

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT P. HATCHER, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. 93-5528  
 )  
 DEPARTMENT OF MANAGEMENT SERVICES, )  
 DIVISION OF RETIREMENT, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case at West Palm Beach, Florida, on November 18, 1993, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. Appearances for the parties at the hearing were as follows:

APPEARANCES

For Petitioner: Allan L. Hoffman, Esquire  
1610 Southern Boulevard  
West Palm Beach, Florida 33406

For Respondent: Jodi B. Jennings, Esquire  
Division of Retirement  
Cedars Executive Center, Building C  
2639 North Monroe Street  
Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUES

The issue in this case is whether the Petitioner, Mr. Robert P. Hatcher, is eligible to retire under the Florida Retirement System rather than under the Teachers' Retirement System.

PRELIMINARY STATEMENT

At the hearing, Petitioner testified on his own behalf and also presented the testimony of Carol Hatcher, Petitioner's wife; John Spriggs, Assistant Director of Personnel for the Palm Beach County School Board; and Bill Owens, Director of Human Resources for the Okeechobee County School Board. Petitioner introduced Exhibits 1 through 4 into evidence. Respondent presented the testimony of June Ferguson, Retirement Administrator, Bureau of Retirement Calculations. The parties stipulated to submit the deposition of Bill Owens into evidence, with the understanding that Mr. Owens would not be available for the hearing. The deposition of Mr. Owens was jointly submitted, and the exhibits attached thereto were introduced as Respondent's Exhibits 1 through 7. Respondent further introduced Exhibits 8 through 11. Respondent's exhibit marked as 12 for identification was not admitted into evidence.

Respondent requested official recognition of the case of Frances Kauffman and Linda Meadows v. Division of Retirement, DOAH Case Nos. 88-5048 and 88-5049, issued May 30, 1989, aff'd per curiam, 559 So.2d 585 (Fla. 2d DCA 1990), which request was granted. Petitioner requested that the Hearing Officer take notice of Chapter 121 of the Florida Statutes, which request was also granted. The parties did not order a transcript of the hearing.

At the conclusion of the hearing the parties were allowed until December 8, 1993, within which to file their proposed recommended orders. Both parties filed timely proposed recommended orders containing proposed findings of fact and conclusions of law. The proposals submitted by both parties have been carefully considered during the preparation of this Recommended Order. The Hearing Officer has found the proposed recommended order submitted by the Respondent to be particularly persuasive and the findings of fact and conclusions of law which follow have in large part been drawn from that document. Specific rulings on all findings of fact proposed by the parties are contained in the appendix hereto.

#### FINDINGS OF FACT

1. The Petitioner was employed by the Hillsborough County School Board on August 25, 1959, and was enrolled in the Teachers' Retirement System (TRS) at that time.
2. The Petitioner worked for the Palm Beach County School Board for 27 years, from 1966 through May 15, 1992.
3. The Petitioner worked with no breaks in service during all years in which the Legislature provided open enrollment periods for members of the TRS to transfer to the Florida Retirement System (FRS). The Petitioner was aware of the open enrollment periods, but declined all opportunities to transfer to the FRS. In this regard, the Petitioner specifically rejected membership in the FRS for the 1974 and 1978 open enrollment periods by signed ballots dated November 27, 1974, and November 2, 1978.
4. Petitioner voluntarily terminated his employment with the Palm Beach County School Board on May 15, 1992.
5. Following his termination with the Palm Beach County School Board, Petitioner began seeking employment with an agency that participated in the FRS in order to become eligible to transfer from the TRS to the FRS.
6. The Petitioner's first contact with the Okeechobee County School Board (OCSB) was approximately two years ago when Dr. Mary Gray, Petitioner's acquaintance, introduced Petitioner to Mr. Owens. The Petitioner approached Mr. Owens in an attempt to obtain employment with the OCSB.
7. The Petitioner sought employment with the OCSB for the sole purpose of obtaining entry into the FRS.

