STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JULIE LAMBROU,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4184
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

In accordance with notice, this cause came on for formal proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida, on April 7, 2006. The appearances were as follows:

APPEARANCES

For Petitioner: James W. Linn, Esquire
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For Respondent: Ruth L. Gokel, Esquire
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STATEMENT OF THE ISSUE

The issues to be resolved in this proceeding concern whether the Petitioner's Decedent, Joanne Eddy, validly effected a transfer from the pension plan to the Investment Plan of the Florida Retirement System (FRS), and whether the Respondent agency is estopped from invalidating that transfer. It must also be determined whether the Petitioner is entitled to an award of reasonable attorney's fees and costs.

PRELIMINARY STATEMENT

This cause arose upon the issuance of a final decision by the State Board of Administration (SBA). The Petitioner had requested intervention by the SBA by filing a Request for Intervention on November 4, 2004. The SBA investigated the issues raised by the Petitioner concerning the reversal of the election by Ms. Eddy to change from the FRS Defined Benefit Program (pension plan) to the Public Employee Optional Retirement (Investment Plan). The SBA considered the issues raised by the Petitioner and finally determined, by letter dated September 30, 2005, that the Petitioner's contention that Joanne Eddy had made a valid election to change from the pension plan to the Investment Plan was not supported by the facts. That decision was communicated to the Petitioner by the SBA's letter of September 30, 2005, which also advised her of a right to hearing to contest the SBA's reversal of her sister, Ms. Eddy's

election to transfer from the pension plan to the Investment Plan. The Petitioner timely filed a Petition for Hearing which was received on November 1, 2005, (an extension of time had been granted by the SBA). That request was referred to the Division of Administrative Hearings on November 16, 2005, and ultimately to the undersigned Administrative Law Judge for formal hearing and adjudication.

The hearing was originally set for January 4, 2006. Thereafter, by joint request by the parties the case was continued and abated. At the request of the parties, it was rescheduled for hearing on April 7, 2006.

The cause came on for hearing as noticed. At the hearing administrative notice was taken of Chapter 121, Florida Statutes (2003), and Florida Administrative Code Rule Chapter 19-13. The Petitioner presented the testimony of Joni Taylor (by telephone), an employee of Hillsborough County and friend of Ms. Eddy who assisted her during her final illness. The Petitioner also presented (by telephone) the testimony of Ron Ziegler, an employee of Hillsborough County in its Department of Human Resources. The Petitioner, Julie Lambrou, testified as well. The Petitioner's Exhibits A through R were admitted into evidence and Exhibit B, a recording of a telephone conversation, was played and transcribed into the record. The Respondent presented the testimony of Walter Kelleher, an employee of SBA

and Dan Beard, an employee of the Florida Division of Retirement (DOR). On concluding the proceeding the parties had the record transcribed and sought to file proposed recommended orders. An extension of time for filing proposed recommended orders was granted due to a medical crisis involving the Respondent's counsel. Ultimately, the Proposed Recommended Orders were timely filed. Those Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The following facts have been stipulated by the parties in the Joint Pre-hearing Statement or Stipulation:

a. Joanne Eddy was employed as a Paramedic by Hillsborough County, Florida, from 1989 until 2004.

b. Hillsborough County is now and for all periods relevant to this case has been a participating employer in the Florida Retirement System (FRS).

c. As a Hillsborough County employee, Ms. Eddy participated in the FRS pension plan from her date of hire in September of 1989 until April of 2004. Ms. Eddy was fully vested in the FRS pension plan.

d. Ms. Eddy was diagnosed with cancer (metastatic melanoma) in August 2003.

e. In that month Ms. Eddy was placed on approved medical leave.

f. Ms. Eddy remained on approved medical leave of absence until her resignation in April 2004 (April 8, 2004).

g. In March 2004, Ms. Eddy submitted a "Second Election Retirement Plan Enrollment Form" to the FRS Plan Choice Administrator (Citi-Street). Ms. Eddy indicated on this form that she wished to change from the FRS pension plan to the FRS Investment Plan. The second election retirement plan enrollment form was signed by Ms. Eddy on March 1, 2004, and received by the FRS Plan Choice Administrator, Citi-Street on March 8, 2004. Citi-Street is a private entity which is an agent of the FRS, Division of Retirement (DOR) and the SBA.

h. On April 1, 2004, Joanne Eddy participated in a grievance hearing involving another Hillsborough County employee.

i. Hillsborough County paid Ms. Eddy for the time that she attended the grievance hearing on April 1, 2004.

j. Ms. Eddy resigned from her FRS employment with Hillsborough County on April 8, 2004.

k. Ms. Eddy called the FRS financial guidance line on April 29, 2004, to inquire about the status of her transfer to the FRS Investment Plan.

l. In May 2004, Ms. Eddy received a written statement from FRS confirming an opening balance of her FRS Investment

Plan account, in the amount of $60,345.86. The transaction date on the statement is April 29, 2004.

m. Ms. Eddy died of cancer on June 20, 2004.

n. Prior to her death, Ms. Eddy designated her two sisters, Petitioner Julie Lambrou and Lynda Wood, as beneficiaries on her FRS Investment Plan account. Ms. Eddy's beneficiary designation form allocates 60 percent to Ms. Lambrou and 40 percent to Ms. Wood. As beneficiaries, Ms. Lambrou and Ms. Wood are entitled to the value of Ms. Eddy's FRS Investment Plan assets, if a transfer to the FRS Investment Plan is determined to be valid.

