

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ADRIAN WAGNER,

Petitioner,

vs.

Case No. 19-4954

STATE BOARD OF ADMINISTRATION,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on November 18, 2019, via video teleconference from sites in Tallahassee and Gainesville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: N. Albert Bacharach, Jr., Esquire  
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For Respondent: Ruth E. Valek, Esquire  
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STATEMENT OF THE ISSUES

The issues are whether Petitioner effectively elected to move her retirement account from the Florida Retirement System

("FRS") Pension Plan to the FRS Investment Plan prior to her retirement from state employment or, if not, whether Respondent, State Board of Administration ("SBA") is estopped from claiming that Petitioner did not successfully elect to move her retirement account into the FRS Investment Plan.

PRELIMINARY STATEMENT

By issuance of a letter dated May 30, 2019, the SBA advised Petitioner, Adrian Wagner, that it was denying her Request for Intervention to move her retirement from the FRS Pension Plan ("Pension Plan") to the FRS Investment Plan ("Investment Plan"). Ms. Wagner timely filed a "Florida Retirement System Investment Plan Petition for Hearing." On September 16, 2019, the SBA referred the matter to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge to conduct a formal administrative hearing.

The final hearing was scheduled for November 18, 2019, on which date it was convened and completed. Prior to the hearing, the parties submitted a Pre-hearing Stipulation, which has been accepted and incorporated into the Findings of Fact in this Recommended Order.

At the hearing, Petitioner testified on her own behalf and presented the testimony of Philip Schwartz, an expert computer consultant. Petitioner offered no exhibits. Respondent presented the testimony of Allison Olson, SBA's Director of

Policy, Risk Management, and Compliance in the Office of Defined Contribution Programs. Respondent's Exhibits 5 through 7 were admitted into evidence without objection.

The one-volume Transcript of the final hearing was filed with DOAH on December 10, 2019. Both parties timely filed Proposed Recommended Orders, which have been duly considered in the writing of this Recommended Order.

Except where otherwise indicated, all references to the Florida Statutes in this Recommended Order are to the 2019 edition.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Petitioner, Adrian Wagner began her state employment on April 22, 1994, with the Department of Health and Rehabilitative Services, which was renamed the Department of Children and Family Services after a 1996 reorganization. Since 2012, the agency has been named the Department of Children and Families.

2. Upon her hiring, Ms. Wagner was enrolled in the Pension Plan, which was the only retirement program available for eligible employees in 1994.

3. In 2002, the Investment Plan was made available for employees participating in the FRS. Ms. Wagner was provided a three month window, from December 1, 2002, through February 28,

2003, to switch to the Investment Plan. The Plan Choice Administrator did not receive an election from Ms. Wagner during the three month period. Therefore, Ms. Wagner remained in the Pension Plan by statutory default. See § 121.4501(4)(a), Fla. Stat.

4. Ms. Wagner changed employers but remained in the FRS system until her last day of employment on April 3, 2019. At the time of her retirement from FRS-eligible employment, Ms. Wagner was working for the Alachua County Sheriff's Office.

5. On March 4, 2019, Ms. Wagner logged onto the FRS website, MyFRS.com, from her home computer. Her intention was to use the second election opportunity afforded by section 121.4501(4)(f), Florida Statutes, to move from the Pension Plan to the Investment Plan.

6. Ms. Wagner recalled clicking a green button to change her plan, which took her to a page that read, "ready to make a decision" to change from the Pension Plan to the Investment Plan. It set out the steps needed to make the change. Ms. Wagner testified that she clicked on a green arrow that said, "change your plan," which took her to a page that set forth the amount of money she would have in the Investment Plan. She continued to a page showing the different plans available to participants in the Investment Plan. The website advised her to contact an Ernst and Young ("EY") financial planner to discuss her plan options.

7. Ms. Wagner testified that a few minutes later she used the phone number provided by the MyFRS.com website to contact the EY financial planners. She testified that the EY planner with whom she spoke was named "Josh."

