

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

LORETTA PHIPPS,

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

Case No. 2010-1850

FINAL ORDER

On November 23, 2010, 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, Loretta Phipps, and upon counsel for the Respondent. Petitioner and Respondent each filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on December 8, 2010. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's post-termination request to be transferred from the Pension Plan to the Investment Plan hereby is denied.

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 4th day of January, 2011, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



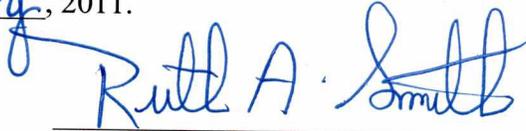
Ron Poppell, Senior Defined Contribution
Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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.


Clerk TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Loretta Phipps, pro se, [REDACTED] and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 4th day of January, 2011.



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

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LORETTA PHIPPS,

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v.

CASE NO.: 2010-1850

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on September 20, 2010, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Loretta Phipps, Pro Se

[REDACTED]

For Respondent: Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue to be resolved is whether the Petitioner's post-termination request to switch from the Pension Plan to the Investment Plan should be granted.

PRELIMINARY STATEMENT

On June 25, 2010, Loretta Phipps filed a Request for Intervention, requesting that she be

EXHIBIT A

allowed to transfer from the Pension Plan to the Investment Plan, even though she had terminated Florida Retirement System (FRS)-covered employment more than seven years previously. The SBA denied Ms. Phipps' request. Ms. Phipps then filed a Petition for Hearing requesting the same relief and this administrative proceeding ensued.

Petitioner attended the hearing by telephone, testified on her own behalf and also presented testimony from her financial counselor, John Donehoo. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance. Respondent's exhibits R-1 through R-6 were admitted into evidence without objection. A transcript of the hearing was filed with the agency and provided to the parties, who were invited to submit proposed recommended orders. Both parties submitted proposed recommended orders. Respondent's Motion for Extension of Time to Submit Proposed Recommended Order is granted by this Order.

UNDISPUTED MATERIAL FACTS

1. Petitioner began FRS-covered employment in 1980. She was given the opportunity to elect membership in the Investment Plan from June, 2002 through August, 2002. She took no affirmative action to join the Investment Plan and therefore remained a member of the Pension Plan by default.

2. Petitioner terminated FRS-covered employment on September 16, 2002. She has not been employed in an FRS-covered position since her termination. She did not file a second election requesting transfer to the Investment Plan before she terminated employment in September of 2002.

3. After she terminated FRS-covered employment, Petitioner received a Plan Choice Default Confirmation Statement, dated October 25, 2002, confirming the fact that she remained a

member of the Pension Plan by default. This statement contains the following sentence: "You may utilize your one time second election option to change retirement plans at any time in the future if you desire to switch to the FRS Investment Plan or Hybrid Plan Option." This sentence was not entirely accurate; it is true that Petitioner (as all participants who had defaulted into the Pension Plan by not making an active election) had a remaining second election which could be used to switch to the Investment Plan, but this election could be used only while in active FRS-covered employment.

4. Sometime in early 2010, long after terminating FRS-covered employment in 2002, Petitioner decided that she wished to transfer to the Investment Plan.

5. After being told that she could use her second election only while actively working in FRS-covered employment, Petitioner filed a request for intervention on June 25, 2010 seeking permission to transfer to the Investment Plan. Because the Plan Choice Default Confirmation Statement Petitioner received in 2002 states that her second election can be used "at any time," Petitioner asserts that she should be able to take that action now.

6. Petitioner's request for intervention was denied by Respondent on July 13, 2010, by letter from Dan Beard, which stated that a second election can be made only while in active FRS-covered employment and pointed out that Petitioner might be entitled to a benefit under the Pension Plan and also potentially had the option of returning to FRS-covered employment and then making a valid election, in order to switch to the Investment Plan.

CONCLUSIONS OF LAW

7. Participation and enrollment in the Investment Plan are governed by Section 121.4501(4), Florida Statutes (2002). An employee must be earning service credit in a qualified FRS-covered position at the time a second election is submitted, in order to make a valid transfer

to the Investment Plan. §§ 121.4501(4)(e) and 121.021(17)(b), Fla. Stat. (2002).

8. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.); and its construction and application of those statutes are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. 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 DCA1998).

9. Petitioner has asked that Respondent “honor” the inaccurate statement contained in the document she received in October, 2002. There is no question that the statement at issue is not fully accurate, but this does not necessarily mean that Petitioner’s request can be granted. In order to successfully assert estoppel against a state agency, a party must demonstrate: (1) a statement or representation made by an agent of the state as to a material fact, which is contrary to a later-asserted position by the state; (2) a reasonable reliance by the party claiming the estoppel on the statement or representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and the reliance thereon. Salz v. Department of Administration, Division of Retirement, 432 So.2d 1376, 1378 (Fla. 3rd DCA 1983) *citing* Department of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981). Estoppel will be applied against an agency only in the most exceptional circumstances. Salz, 432 So.2d at 1378 *citing* North American Co. v. Green, 120 So.2d 603 (Fla. 1959).

10. While it is unfortunate that Petitioner received inaccurate information and understandable that she believes she should be able to do what the 2002 communication from FRS said she could do, she did not rely on this statement in any legal sense, because she had

terminated her FRS-covered employment before she received it. In other words, Petitioner did not forego filing a second election when she was eligible to do so because of the Plan Default Confirmation Statement. Respondent must administer its statutes and rules consistently and under these circumstances, estoppel cannot apply. Petitioner is in no different position than she would have been had she never received the letter containing the inaccurate statement.

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 November, 2010.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

NOTICE: 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, which 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.

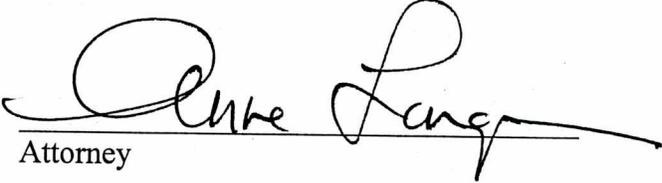
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 23^d day of November, 2010.

Copies furnished to:

Loretta Phipps,
[REDACTED]
[REDACTED]
[REDACTED]

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Attorneys for Respondent


Attorney