o. On September 3, 2004, an employee of the Division of Retirement within the Department of Management Services wrote a letter to Joanne Eddy's mother, Kathleen Dickey. In part, the September 3, 2004, letter states:

> Ms. Eddy elected to transfer to the Investment Plan effective April 1, 2004. However, since she did not work in the month of April and therefore did not receive a salary payment under the Investment Plan, her election is null and void.

p. Ms. Lambrou followed all legally required procedures to contest the denial of her sister's election to transfer to the FRS Investment Plan.

q. On September 30, 2005, SBA Director of Policy, Risk Management and Compliance wrote a "Final Action" letter to

Ms. Lambrou advising her that SBA had concluded that Ms. Eddy's election to transfer to the FRS Investment Plan was invalid.

r. Petitioner, Julie Lambrou, filed a Petition for Hearing in this matter on November 1, 2005, after receiving an extension from the SBA.

s. Ms. Lambrou's attorney sent SBA a letter on February 22, 2006, enclosing a copy of the Hillsborough County payroll check for the work performed by Ms. Eddy on April 1, 2004.

t. As of the date of the Joint Pre-hearing Statement, th[e] Division of Retirement ha[d] made no determination as to whether the information contained in the February 22, 2006, letter constitutes creditable service.

2. Ms. Eddy was very positive and very active regarding her chances for recovery from the effects of melanoma and embarked on an active treatment, surgery and therapy program to try to effect a cure. This included chemical therapy as well as brain surgery, which was apparently successful. She even participated in the trial of a new therapy, interleukin therapy and a new and aggressive type of chemical therapy. She was initially optimistic about her chances for recovery. In early 2004, however, she begin to decline in health. She thus began to focus very strongly on setting her personal affairs, including her financial affairs, in order. She then learned

that, because she was not married and had no children, under the FRS pension plan (defined contribution) there would be no beneficiary eligible to receive her retirement benefits upon her death. She learned at the same time, however, that if she transferred to the Investment Plan, that she could designate beneficiaries to receive the full value of her Investment Plan account upon her death.

3. Consequently, she decided to do so and submitted the necessary forms to make an election (her "second election") to transfer from the pension plan to the Investment Plan with the FRS, in March 2004. She named her two sisters as beneficiaries in a 60 percent, 40 percent proportion because she really wished the money to be for the use of her nephews and nieces. One sister had three children, the other two children.

Eligibility to Transfer to Investment Plan

4. Members of the pension plan who did not elect to transfer to the FRS Investment Plan when the plan was established in 2002, as of March of 2004, were permitted to make a one-time election known as the "second election" to transfer to the Investment Plan in accordance with Section 121.4501(4)(e), Florida Statutes (2003). This is distinguished from the first election period which ended in August of 2003. § 121.4501(4)(a), Fla. Stat. (2003).

5. No rules had been enacted in March 2004 governing the second election to transfer to the Investment Plan. In the absence of rules, the official policy statement concerning transfer eligibility to the Investment Plan is the official "Summary Plan Description" of the FRS Investment Plan, promulgated by the DOR, which was in effect in March and April of 2004. It is to this document to which employees, intent on transferring to the Investment Plan, are referred by a notation or instruction on the face of the enrollment form those employees must use to enroll in the Investment Plan. The Summary Plan Description contains the following guidance for employees considering a second election:

> If you wish to use your Second Election, note that the plan change is effective the first day of the month following the receipt and processing of your second Election Retirement Plan Enrollment Form by the FRS Plan Choice Administrator. To finalize the plan change you must work or be covered by approved leave for at least one day in the month of your effective date. If you submit your Second Election Retirement Plan Enrollment Form in December and it is received and processed by the Plan Choice Administrator on December 15, your plan change will be effective on January 1. To finalize the change you must work or be covered by approved leave for at least one day in the month of January. If you do not work or are not on approved leave in January, your plan change will be reversed and you will remain in your original plan. (emphasis supplied) (See Exhibit O in evidence.)

6. Applying the foregoing provision in the Summary Plan Description, Ms. Eddy's election thus became effective on April 1, 2004. She was on approved leave in April through the date of her resignation which was April 8, 2004. Moreover, she was paid for work performed on April 1, 2004, for attending a grievance hearing as a union representative. This was a regular, compensable part of her employment duties because she was a designated union representative and her duties required her to attend such grievance hearings and related meetings. Indeed, she attended a formal meeting on March 11, 2004, concerning the same grievance claim proceeding, in which the grievance claim of Linda Wood was discussed with Ms. Joni Taylor. This was done through her official duties as an employee union representative designated by her employer to attend such meetings by her employer's adherence to the collective bargaining agreement with the union. If Ms. Eddy was entitled to payment for the April 1, 2004, attendance at the grievance hearing, as indeed she was, then she also should have been paid for the meeting on March 11, 2004, on the same basis or theory as she was paid for the April 1, 2004, grievance hearing by her employer, Hillsborough County.

7. Ms. Eddy was aware in March 2004 that changing retirement plans was the only effective means of passing her vested retirement benefits on to other members of her family.

She thus filled out the Second Election Retirement Plan Enrollment Form supplied by the FRS in March 2004. That form indicates that enrollment is effective on the first day of the month following the month in which the election form is received by FRS. It is undisputed that her election form was received by the FRS administrator on March 8, 2004.