8. The EY call summary log for Ms. Wagner was entered into evidence. The log is a record of every phone call between EY and Ms. Wagner. It includes the date and time of the call, the name of the EY employee who spoke to Ms. Wagner, and a brief summary of their discussion. The EY call summary log identified the EY planner who spoke with Ms. Wagner at 12:10 p.m., on March 4, 2019, as Joshua Kantrowitz.

9. Ms. Wagner testified that Mr. Kantrowitz told her that he could not see in his computer that she had made the switch to the Investment Plan. While Mr. Kantrowitz waited, Ms. Wagner clicked several "back" buttons on the MyFRS.com website. She then went through the same page progression she had done previously to make her plan selection.

10. Ms. Wagner recalled finalizing her decision by clicking a button that read "send," or "submit," or "continue."

11. Ms. Wagner testified that Mr. Kantrowitz told her that he could now see that she had elected to change her retirement from the Pension Plan to the Investment Plan. They discussed fund options, tax questions, and penalties for taking funds out of the Investment Plan. Mr. Kantrowitz verified Ms. Wagner's

email address so that he could send her an FRS Investment Beneficiary Form. Ms. Wagner understood Mr. Kantrowitz to say that she would not be able to see that she had changed to the Investment Plan on the website for about a month.

12. The conversation was interrupted when the phone connection was lost. Ms. Wagner testified that it was her understanding that she had successfully changed her retirement from the Pension Plan to the Investment Plan, and that this change had been confirmed by Mr. Kantrowitz.

13. A transcript of the conversation between Ms. Wagner and Mr. Kantrowitz was entered into evidence. The transcript does not confirm every aspect of Ms. Wagner's recollection.

14. The transcript records that Ms. Wagner told Mr. Kantrowitz that she "just switched over from the FRS Pension Plan to the Investment Plan." Mr. Kantrowitz asked when she made the switch. Ms. Wagner responded, "I just hit it today. Did it today." She added that she made the election "about ten minutes ago."

15. The transcript clarifies that Mr. Kantrowitz accepted, but did not confirm, Ms. Wagner's statement that she made the switch to the Investment Plan. After Ms. Wagner told him that she made the switch only 10 minutes ago, Mr. Kantrowitz stated:

Okay. And you did it by--basically, you know, if you do--you know, it's still being processed at the moment. Basically, you

know, in the next month, it's going to make that conversion. In order to, you know, switch and make that choice, you know, the types of investments you're putting into. Okay. So I do want to keep you aware of that if you did fill it out today, okay.

16. Mr. Kantrowitz never confirmed that the second election had been completed nor did he state whether he could or could not see the change on his computer. Mr. Kantrowitz simply accepted Ms. Wagner's word and went on to tell her what would happen next if she indeed made the change.

17. Mr. Kantrowitz did state that the conversion would be made in the next month, confirming in part Ms. Wagner's recollection that she was told that it would be a month before she could see the switch to the Investment Plan on the website. Again, however, this statement was contingent: if Ms. Wagner made the change, the conversion would take about a month.

18. The EY call summary log entry for the March 4, 2019, conversation, presumably completed by Mr. Kantrowitz, records Ms. Wagner's "Question or Problem" as "made a switch to the FRS IP. [D]oesn't plan to work in the FRS anymore." The log records the "Resolution" with a series of four bullet points:

- talked about IP. taxation, timelines, HIS. says she spoke with admin and they said she would hit NRA at April 1 for 25 YOS SR.
- she did the 2nd election online and was defaulted into the FRS RDF.

- needs to set up beneficiaries
- sending out beneficiary form

19. It could be argued that the second bullet point confirms that Ms. Wagner successfully completed the second election into the Investment Plan. However, when read in tandem with the transcript, Mr. Kantrowitz's notes clearly set forth his summary of the conversation as it occurred, not his independent conclusion that Ms. Wagner had completed the second election.

20. After the call with Mr. Kantrowitz was dropped, Ms. Wagner called back to inquire as to her exact retirement date. She spoke briefly with another EY planner, Zach Brown, who told her that the Division of Retirement keeps the record of official years of service for employees. Mr. Brown transferred the call to the Division of Retirement. The transcript indicates that Ms. Wagner remained on hold for some time, then hung up before speaking with a Division of Retirement representative.

