

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

JOAN CHIOFALO,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2017-0350
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On May 23, 2018, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. The Recommended Order indicates that copies were served upon the pro se Petitioner, Joan Chiofalo, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. No exceptions to the Recommended Order, which were due by June 7, 2018, were filed by either party. 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 use her second election to transfer from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to pay the statutorily-required “buy-in” amount hereby is denied. Petitioner claimed that she thought she was in the FRS Pension Plan until recently, even though she had received quarterly statements showing she was in the FRS Investment Plan starting in

the second quarter of 2003 and continuing every quarter since that time. Petitioner could not produce any evidence that her initial 2003 Investment Plan election was made without her knowledge and consent.

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 27th day of July, 2018, 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

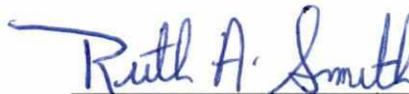
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Joan Chiofalo, pro se, both by email transmission at chiofaloj@hotmail.com and by U.P.S. to 10445 Ireland Street, Spring Hill, Florida 34608; and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com), at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 27th day of July, 2018.



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

JOAN CHIOFALO,

Petitioner,

vs.

CASE NO. 2017-0350

STATE BOARD OF ADMINISTRATION,

Respondent.

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 March 21, 2018, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Joan Chiofalo, pro se
10445 Ireland Street
Spring Hill, FL 34608
Petitioner

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner can transfer from the Investment Plan to the Pension via her second election without paying the Pension Plan buy-in.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R1 through R12 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.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with Spring Hill Fire Rescue, an FRS-covered agency, in November 2001.
2. Petitioner had a deadline of March 1, 2003 to elect membership in either the defined contribution Investment Plan or the defined benefit Pension Plan.
3. Petitioner made her election through the MyFRS.com website. She selected enrollment in the Investment Plan on January 27, 2003, establishing a February 1, 2003 effective date. The website advised Petitioner that there could be a cost to buy into the Pension Plan if she made a second election to become a member of the Pension Plan at a later date.
4. Petitioner began receiving Investment Plan Quarterly Statements the second quarter of 2003 and has received a statement every quarter since.

5. Petitioner submitted Pension Plan Beneficiary Designation Forms in 2006 and 2011. Both times the forms were rejected with the following notice: "You completed the FRS Pension Plan Beneficiary Form rather than the FRS Investment Plan Beneficiary Designation Form." The proper Investment Plan form was enclosed, with instructions to return the completed form to the FRS Investment Plan administrator.

6. Petitioner filed a Request for Intervention on October 30, 2017 requesting that she be able to use her second election and be put into the Pension Plan, but without having to pay the buy-in amount over the value of her Investment Plan account.

7. Respondent informed Petitioner that it had no statutory authority to waive the buy-in provision and therefore could not grant her request.

8. On December 5, 2017 Petitioner filed a Petition for Hearing requesting that she be allowed to transfer to the Pension Plan without having to pay the Pension Plan buy-in. This administrative proceeding followed.

CONCLUSIONS OF LAW

9. Movement from the Investment Plan to the Pension Plan is governed by section 121.4501(4)(g)2., Florida Statutes, which provides in pertinent part:

(g) 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. This paragraph is contingent upon approval by the Internal Revenue Service.

1. If the employee chooses to move to the investment plan, the provisions of subsection (3) govern the transfer.

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 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.

...

§ 121.4501(4)(g), Fla.Stat. (2014)(emphasis added).

10. Rule 19-11.007(3)(d), Florida Administrative Code, provides:

For members transferring to the FRS Pension Plan, if the member's Investment Plan account balance was less than the calculated amount required to buy back into the FRS Pension Plan, the election will require a personal payment. The member will receive notification and proper instructions from the Division detailing where and in what form to send any personal payments. Such payment, if necessary, must be received by the date determined by the Division. If the required amount is not received by the Division by the date due, the election will be voided.

11. At the time Petitioner made her election to join the Investment Plan, she had access to educational resources including the Plan Choice Kit, toll-free MyFRS

Financial Guidance Line and the MyFRS.com website, and the FRS Investment Plan Summary Plan Description. These educational resources inform members that they have a one-time opportunity to switch from the Investment Plan to the Pension Plan, but that they must buy into the Pension Plan with the money in their Investment Plan account and that if the buy-in cost exceeds the value of their Investment Plan Account, they must make up the difference with other financial resources in order to complete the transaction.

12. Respondent records demonstrate that the action complained of here (Petitioner being placed in the Investment Plan), occurred more than five years prior to Petitioner's complaint having been submitted. Pursuant to Section 121.4501 (8)(g), Florida Statutes, Respondent's action is presumed to have been taken at Petitioner's request and with her full knowledge and consent. That 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 and 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.

13. Petitioner has not come forward with any evidence that would show that the action taken by Respondent in 2003 was taken without her knowledge and consent. Rather, all of the documentary evidence, including at least 14 years of quarterly statements from

the Investment Plan, demonstrates that Petitioner elected the Investment Plan, knew she was in the Investment Plan, and never took timely action to switch or undo her election. Petitioner's specific complaint, that her initial election should be proved by Respondent producing a written document showing her signature, is made legally irrelevant by the above-cited statute. Petitioner was correctly placed in the Investment Plan. *Marin Crowe v. State Board of Administration*, State Board of Administration Case No.: 2017-0282 (Recommended Order March 14, 2018, Final Order April 4, 2018)(petition dismissed where petitioner in 2017 denied having made an election into the Investment Plan in 2009 despite having received quarterly statements and testifying she never opened the statements).

14. 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 to demonstrate compliance with all applicable statutory requirements before being granted the relief requested. *Young v. Department of Community Affairs*, 625 So.2d 837 (Fla. 1993); *Department of Transportation v. J.W.C.*, 396 So.2d 778 (Fla. 1st DCA 1981).

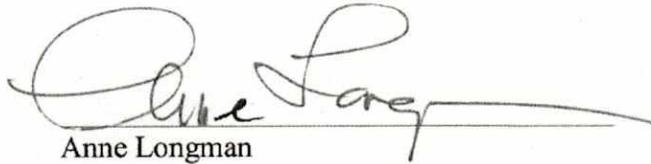
15. Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. *Balezentis v. Department of Management Services, Division of Retirement*, 2005 WL 517476 (Fla. Div. Admin. Hrgs.). Respondent's construction and application of Chapter 121 are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See *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 DCA 1998).

16. It is unfortunate that Petitioner, according to her testimony, never realized the difference between the Pension Plan and the Investment Plan, but this cannot be attributed to the SBA, and Respondent does not have the authority to waive the statutorily- mandated Pension Plan buy-in.

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 23^d day of May, 2018.



Anne Longman
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
nell.bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Joan Chiofalo
10445 Ireland St.
Spring Hill, FL 34608
chiofaloj@hotmail.com

Petitioner

and via electronic mail only to:

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Brandice D. Dickson, Esquire
Pennington, P.A.
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slindsey@penningtonlaw.com

Counsel for Respondent