8. The information provided Ms. Eddy in the Summary Plan Description indicated that she was eligible to elect the FRS Investment Plan if she worked or was on approved leave in the month of April 2004. As a union representative Ms. Eddy knew that her presence at the grievance hearing on April 1, 2004, was compensable under the terms of the Collective Bargaining Agreement between the county, her employer, and her union. The March 11, 2004, meeting should have been compensable as well on the same basis, and Ms. Eddy, no doubt, could have called that to her employer's attention and to the attention of the DOR, if she had known of any requirement, intent or position by the DOR or the SBA that she had to have been paid for employment during the month of March, in order for her March 2004 election to be valid. Ms. Eddy also was aware that she was on approved leave during all of 2004 until her resignation on April 8, 2004.

9. Ms. Eddy received an initial written confirmation from the DOR of her election to transfer to the Investment Plan in March 2004, in the form of a "Second Election Plan Choice

Confirmation." The confirmation, which bears a transaction date of March 8, 2004, states in relevant part:

> This statement confirms your recent FRS Plan Choice utilizing your one time, second election. You have elected to change to the FRS Investment Plan effective 04/01/2004 and transfer the present value of your FRS Pension Plan benefit.

10. Ms. Eddy called the FRS Financial Guidance Line on April 29, 2004, and in a lengthy conversation with persons responsible for fielding inquiries and giving financial planning information (Ernst and Young and Citi-Street), she discussed her account and various options that might be available to beneficiaries, including tax ramifications. During this phone conversation, a Citisreet representative confirmed that her transfer to the Investment Plan became effective in April 2004, and her investment account balance would be transferred to the FRS Investment Plan by the end of April 2004.

11. Before her death, Ms. Eddy received a second written confirmation from FRS that her transfer to the FRS Investment Plan was effective, in the form of an "Investment Plan Opening Balance Confirmation Statement." This confirmation, which bears a transaction date of April 29, 2004, the date of her phone conversation, states:

> This statement confirms the opening balance of your FRS Investment Plan account. On 04/29/2004, the amount of $60,345.86, which

> represents the present value of your FRS Pension Plan benefit will be allocated to the investment options listed below.

Ms. Eddy died on June 20, 2004. At the time of her death she had 2.44 hours of unused sick leave and 6.52 hours of unused annual leave or vacation leave, for which payment was made following her death.

12. On June 9, 2004, Dan Beard, a Benefits Administrator with the DOR, in an e-mail with the subject "Election Reversals," noted the following with respect to Ms. Eddy's election: "Per agency, member was on some type of leave and finally resigned. Second election to IP is not valid since member did not work in IP effective month."

13. Ms. Lambrou first learned that the DOR had determined Ms. Eddy's election to be "null and void" from a letter sent to Kathleen Dickey, her mother, dated September 3, 2005, which was in response to an inquiry made by Ms. Dickey. She learned also of this position by the DOR in conversations with Paul Dane, an employee of the DOR. The September 3, 2005, letter states that Ms. Eddy's election was void because "she did not work in the month of April and therefore did not receive a salary payment under the Investment Plan . . . ." (See Exhibit H in evidence.)

14. Ms. Lambrou thereafter made many inquiries into the reasons for the reversal, chronicled in Attachment 1 of the SBA final decision letter. (Exhibit J in evidence.)

15. The SBA conducted a review in response to Ms. Lambrou's Request for Intervention, which was submitted on November 4, 2004.

16. In every written communication from and between SBA and the DOR, from June 2004 through April 2005, the asserted reason for reversing Ms. Eddy's election was that she did not work or earn salary in the month following the month of her election which was therefore her effective month of April 2004.

17. In its final decision letter of September 30, 2005, the SBA repeated the position that Ms. Eddy's election was invalid because she was not actively employed and did not earn a salary during April 2004.

18. In response to the final decision letter, Ms. Lambrou filed a request for formal hearing and hired counsel to represent her.

19. A later examination of Ms. Eddy's work record revealed that Ms. Eddy had in fact worked on April 1, 2004, for which her employer, Hillsborough County, issued a delayed salary paycheck. This information was revealed in a letter of February 22, 2006, from Ms. Lambrou's attorney to the SBA, to the effect that Hillsborough County had issued a paycheck for Ms. Eddy's work on April 1, 2004.

20. Despite the policy position communicated to members of the retirement system in the official Summary Plan Description,

that an effective election required working or being on approved leave in the month the election became effective, following receipt of the information concerning Ms. Eddy's work on April 1, 2004, the SBA took the additional position that not only must the employee seeking to transfer from the pension plan to the Investment Plan receive a salary payment in the effective month (April 2004), but must also have been working and getting paid on the day the election form was submitted. Moreover, at the hearing, Dan Beard, the Benefits Administrator for the DOR, testified that in order to be eligible to transfer to the Investment Plan, a member must be on paid status on the day the FRS administrator receives the member's election form. When asked how a member would be able to know that they had to be on paid status on the day the election form is received in order to be eligible to transfer to the FRS Investment Plan, Mr. Beard could only respond that member education was "not part of his job."

