledge and consent.

This section states:

(g) The state board shall receive and resolve member complaints against the program, the third-party administrator, or any program vendor or provider; shall resolve any conflict between the third-party administrator and an approved provider if such conflict threatens the implementation or administration of the program or the quality of services to employees; and may resolve any other conflicts. The third-party administrator shall retain all member records for at least 5 years for use in resolving any member conflicts. **The state board, the third-party administrator, or a provider is not required to produce documentation or an audio recording to justify action taken with regard to a member if the action occurred 5 or more years before the complaint is submitted to the state board. It is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member with the member’s full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.**

§ 121.4501(8)(g), Fla. Stat. (emphasis added).

14. Section 121.4501(4)(b)2. provides that “[t]he election to participate in the pension plan or investment plan is irrevocable, except as provided in paragraph (f).” 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....**

2. If the employee chooses to move to the pension plan, **the employee must transfer from his or her investment plan 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 pension plan and service in the investment plan. Benefit commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension 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 pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. **The [Division of Retirement Services] must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary.** A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

(Emphasis added).

15. All the documentary evidence, including the third-party administrator’s verification of initial election and approximately 17 years’ worth of quarterly statements from the Investment Plan, demonstrate that Petitioner had adequate repeated notice and knew or should have known that she was an Investment Plan member, and never took timely action to switch or undo the election.

16. Pursuant to Section 121.4501(4)(b)2, Petitioner still has a second election which she may use to transfer to the Pension Plan, but there is no statutory provision authorizing movement from the Investment Plan to the Pension Plan without both using a second election

and paying the required “buy-in” amount. Petitioner’s submission of her second election must be processed in accordance with all applicable statutory requirements. Petitioner carries the burden to demonstrate 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).

17. Respondent, 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.

18. 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”).

19. Respondent does not have the authority to allow Petitioner to rescind her election or to make her second election retroactively or without a “buy-in,” nor is there any requirement that her election in 2002 be documented by her signature.

**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.

DATED this 5<sup>th</sup> day of February 2021.

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  
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