21. Ms. Wagner testified that on March 18, 2019, she again contacted the EY financial planners. She spoke for roughly a half-hour with a woman whose name she did not recall. The woman verified Ms. Wagner's personal account information. After being verified, Ms. Wagner asked tax and health care subsidy questions and stated that she planned eventually to move her Investment Plan account from EY to an outside investment firm. Ms. Wagner



testified that the EY planner never stated that she was not enrolled in the Investment Plan.

22. The EY call summary log does not show a phone call from Ms. Wagner on March 18, 2019.

23. Ms. Wagner testified that on March 19, 2019, she met with Shawn Powers, the human resources manager for the Alachua County Sheriff's Office, to discuss Ms. Wagner's impending retirement. As Ms. Powers filled out a retiree insurance data sheet, Ms. Wagner told her that she had enrolled in the Investment Plan. Ms. Powers cautioned her about the risks involved in the Investment Plan. Ms. Wagner assured her that she understood the risks. Ms. Powers checked the "Investment Plan" box on the insurance form. Ms. Wagner signed the form, attesting to her understanding that she had made the election to move from the Pension Plan to the Investment Plan.

24. Ms. Wagner testified that, after the March 4, 2019, conversation with Mr. Kantrowitz, she received several emails from EY financial planners. She understood these emails as indirect confirmation that she had successfully elected to move to the Investment Plan. During cross-examination, Ms. Wagner conceded that none of these communications affirmatively stated that she was now in the Investment Plan.

25. The third-party Plan Choice Administrator for the Investment Plan is Alight Solutions.

26. FRS members who wish to utilize their second election have multiple options: they may complete and mail in a hard copy form; they may submit a second election form on the MyFRS.com website; or they may log into their account on the MyFRS.com website and go through the process of submitting and confirming their second election online. Fla. Admin. Code R. 19-11.007(3).

27. If an FRS member successfully utilizes the online MyFRS.com process for submitting a second election, an "election confirmation" page appears that informs the member that the election has been received by Alight Solutions.

28. Ms. Wagner had no specific recollection of receiving an electronic confirmation that her election to move to the Investment Plan had been successfully submitted or that it had been received by Alight Solutions.

29. If an FRS member successfully submits an election form to Alight Solutions, a hard copy letter is mailed to the member confirming receipt. Ms. Wagner had no specific recollection of receiving any type of correspondence confirming receipt of her Investment Plan election via conventional mail.

30. Ms. Wagner retired from the Alachua County Sheriff's Office on April 3, 2019. The parties stipulated that the SBA has no record of receiving a second election from Ms. Wagner

during her term of employment with an FRS-participating employer.

31. On April 8, 2019, Ms. Wagner logged onto the MyFRS.com website and saw that she was still enrolled in the Pension Plan. Ms. Wagner immediately phoned the number for the EY financial planners and was transferred to a "solutions person" named Nichole. Ms. Wagner explained to Nichole that on March 4, 2019, she had elected to move her retirement account from the Pension Plan to the Investment Plan via the MyFRS.com website. She provided Nichole with the chronology of events from March 2019 as she remembered them. Nichole told Ms. Wagner that she would research the matter and get back to her within two weeks.

32. Ms. Wagner testified that on or about April 22, 2019, Nichole phoned her to say that she could find no record of anything Ms. Wagner claimed to have done on the MyFRS.com website. Nicole told Ms. Wagner that she would need more time, possibly another two weeks, to do further research on the matter.

33. Ms. Wagner told Nichole how upset she was. Nichole assured Ms. Wagner that she would do her best to find out what happened. Nichole also stated that she would send Ms. Wagner a form to request that the SBA intervene.

34. Ms. Wagner subsequently filed a Request for Intervention, which was received by the SBA on May 17, 2019.

35. Ms. Wagner testified that after she filed her Request for Intervention, but before the SBA responded, she attempted to contact Nichole. Her call was answered by an unnamed EY planner who stated that he would remain on the line while putting her through to a solutions person. Ms. Wagner began speaking with the solutions person but was interrupted by the EY financial planner, who stated that he had found notes by Mr. Kantrowitz indicating that she had changed from the Pension Plan to the Investment Plan.