8. Mr. Owens recruited and interviewed the Petitioner for the position of Custodian I at the OCSB. At the time the Petitioner was recruited and interviewed, Mr. Owens knew the Petitioner wanted to work for the OCSB for the sole purpose of establishing retirement eligibility. The Petitioner requested that he be hired to work only long enough to establish retirement eligibility by working for a state employer that was a member of the Florida Retirement System. Prior to the Petitioner's request, the OCSB had never had such a request before.

9. The OCSB hired the Petitioner with the knowledge that he had health problems and believing that he would not be able to perform the duties of custodian for more than a short period of time.

10. By letter dated June 23, 1993, the OCSB approved the Petitioner's employment as Custodian I for the OCSB effective June 30, 1993. The Custodian I position was classified as a regular position, not a short-term position.

11. The Petitioner reported to work at the Okeechobee High School on June 30, 1993. He answered phones for several hours, performed some inventory work, then resigned that afternoon. The OCSB acknowledged receipt of the Petitioner's resignation letter, effective June 30, 1993, by letter dated August 2, 1993.

12. The Petitioner submitted an application for membership in the FRS to the OCSB on June 30, 1993.

13. Prior to his employment with the OCSB, the Petitioner investigated the possibility of transferring from the TRS to the FRS. The Petitioner was neither told nor did he receive any written communication by the DOR that he could transfer to the FRS based upon employment for one day.

14. By letter dated August 16, 1993, the Respondent notified the Petitioner that he could not obtain entry into the FRS because his employment was not bona fide, but that he could retire under the TRS.

15. If the Petitioner were to retire under the TRS, his Option 1 monthly benefit payment would be \$2,571.64; his Option 3 monthly benefit payment would be \$2,396.25. Under the FRS, Petitioner's Option 1 monthly benefit payment would be \$3,054.91; his Option 3 monthly benefit payment would be \$2,771.20.

#### CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this cause, pursuant to Section 120.57(1), Florida Statutes.

17. Chapter 121, Florida Statutes, established the Florida Retirement System in 1970.

18. The Teachers' Retirement System was established pursuant to Chapter 238, Florida Statutes. The administration of the Teachers' Retirement System was consolidated with the administration of the Florida Retirement System in 1970. Section 121.011(2)(b), Florida Statutes.

19. The Division of Retirement, pursuant to Section 121.031(1), Florida Statutes, is authorized to implement rules for the effective and efficient administration of the system. An agency's interpretation of its own rule is entitled to great weight. See *Franklin Ambulance Service v. Department of Health and Rehabilitative Services*, 450 So.2d 580 (Fla. 1st DCA, 1984).

20. Rule 60S-1.002, Florida Administrative Code, states:

The Division shall deny membership to any officer or employee who does not meet the requirements for membership in the Florida Retirement System as set forth in Chapter 121, Florida Statutes, and these rules.

21. Two methods of transfer from the TRS to the FRS have been available under the law. The first method provided six statutory open enrollment periods between 1970 and 1991. Section 121.051(2)(a), Florida Statutes, and Rule 60S-1.004(2)(a), Florida Administrative Code. The second method requires employees to terminate employment and be subsequently reemployed. See Section 121.051(1)(c), Florida Statutes, and Rule 60S-6.001(60), Florida Administrative Code.

22. Petitioner chose not to transfer from the TRS to the FRS during the six open enrollment periods provided by the Legislature between 1970 and 1991. Petitioner is attempting to transfer now under the termination and reemployment provisions because it is to his economic advantage to do so; if Petitioner were to retire under the FRS, as opposed to retiring under the TRS, his monthly benefit payment under Option 1 would increase by \$483.27; his monthly benefit payment under Option 3 would increase by \$374.95.

23. In order to transfer under the reemployment provisions, the Petitioner must show that his termination and subsequent reemployment comported with the requirements of the law. In this regard, Section 121.051(1)(c)1., Florida Statutes, provides:

After June 30, 1983, a member of an existing system who is reemployed after terminating his employment shall have at the time of reemployment the option of selecting to remain in the existing retirement system or to transfer to the Florida Retirement System. Failure to submit such selection in writing to the Division of Retirement within 6 months of reemployment shall result in compulsory membership in the Florida Retirement System.