21. If Ms. Eddy's election to transfer to the Investment Plan were determined to be valid her beneficiaries would be entitled to receive her full investment account balance. If her election is determined to be invalid then no benefits will be paid to any beneficiary, relative or to her estate, and the funds accrued in her retirement account or accounts through her working life will be forfeited to the state. The SBA was aware

in June 2004 that Ms. Eddy was on approved leave when she submitted her election to transfer to the FRS Investment Plan, and was on approved leave through the date of her resignation on April 8, 2004.

22. Notwithstanding the clear language in the Summary Plan Description, the SBA took the position after Ms. Eddy's death that her election was invalid because she had not worked and had not received a salary in April 2004. This was the position the SBA communicated on a number of occasions in writing thereafter, until a formal proceeding was initiated by Ms. Lambrou on November 1, 2005.

23. After the formal proceeding was initiated and after counsel for the Petitioner informed the SBA in February 2006 that Ms. Eddy had in fact worked and been paid by Hillsborough County for work performed in April 2004, the SBA altered its position so that it also contended that the transfer to the Investment Plan was invalid because Ms. Eddy had allegedly not worked and not received a salary on the day the election to enroll in the Investment Plan and the enrollment form was filed (March 1, 2004) or, alternatively, that she had not worked or been paid on the date the Investment Plan election enrollment form was received by the FRS plan administrator.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

25. The parties have stipulated that the relevant provisions of Chapter 121, Florida Statutes (2003), govern the disputed issues in this case. The pertinent facts in this case occurred in the years 2003 and 2004. The election to transfer from the FRS Pension Plan to the FRS Investment Plan as of March 2004 was governed by Section 121.4501(4)(e), Florida Statutes (2003), which provides pertinently as follows:

> After the period during which an eligible employee had the choice to elect the defined benefit program [Pension Plan] or the Public Employee Optional Retirement Program [Investment Plan], the employee shall have one opportunity, at the employee's discretion, to choose to move from the defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program.

Overview

26. Ms. Eddy elected to transfer to the Investment Plan in March 2004. There were no rules in effect governing such transfers in Ms. Eddy's situation at that time, and none were enacted until October 2004. Under the Agency's statutory interpretation or its policy statement in effect at times pertinent, the official Summary Plan Description, an FRS member

was eligible to transfer from the pension plan to the Investment Plan if one of two requirements was met: either the member must "work" during the month the transfer became effective, or the member "must be covered by approved leave at least one day" in the effective month. The effective month of Ms. Eddy's transfer to the Investment Plan is the month following the month in which the election form was received by FRS. The election form was received on March 8, 2004, and therefore the effective month of the transfer to the Investment Plan is April 2004.

27. Ms. Eddy met both requirements because she received pay for work performed on April 1, 2004, and was on approved leave in April 2004. She was therefore eligible to elect to transfer to the Investment Plan, and the election to transfer was valid under the Agency's policy interpretation extant at that time. The Summary Plan Description was available to Ms. Eddy and depicted on the FRS-related web site to which she had access and of which she was aware.

28. Ms. Eddy performed each step required by the FRS to effect her transfer to the Investment Plan. She received two written confirmations from the FRS indicating to her that her transfer was effective and that she was enrolled in the Investment Plan. On her own volition she sought information concerning the Investment Plan from the official sources identified on the FRS website, including making a lengthy

telephone call to the FRS Financial Guidance Line. She thus made contact with Ernst Young, the Financial Planning Agents of the Agency and Citi-Street, the Agency charged with administering accounts and effecting transfers. Both of these companies, agents of the DOR and/or the SBA, were reached by the DOR toll-free phone number. In this phone conversation she received assurance that her transfer to the Investment Plan was being effected. She received advice about naming her beneficiaries and otherwise received confirmation that she had enrolled in the Investment Plan correctly and as required. She was thus given to believe that she had taken all necessary actions to complete the transfer. She received advice as to tax ramifications of her election and concerning her beneficiaries' opportunities for withdrawal of her funds at some later point. This was the last information she received before she died.

29. Had she been informed before her death that the SBA deemed her ineligible to transfer because she had not "worked" and received pay during the month of and the month following her transfer election, she could have taken paid leave which she had in her leave account in each of those months and satisfied the pay status requirement, if she had known of any need to do so. This is wholly aside from the fact that, as represented to her and all other affected employees by the Summary Plan Description, and the enrollment form itself, which referenced

it, that she could qualify to transfer to the Investment Plan if she was simply on approved leave status. She clearly knew she was on approved leave status.

30. Moreover, if she had known that there was any question concerning her eligibility to transfer, she could have obtained proof from her employer that she was on pay status and had worked the one day in April. She could also have obtained proof of and payment for performing essentially the same sort of duties when she attended the formal meeting on March 11, 2004, with Ms. Taylor concerning the same grievance procedure (if indeed she was not paid for it, the record is silent on that question). She could have provided this proof to the Agency at the time, but she was not informed of any defect in her entitlement to transfer to the Investment Plan. If she had been so informed she would have no doubt acted quickly to remedy such a flaw because she was very focused on concluding her affairs and particularly her financial affairs, to ensure that her retirement funds were deposited and approved in the Investment Plan so that she would have something to leave to her sisters.

31. She was very aware from March 2004 forward that her death was imminent and that therefore there was a critical need to make sure that all these arrangements had been performed correctly. The confirmations she received, referenced above, led her to believe that they were. Even if Ms. Eddy were not

actually eligible to elect a transfer to the Investment Plan, which she was, for the reasons delineated herein, the SBA is estopped to deny that election based upon the peculiar facts and circumstances of this case delineated herein.