36. It is highly likely that the unnamed EY financial planner was referencing the EY call summary log notes quoted at Finding of Fact 18. As found above, Mr. Kantrowitz's contemporary notes reflected what he was told by Ms. Wagner. The notes do not constitute an independent confirmation that Ms. Wagner successfully completed her second election.

37. The SBA submitted into evidence a spreadsheet titled "Participant Web Activity Detail." SBA witness Allison Olson testified that this document was produced by Alight Solutions in response to her request for all records of Ms. Wagner's March 4, 2019, activity on the MyFRS.com website.

38. Ms. Olson is the Director of Policy, Risk Management, and Compliance in the Office of Defined Contribution Programs. She credibly testified that she is familiar with reading the Alight Solutions spreadsheets and that she saw nothing on

Ms. Wagner's page indicating that Alight Solutions received her Investment Plan election.

39. Petitioner's information technology expert, Philip Schwartz, testified that the document provided by Alight Solutions was a "program log," a high level program that runs to handle a particular task such as an accounting function. Mr. Schwartz testified that he suggested to his client that she request the "server log" for the relevant date. The server log captures every keystroke and click made by a user such as Ms. Wagner, even in situations in which the server is too busy to complete the requested function.

40. Mr. Schwartz believed the program log was insufficient because it showed only which page of the website Ms. Wagner was on at a given moment, not which buttons she clicked or whether she had hit the "send" button. Mr. Schwartz's suggestion was that Ms. Wagner might have done everything necessary to complete the second election but that the MyFRS.com server may not have recorded her election. The server log would have provided a more accurate representation of Ms. Wagner's intentions.

41. Ms. Olson testified that, after an informal hearing attempting to resolve the case, she requested a server log from Alight Solutions. The company responded that it did not have the server log. Ms. Olson testified that the program log would indicate the second election had it been completed by

Ms. Wagner. Ms. Olson stated that FRS members are always advised to follow through and make sure their election has been received.

42. Mr. Schwartz testified that there is no industry standard as to the length of time a program log should be kept. He has known companies to hold them for as long as a year, but has also known companies to keep them for only 90 days. Mr. Schwartz testified that there is no legal requirement for a company such as Alight Solutions to maintain a program log at all.

43. Mr. Schwartz testified that he did not have enough knowledge of Alight Solutions' terminology to state whether the program log indicated that Ms. Wagner's election had been received. Thus, there is no evidence to contradict Ms. Olson's credible testimony that the Alight Solutions program log did not indicate receipt of Ms. Wagner's Investment Plan election.

44. The preponderance of the evidence establishes that Ms. Wagner intended to make her second election on March 4, 2019, and to move her retirement account from the Pension Plan to the Investment Plan.

45. The preponderance of the evidence also establishes that Ms. Wagner failed to complete her second election and that Alight Solutions, the Plan Choice Administrator for the Investment Plan, did not receive her election.<sup>1/</sup>

46. The evidence was insufficient to show that the SBA or any entity or person acting on its behalf or as its agent made any representation to Ms. Wagner that her second election had been received by the Plan Choice Administrator.

CONCLUSIONS OF LAW

47. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

48. Ms. Wagner argues that she should be deemed to have enrolled in the Investment Plan either because she made a valid second election via the MyFRS.com website, or because the SBA is estopped from taking the position that her attempted Investment Plan election was never received by the Plan Choice Administrator.

49. Section 121.4501(4)(f), Florida Statutes, provides, in relevant part:

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 . . . . (emphasis added).

50. Though the evidence supports Ms. Wagner's contention that she intended to make the election offered by section 121.4501(4)(f), the statute's language makes clear that the relevant inquiry is not the employee's intent but whether her election was received by the third-party administrator. There is no evidence that Alight Solutions, the Plan Choice Administrator, received a second election by Ms. Wagner while she was still employed in an eligible position.

