

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN ASHMEAD,

Petitioner,

vs.

Case No. 16-7552

STATE BOARD OF ADMINISTRATION,

Respondent.

_____ /

RECOMMENDED ORDER

An administrative hearing was conducted in this case on February 13, 2017, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John Ashmead, pro se
408 South 15th Street
Fernandina Beach, Florida 32034

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Petitioner, John Ashmead (Petitioner or Mr. Ashmead), is entitled to change his Florida Retirement System (FRS) election from the FRS Pension Plan to the FRS Investment Plan.

PRELIMINARY STATEMENT

By letter dated November 18, 2016 (Denial Letter), the State Board of Administration (Respondent or the SBA), advised Petitioner of its decision to deny Petitioner's request to process a second election form to change his FRS election from the FRS Pension Plan to the FRS Investment Plan. The Denial Letter advised Petitioner of his right to request an administrative hearing on the issue within 21 days. Petitioner timely filed a petition for hearing, and, on December 21, 2016, Respondent's counsel forwarded Petitioner's petition for hearing to the Division of Administrative Hearings for a hearing. The case was assigned to the undersigned and subsequently scheduled for the final hearing held February 13, 2017.

Petitioner attended the final hearing and was unrepresented by counsel. Petitioner testified on his own behalf, but presented no other witnesses. Petitioner's Exhibits P-1 and P-2 were admitted into evidence without objection. The SBA, through the introduction of deposition transcripts, presented the testimony of Respondent, Jennifer Lafave, and Sergeant Edmond Israel. Respondent's Exhibits R-1 through R-4 and R-7 through R-10 (which include the deposition transcripts of Respondent and witnesses Lafave and Israel) were admitted into evidence without objection.

The proceedings were recorded and a transcript was ordered. The parties were given the standard 10 days from the filing of the transcript within which to file their respective proposed recommended orders. The one-volume Transcript of the hearing was filed on March 17, 2017. Thereafter, Respondent timely filed its Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner was employed by the Florida Department of Agriculture and Consumer Services (Department of Agriculture), Office of Agricultural Law Enforcement, an FRS-participating agency, beginning January 10, 2010.

2. Mr. Ashmead, through his employment with the Florida Department of Agriculture and Consumer Services (Department of Agriculture), became a member of the FRS Pension Plan. The FRS Pension Plan is a defined benefit retirement plan.

3. Because of health concerns, Mr. Ashmead made the decision to retire from the Department of Agriculture in 2016. Mr. Ashmead decided to move to the FRS Investment Plan before he retired so he could take a lump sum withdrawal of his FRS retirement assets, a plan feature not available to Pension Plan members.

4. Mr. Ashmead completed a second election form that indicated his desire to transfer to the Investment Plan and gave it to Sergeant Edmond Israel (also employed by the Department of Agriculture) on October 6, 2016. Sergeant Israel agreed to transmit the second election form to the Plan Choice Administrator by facsimile (fax) to fax number 1-888-310-5559 (as per the instructions on the second election form) for Mr. Ashmead.

5. Sergeant Israel attempted to transmit the second election form by fax to the Plan Choice Administrator on October 6, 2016. Sergeant Israel did not call or take any other steps to confirm that the fax transmissions he attempted to send for Mr. Ashmead were received.

6. The fax journal log for the fax machine that Sergeant Israel used indicates that Sergeant Israel's attempted transmissions of Petitioner's second election form to fax number 1-888-310-5559 on October 6, 2016, were not completed. The transmission results were "busy" which means "busy" or "no response" per the fax journal log legend. In fact, all the attempted transmissions from the same fax machine that Sergeant Israel used are marked "busy" from July 17, 2016, through October 16, 2016, indicating that the fax machine that Sergeant Israel used was not functioning properly.

7. AON Hewitt, the Plan Choice Administrator for the FRS Investment Plan, did not receive the second election form Sergeant Israel attempted to fax for Mr. Ashmead on October 6, 2016.

8. Mr. Ashmead submitted his resignation letter on October 6, 2016, and stopped working for the Department of Agriculture altogether on October 20, 2016.

9. Mr. Ashmead called the "MyFRS Financial Guidance Line" on October 21, 2016 (after he terminated employment with the Department of Agriculture) to inquire about his second election status. He was told during this call that the Plan Choice Administrator had not received his second election form.

10. On October 26, 2016, for the first time, AON Hewitt received a second election form that was signed by Mr. Ashmead indicating Petitioner's desire to transfer to the Investment Plan.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat.^{1/}

12. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); see also Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 142 (Fla. 4th

DCA 1989) (burden is on beneficiary to establish entitlement to retirement benefits).

13. As the usual standard of proof applicable to questions of fact in administrative hearings, the standard of proof which Petitioner must meet in this case is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.; Haines v. Dep't of Child. & Fams., 983 So. 2d 602 (Fla. 5th DCA 2008).

14. Movement between FRS plans after an initial election has been made--the "second election" or "2nd election"--is governed by section 121.4501(4)(e), Florida Statutes, which states:

(e) 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 the requirements under s. 121.021(17)(b), excluding leaves of absence without pay.

§ 121.4501(4)(e), Fla. Stat. (emphasis added).

15. A member is eligible to change plans only if he is earning service credit in an employer-employee relationship; that is, still employed. The law does not allow FRS members,

like Mr. Ashmead, to change plans after they terminate FRS-covered employment.

16. The process for making a second election is set forth in Florida Administrative Code Rule 19-11.007. This rule places the burden on the member to ensure the second election form is timely received by the Plan Choice Administrator stating: "[i]t is the responsibility of the member to assure that the 2nd election is received by the Plan Choice Administrator no later than 4:00 p.m. Eastern Time on the last business day the member is earning salary and earning service credit."

17. Thus, to change retirement plans in accordance with the foregoing statute and rule, it was Mr. Ashmead's responsibility to ensure the Plan Choice Administrator actually received his second election form before he terminated FRS-covered employment. See also Pazian v. Fla. Prepaid Coll. Bd., Case No. 09-3367 (Fla. DOAH March 9, 2010; Fla. Prepaid Coll. Bd. June 2, 2010) (holding that the transmitter of certain investment instructions via fax assumed the responsibility to ensure the instructions were actually received by the intended recipient).

18. The fact that Mr. Ashmead made the decision to change plans before he retired is immaterial. Likewise, the fact that Mr. Ashmead delivered his second election form to a coworker, Sergeant Israel, before he retired is of no consequence. FRS employers are not agents of the SBA. As such, the SBA is not

bound by information communicated to FRS employees and is not responsible for their failure to complete activities required by law to change plans. See § 121.021(10), Fla. Stat.; see also Serpas v. State Bd. of Admin., Case No. 12-3250 (Fla. DOAH Jan. 1, 2013; SBA Feb. 20, 2013) (holding that an FRS member's second election was invalid even though his coworker attempted to fax his second election form before he terminated FRS-covered employment).

19. Having failed to meet his burden to demonstrate that he made a timely election to join the FRS Investment Plan, Mr. Ashmead's request for relief must be denied.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is:

RECOMMENDED that the State Board of Administration issue a final order denying the relief requested in the petition filed by John Ashmead.

DONE AND ENTERED this 6th day of April, 2017, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day April, 2017.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes or Florida Administrative Code are to current versions.

COPIES FURNISHED:

John Ashmead
408 South 15th Street
Fernandina Beach, Florida 32034

Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32301
(eServed)

Ash Williams, Executive Director
and Chief Investment Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Post Office Box 13300
Tallahassee, Florida 32317-3300

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.