Eligibility to Transfer

32. The facts found herein based upon preponderant credible evidence indeed reflect that Ms. Eddy was eligible to transfer to the Investment Plan in accordance with the official Summary Plan Description. This is because she was on approved medical leave during the month that her election became effective -- April 2004 and for that matter during March 2004 when she filed her enrollment form and election to transfer to the Investment Plan. The Summary Plan Description reflects the SBA's contemporaneous statutory interpretation or policy concerning the meaning and applicability of the statutes governing the Investment Plan and transfers thereto. The Summary Plan Description states that to make a transfer, a member "must work or be covered by approved leave for at least one day in the month" the transfer becomes effective. There is no question that the transfer became effective in April 2004, on April 1 to be specific. Only after Ms. Eddy died did the Division of Retirement notify her mother that her election was invalid because she did not work and earn a salary during the effective month. Based on a later examination of her work

records, Hillsborough County, her employer, determined that she had, in fact, worked in a bona fide way on April 1, 2004, when she participated in the grievance hearing which was part of the duties of her employment. The county accordingly issued a belated paycheck for the work she had thus performed. Despite the fact that she worked and received a salary payment during the April 2004, effective month, and despite the fact that she was on approved leave through the date of her resignation on April 8, 2004, the SBA still maintains that her transfer was invalid. It was informed no later than February 2006, by letter of the Petitioner's counsel, of the fact of the salary payment for the work performed on April 1, 2004, paid to Ms. Eddy or to her estate by Hillsborough County.

33. Section 121.4501, Florida Statutes (2002) was designed to provide participants in the FRS Pension Plan, the opportunity to transfer from that plan in which retirement benefits are paid based on a formula of the average salary times years of service, to a defined contribution plan or Investment Plan, in which the value of the participant's retirement benefit is expressed in actual dollars earned by funds invested in the financial markets. The statute provided an initial transfer period for existing employees during calendar years 2002 and 2003, the so-called "first election period." Thereafter, in accordance with Subsection (4)(e) of that statute, there is provided a "second

election" after the first election period has elapsed, giving FRS members a second chance to elect a transfer from one plan to the other, at their discretion. In March 2004, when Ms. Eddy made her election, Section 121.4501(1)(e) provided as follows:

> After the period during which an eligible employee had the choice to elect the defined benefit program [pension plan] or the public employee optional retirement program [investment plan], the employee shall have one opportunity, at the employee's discretion to choose to move from the defined benefit program to the public employee optional retirement program or from the public employee optional retirement program to the defined benefit program. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.
>
> 1. If the employee chooses to move to the public employee optional retirement program, the applicable provisions of this section shall govern the transfer.

34. The Respondent Agency's reason for reversing Ms. Eddy's election was described as being that she had not worked or received pay during the month of April 2004, the month when her election became effective. Later, apparently after it had been informed by counsel's letter in February 2006 that, with proof supplied, she had indeed worked and had been paid for the day in question in April 2004, the SBA then maintained that in order to be eligible to make the transfer Ms. Eddy would have had to work in March 2004, the month when she submitted her

election and election document or Investment Plan enrollment form. This position by the Agency was altered again at the hearing when the SBA witness, Mr. Kelleher, testified that in his view Ms. Eddy would have had to work on the day that she submitted her election or enrollment form in March 2004. Moreover, the Division of Retirement's witness, Dan Beard, in his testimony espoused the view that Ms. Eddy would have had to work on the day the election form was received by the retirement plan administrator. How an applicant for transfer like Ms. Eddy would have known what that day was is unexplained in the evidence.

35. While the rationale for such a position is difficult to discern, perhaps it is predicated on the belief that Ms. Eddy did not meet the definition of "eligible employee" at the time of her election. "Eligible employee" was defined in the 2003 statute and continues to be defined as "an officer or employee, as defined in s. 121.021(11)." Section 121.021(11), Florida Statutes, defined then, and continues to define "officer or employee" as "any person receiving salary payments for work performed in a regularly established position and, if employed by a city or special district, employed in a covered group."

36. The SBA and the DOR apparently place a great deal of weight on a literal interpretation of "salary payments" as meaning that an eligible employee, to have that status must

actually be receiving monetary compensation for work performed; as opposed to other forms of pay or benefits as for instance annual leave accruals or medical disability payments, which Ms. Eddy was receiving and had accrued in her account. Throughout the chronological course of this controversy, culminating in this formal proceeding and hearing, the Respondent has applied this literal interpretation of salary payments and "eligible employee" to any date that could be relevant to the transfer election. Indeed, the SBA has relied on three different dates for determining eligibility based on the members pay status in the course of this proceeding prior to and during hearing: (1) one day during the effective month (April 2004); (2) the day the election form was submitted (March 2, 2004); and (3) the date the election form was received by the Retirement Plan Administrator (March 8, 2004).