51. Rule 19-11.007 is titled "Second Election Enrollment Procedures for the Florida Retirement System Retirement Programs." Subsection (2) of the rule provides, in relevant part:

(2) A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator during the month in which the member is actively employed and earning salary and service credit in an employer-employee relationship consistent with the requirements of section 121.021(17)(b), F.S. Members on an unpaid leave of absence or terminated members cannot use their 2nd election until they return to FRS-covered employment. Employees of an educational



institution on summer break cannot use their 2nd election during the full calendar months of their summer break. For example, if the last day of the school term is May 21st and the first day of the new school term is August 17th, the employee may not file a 2nd election in the calendar months of June or July. The beginning of the school term is determined by the employer. In general terms, this means that the 2nd election can only be made and processed during the month in which the member is actively working and being paid for that work. It 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 of the month the member is actively employed and earning salary and service credit. (emphasis added).

52. The rule reiterates the statute's admonition that the second election must be received by the Plan Choice Administrator to be effective. It also places a duty on the employee to assure that the Plan Choice Administrator has received the second election before the employee leaves active employment, which renders nugatory Mr. Schwartz's suggestion that the MyFRS.com server may have been at fault. Even if the server malfunctioned, Ms. Wagner still had a responsibility to follow up once she failed to receive a confirmation statement from the Plan Choice Administrator.

53. Eligible employees may choose to move between plans "only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b)."

§ 121.4501(4)(f), Fla. Stat. Because Ms. Wagner terminated her FRS-qualifying employment on April 3, 2019, and is no longer earning service credit, she may no longer move between plans.

54. Having failed to establish that she completed her second election, Ms. Wagner must resort to her second argument, that the SBA is estopped from claiming that her second election failed. To establish equitable estoppel, the following elements must be shown: 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. Dep't of Rev. v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). "As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances." Id.

55. There was insufficient evidence to establish that the SBA's representatives, agents, or vendors made any statements that affirmatively confirmed receipt of Ms. Wagner's election to switch to the Investment Plan. At most, Mr. Kantrowitz accepted at face value Ms. Wagner's statement that she had made the change and then went on to advise her regarding Investment Plan options.

56. Ms. Wagner testified that she relied on the receipt of emails from EY planners to confirm her understanding that she had successfully enrolled in the Investment Plan, but was forced to acknowledge that those emails did not expressly confirm her enrollment. The emails themselves were not offered into evidence.

57. In summary, Ms. Wagner failed to establish either that she effectively elected to move her retirement account from the Pension Plan to the Investment Plan prior to her retirement from state employment or that the SBA was estopped from claiming that she did not successfully elect to move her retirement account into the Investment Plan.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the State Board of Administration enter a final order dismissing Petitioner's Florida Retirement System Investment Plan Petition for Hearing.

DONE AND ENTERED this 8th day of January, 2020, in  
Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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LAWRENCE P. STEVENSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of January, 2020.

ENDNOTE

<sup>1/</sup> There was the bare possibility, raised by Mr. Schwartz, that Ms. Wagner did everything necessary to make the second election and that the fault was with the MyFRS.com server. Even if this was the case, however, Ms. Wagner remained responsible for knowing that she should have received a confirmation of her election and for inquiring in a timely fashion as to why she had not received it.

The EY call summary log indicates that Ms. Wagner had made several telephonic inquiries prior to March 4, 2019, regarding switching to the Investment Plan. She "went over the 2nd election process and projections" with EY planner Matt Mitola on September 19, 2017. She discussed the second election process again on November 17, 2017, with EY planner Jeffrey Egberongbe. In his notes from a call with Ms. Wagner on September 26, 2018, EY planner David Scholten wrote that she was "changing from PP to IP" and that she wished to make the change "because she's receiving a high benefit from the US military." On November 30, 2018, Ms. Wagner spoke to EY planner Gladys Gonzalez about how to make the second election online. The second election obviously had been on Ms. Wagner's mind for quite some time prior to March 4, 2019. There appears no reason why she should not have understood how to complete the second election process.

COPIES FURNISHED:

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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.