37. Significantly, however, there were no rules in place concerning transfer from the pension plan to the Investment Plan at the time Ms. Eddy made her transfer and indeed for months thereafter and after her death, not until October 2004. The one official document addressing this issue in evidence is the Summary Plan Description, (to which applicants are referred on their Investment Plan enrollment form). It was available to all FRS employers and members, including Ms. Eddy, in March 2004. It best illustrates the SBA's contemporaneous interpretation of

the applicable statutes and is the most credible, preponderant and persuasive proof of its policy with regard to eligibility to make the transfer. Thus, at the time of her election, Ms. Eddy met the requirements for transfer to the Investment Plan as they are plainly set forth in this Summary Plan Description, as follows:

> If you wish to use your second election, note that the plan changes effective the first day of the month following the receipt and processing of your second election retirement plan enrollment form by the FRS Plan Choice Administrator. To finalize the plan change you must work or be covered by approved leave for at least one day in the month of your effective date. If you submit your Second Election Retirement Plan Enrollment Form in December and it is received and processed by the Plan Choice Administrator on December 15, your plan change will be effective on January 1. To finalize the change you must work or be covered by approved leave for at least one day in the month of January. If you do not work or are not on approved leave in January, your plan change will be reversed and you will remain in your original plan. (Emphasis supplied).

38. This Summary Plan description comports with the ordinary understanding of "employee" as defined in Section 121.021(11), Florida Statutes, that is, one who holds a regular position, who may be either actively working in the position or who is on approved leave from that position and so has the right to return to active employment. The dispute concerning Ms. Eddy's situation seems to have been engendered by an

evolving or uncertain policy concerning what is necessary to be deemed to be an "eligible employee" for the purpose of an election to transfer between the relevant retirement plans.

39. At some point after the initial transfer or after March and April of 2004 the SBA apparently altered its definition of "eligible employee." This may have been as early as the e-mail referenced in the above findings of fact sent shortly before Ms. Eddy's death but which was unknown to her. The SBA and DOR Staff apparently may have begun to apply a stricter eligibility requirement as reflected in the e-mails between agency personnel in June and August 2004 (see Exhibit "G" in evidence) and as indicated by the September 3, 2004, letter to Ms. Eddy's mother (Exhibit "H" in evidence). In their review of Ms. Eddy's situation they may even have begun application of the contemplated rule change before that rule was adopted. In any event, the process was formalized with the adoption of Florida Administrative Code Rule 19-11.007 in October 2004, which contains the language:

> The participant must work at least one day in the month that the election becomes effective for the transfer to be effective (Subsection (3)(d).

40. That rule language represents a change from the requirement in effect in March 2004, expressed in the Summary Plan Description. Interestingly, however, Ms. Eddy would have

been eligible under this rule because of the proof supplied later to the SBA, perhaps as late as Petitioner's counsel's letter of February 2006, to the effect that indeed Ms. Eddy was paid for work performed in April 2004, the month that her election became effective. In any event, the SBA and the DOR staff were applying a stricter eligibility standard, before the rule was ever adopted, to Ms Eddy's situation making it impossible for Ms. Eddy to comply because of her death.

41. This illustrates the problem in this case because the SBA has applied a changing purported policy on eligibility retroactively to Ms. Eddy and her situation. At the time of Ms. Eddy's election, the SBA interpreted the term "eligible employee" as one who is working or covered by approved leave, as shown in the Summary Plan Description. At some point after that description was published, SBA changed its interpretation of "eligible employee," as is reflected in Florida Administrative Code Rule 19-11.007, not adopted until October 2004. In evaluating Ms. Eddy's eligibility to transfer, effectively, the SBA applied the later-adopted rule or its policy concept, rather than the published policy statement contained in the Summary Plan Description that was in effect at the time Ms. Eddy made her election. The October 2004, rule that changed the "eligible employee" definition or interpretation cannot lawfully be applied to an election that was made in April 2004 before the

rule was adopted and when the different and noticed policy statement embodied in the Summary Plan Description was clearly in effect. See Cleveland Clinic Florida Hospital v. AHCA, 679 So. 2d 1238, 1241-42 (Fla. 1st DCA 1996).

42. Interestingly, another change was effected by the 2005 amendment to Section 121.4501(4)(e), Florida Statutes, which now reads in pertinent part:

> Eligible employees may elect to move between Florida Retirement Systems programs only if they are earning service credit in an employer-employee relationship consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be 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 employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except that the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator.

43. In other words, with this change, what is now the pivotal consideration is that the employee be working, in an employee-employer relationship, and must be earning service credit in the month or at the time that the third party administrator receives the election from the employee. The effect of this change is to reverse the requirement that an employee must be working on the effective date of the transfer,

and to effectively define "eligible employee" in terms of "creditable service," excluding leaves of absence. Florida Administrative Code Rule 19-11.007 was amended on March 9, 2006, to reflect this legislative change.

44. The statute clearly changes the requirement for eligible employees, although the Section 121.4501(2)(f) definition of "eligible employee" remains unchanged. Mr. Beard's testimony, in effect, reflects the present rule, amended on March 9, 2006, as well as the above statutory change, where he testifies that the status of eligible employee or employee being paid a salary must be in effect on the date that the Florida Retirement System receives the election form from the employee. He was thus in his testimony applying the present March 9, 2006, rule amendment and the statutory amendment quoted above to Ms. Eddy's situation which arose back in March of 2004.

45. The SBA has thus attempted to determine Ms. Eddy's status by applying concepts from later adopted statutes and rules to the March 2004 election by Ms. Eddy. At various times in this proceeding it has applied the concept of "eligible employee" from the October 2004, rule and from the March 2006 rule to Ms. Eddy's April 2004 effective election, with the rules being inconsistent with each other. Thus, the Respondent, effectively has espoused three different concepts concerning the

requirements Ms. Eddy had to fulfill in order to be an "eligible employee" and to validly effect her transfer, as found above.

46. When considered in relationship to the Agency statement embodied in the Summary Plan Description, which was noticed and made available to all employees or persons situated as Ms. Eddy on the relevant website and otherwise, it is clear that the Summary Plan Description is the most credible and persuasive espousal of Agency policy governing Ms. Eddy's Investment Plan transfer election situation. The putative policy or positions espoused by the Agency are less credible under the circumstances found and concluded above and are rejected. As discussed above they cannot legally be applied retroactively to Ms. Eddy's situation in any event.

47. Moreover, even if the Agency's second or third position or some variant of it were true, so that Ms. Eddy had to have worked for salary sometime in March 2004, the month in which she filed her election, the testimony of Ms. Taylor was unrefutted and establishes that she had a formal meeting with Ms. Taylor on March 11, 2004. That formal meeting was about the same grievance procedure (involving county employee Linda Wood), with which her clearly legitimate, paid employment duty on April 1, 2004, was involved. It was a regular part of her employment duties, according to the persuasive evidence in this record, to be in attendance at such meetings or hearings as the

employee union representative. Her employer obviously deemed that to be the case because it paid her for the grievance hearing it knew about in April 2004.

48. The record does not reflect that she was paid for the March 11, 2004, formal meeting with Ms. Taylor (the management representative) concerning the grievance procedure process and claim, but the duties being substantially the same on both occasions, it is likely that had Ms. Eddy sought it she could have been paid for that meeting and quite likely her estate, if it so requested, would be entitled to payment for the March 11, 2004, duties. That being the case, it would seem that she qualifies as an "eligible employee," under even the Agency's definition espoused at hearing, because of these facts concerning the March 11, 2004, formal meeting.

49. In any event, the policy statement put forth by the Agency in the Summary Plan Description is the one preponderantly and persuasively proven to apply to Ms. Eddy's situation. It was in effect at that time, in the absence of a rule. Thus, for the reason that Ms. Eddy was paid during the month her election became effective, April 2004, and because she was on approved leave status during both March and April 2004, she is clearly an eligible employee and as such validly effected her election to transfer her retirement credits or benefits to the Investment Plan.

Estoppel

50. It is well-settled that estoppel against a state agency is only applied in exceptional circumstances. Salz v Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3rd DCA 1983); Kuge v. Department of Administration, Division of Retirement, 449 So. 2d 389 (Fla. 3rd DCA 1984). It is well-settled that "exceptional circumstances" do occur from time to time. The Salz and Kuge cases both demonstrate the type of estoppel applicable to the instant situation.

51. In the Salz case, a teacher was erroneously informed that she could purchase eight years of credible service for years working at a school which was not a public school but erroneously believed to be. She relied upon the information and purchased the credits. Based on the purchase credit she determined that she could reasonably retire. After the fact, the DOR sought to disallow the eight years of credit purchased. The court noted in that opinion that estoppel against an agency may be established by showing "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon." Id. at 1379. That case squarely met these estoppel requirements: the DOR

representative represented that the teacher could purchase the service; she relied reasonably upon the representation, coming as it did from an official charged with making such determinations; she changed position by quitting her position believing that she had sufficient retirement to meet her needs. Id. (citing DOR v. Anderson, 403 So. 2d 397, 400 (Fla. 1981).

52. The Kuge case is a similar case. In the Kuge case a teacher had been informed that if she worked until a certain date, she would be credited with 10 years of credible service and thus be vested in the retirement system. She worked to the indicated date and resigned. The Agency then took the position that she was several months short from 10 years and therefore was not vested. A court determined in that opinion that she had properly relied upon the mistaken factual information concerning her credible service and clearly changed her position when she resigned her position to her detriment. Consequently, the Agency was estopped to deny her vesting in the retirement system. 449 So. 2d at 389.

53. This is a parallel case, because Ms. Eddy relied upon the information given to members of the State Retirement System by the Summary Plan Description. She followed up on that information to make sure everything was in order because she was very concerned that her financial plans be carried out. She was focused on leaving her retirement benefits to her two sisters

because she knew that she was terminally ill, would not likely survive and that she had limited time in order to effect her financial plans in this regard and otherwise. In this effort she called the state's designated financial planning and information source and agents, conferred with them at length and received no information to the contrary. Rather, the factual information she received clearly represented that her transfer was effected.

54. She received two written confirmations from FRS that her transfer to the FRS Investment Plan had been processed and her investment account had been accordingly funded. She received no information or representation to the effect that there might be a chance that the transfer to the Investment Plan might be reversed, even after the funds had been transferred to the Investment Plan account. She was very focused upon making sure her sisters received the benefits so that her nieces and nephews would benefit by it derivatively, the benefits of her years of retirement credit. She knew that she could only achieve this result by becoming a participant in the FRS Investment Plan. She was so focused particularly because, by March 2004, she already knew that her death was imminent. The evidence clearly shows that she was capable during March and April of 2004 of doing whatever was necessary or needed to comply with the transfer requirements, if different ones had

been communicated to her, which they were not. She relied to her detriment and that of her designated beneficiaries on the factual representations that she had the status and had done what was necessary to accomplish the transfer. It is concluded that, based upon the findings and conclusions herein the SBA is estopped to reverse Ms. Eddy's election to transfer to the Investment Plan.

55. Moreover, clearly, if Ms. Eddy's election to transfer to the Investment Plan, so that her sisters could receive her retirement benefits, was deemed to be invalid, those benefits would be the subject of a forfeiture, because there would be no beneficiaries to receive her retirement benefits. This brings to attention an opinion of the First District Court Appeal in Pamela Eaves v. Division of Retirement, 704 So. 2d 140 (Fla. 1st DCA 1997). That case, in an opinion by Judge Robert Benton, involved a different fact situation from the instant case in that it involved a decedent designating beneficiaries to receive his retirement benefits before he later re-married. His second wife was never designated as a beneficiary. The decedent then succumbed to a heart attack before he ever retired and the court was confronted with the fact that his designated beneficiaries could not receive his retirement benefits because they no longer met the statutory requirements since they were no longer eligible dependents. Nevertheless, the DOR took the position

that because they had been named beneficiaries that they had to execute a disclaimer of benefits (even though they were due none) before the surviving spouse could claim the decedent's survivor benefits. The court, speaking through Judge Benton reversed that position taken in the Agency's Final Order on appeal. The court determined that the purported designation of other beneficiaries was nugatory because, at law, they were not dependents and could not be qualified to receive the benefits. The court went on to state, espousing the principal that the law abhors a forfeiture, that:

> If the surviving spouse could not receive benefits in the present case, nobody could. To uphold the Division's position would have the effect of working a forfeiture, which we decline to do. See generally Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976) ('statutes imposing forfeiture will be strictly construed in a manner such as to avoid the forfeiture and will be liberally construed so as to avoid and relieve from forfeiture.'); Ireland v. Thomas, 324 So. 2d 146, 147 (Fla. 1st DCA 1975) (where forfeiture of retirement benefits was not clearly required by statute, no forfeiture should be inferred). . . .

This opinion is instructive in the situation at bar. Ms. Eddy has been established to have been entitled to make the transfer election. It was shown to have been valid. Moreover, the Agency has been shown to be estopped to deny it. However, if the Agency's position were to be adopted a forfeiture would be imposed, which Judge Benton's opinion instructs should be

avoided through a liberal construction of the relevant statutes "so as to avoid and relieve from forfeiture." Ireland supra.

Attorney's Fees Claim

56. The Petitioner contends that SBA has acted for an improper purpose in this case by taking actions that caused unnecessary delay and needlessly increased the cost of the litigation in securing her sister's retirement benefit. The Petitioner has therefore moved for an award of attorney's fees and costs under authority of Section 120.595(1)(d) and (e), Florida Statutes (as amended in 2003). The Petitioner contends that the SBA's decision to reverse Ms. Eddy's election was contrary to its own contemporaneous interpretation of law or its policy, as reflected in the Summary Plan Description and, moreover, once it became clear that the decision to reverse her election was in error, when it learned that she had worked and received pay during April 2004, that the SBA persisted unreasonably in advocating its position to deny the claim.

57. However, as the court observed in Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034 (Fla. 1st DCA 1991), the determination of whether a party participated in an administrative proceeding for an improper purpose is an issue of fact. 591 So. 2d at 1037. The facts in this case demonstrate indeed that the SBA tended to alter or shift its position concerning its basis for denying the claim. It first contended

that because the decedent had not been paid a salary as an "eligible employee" in the effective month of the election, April 2004, that the claim should be denied. Upon learning, in February 2006, that the Petitioner's decedent had been paid for the one day in that month, it expanded its interpretation to refer also to the fact that she had not been paid or worked on paid status in March 2004, the month the election was submitted. Later, it apparently adopted a corollary position that the Petitioner's decedent had to be earning "creditable service" in the effective month of April 2004. This was while it also did not recognize the other avenue of eligibility for a transfer between plans contained in the Summary Plan Description, that is, if the party seeking to make the election was on "approved leave" status, which Ms. Eddy was.

58. Upon consideration of all the facts and circumstances, however, it is determined that there has not been substantial, persuasive evidence that the SBA's apparently varying legal positions in support of its ultimate denial, during the free-form and formal stage of this dispute, clearly went beyond the pale of reasonable advocacy of its positions in continuing to deny the Petitioner's claim. Thus, its actions did not clearly constitute an abuse of agency discretion or arbitrariness. In that circumstances, an award of attorney's fees under Section

120.595, Florida Statutes, on the basis of "improper purpose," has not been persuasively established.

59. In summary, the above findings of fact and conclusions of law, based upon the preponderant, persuasive evidence, show that Ms. Eddy indeed met the eligibility requirements to effect transfer to the relevant Investment Plan at the time she elected such transfer. Moreover, aside from her meeting those eligibility requirements for the reasons found and concluded above, the SBA is estopped to deny that her transfer election to the Investment Plan was valid, for the reasons found and concluded above.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED: That a final order be entered by the State Board of Administration finding that the election of Ms. Eddy, the Petitioner's decedent and testatrix, to transfer her retirement benefits and credits to the FRS Investment Plan was valid and that the benefits thereof be paid over, in the proportions designated by Ms. Eddy, to Ms. Eddy's designated beneficiaries, the Petitioner, Julie Lambrou, and her sister,

Lynda Wood. The request for attorney's fees and costs is denied.

DONE AND ENTERED this 28th day of September, 2006 Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.