24. And, Section 121.051(1)(c)2., Florida Statutes, provides:

After June 30, 1988, the provisions of subparagraph 1. shall not apply to a member of an existing system who is reemployed within 12 months after terminating his employment. Such member shall continue to have membership in the existing system upon reemployment and shall not be permitted to become a member of the Florida Retirement System, except by transferring to that system as provided in ss. 121.052 and 121.055.

25. The facts in this case establish that the Petitioner had a bona fide termination from the Palm Beach County School Board and that he was not employed by an FRS employer for one year following that termination. However, the facts in this case surrounding Petitioner's subsequent employment with the OCSB also establish that such employment was something less than genuine employment. Rather, the Petitioner's purported employment with the OCSB was more in the nature of a ruse or sham to achieve a goal other than genuine gainful employment. The purported employment relationship between Petitioner and the OCSB was, at best, feigned. It is clear from the greater weight of the evidence that neither the Petitioner nor the OCSB intended to enter into a regular employer/employee relationship; the sole purpose of their brief relationship being to provide a conduit through which the Petitioner could obtain access to the FRS.

26. An analogous issue was litigated in *Frances Kauffman and Linda Meadows v. Division of Retirement*, DOAH Case Nos. 88-5048 and 88-5049, issued May 30, 1989, aff'd per curiam, 559 So.2d 585 (Fla. 2d DCA 1990). In that case, the issue was whether Kauffman and Meadows, members of the TRS, could transfer from the TRS to the FRS. Resolution of that issue depended upon whether the members had had bona fide terminations for purposes of Chapter 121 of the Florida Statutes. The appellate court affirmed per curiam DOR's denial of Petitioners' applications to transfer to the FRS. The DOR's decision in Kauffman and Meadows turned upon the fact that the alleged terminations were done exclusively for Petitioners to transfer from one retirement system to another. Petitioners worked closely with the school board administration to bring their terminations within the literal language of the rules of the FRS, but the terminations were not bona fide for retirement purposes.

27. The issue in the present case is analogous and turns on whether Petitioner's reemployment was bona fide for retirement purposes. The term "bona fide" is defined in Black's Law Dictionary, Sixth Edition, 1990, at page 177, as follows:

In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust or confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned.

28. The DOR has no rule which states a specific period of time a member must work for an FRS employer in order to transfer to the FRS. However, implicit in a common sense interpretation of the requirement for reemployment is the notion that the reemployment must be bona fide. Just as the absence of bona fide terminations were a bar to the relief sought in the Kauffman and Meadows case, the absence of a bona fide reemployment is a bar to the relief the Petitioner seeks here.

29. The Petitioner argues that this case is controlled by the decision in *Steinhardt v. State of Florida, Division of Retirement*, 318 So.2d 562 (Fla. 2d DCA 1975). Although the legal issues presented in that case are somewhat similar to the ones presented here, the facts before the court in the Steinhardt case are so different from the facts in this case as to render it inapposite.

RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that the Division of Retirement issue a final order concluding that the Petitioner is not eligible for participation in the Florida Retirement System and denying Petitioner's application for transfer from the Teachers' Retirement System to the Florida Retirement System.

DONE AND ENTERED this 6th day of January 1994 in Tallahassee, Leon County, Florida.

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MICHAEL M. PARRISH  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of January 1994.

APPENDIX

The following are my specific rulings on all proposed findings of fact submitted by all parties.

Findings submitted by Petitioner:

Paragraphs a and b: Accepted in substance.

Paragraph c: Accepted in part and rejected in part; accepted that the Petitioner obtained the described employment, but rejected that the employment was bona fide.

Paragraph d: Accepted in part and rejected in part. The conclusion that the one day was sufficient to qualify the Petitioner for transfer to FRS is rejected as incorrect and as not warranted by the evidence; the remainder of the facts in this paragraph are accepted.

Paragraph e: Rejected as constituting a conclusion of law, rather than a proposed finding of fact; a conclusion which is, in any event, not warranted by the evidence in this case.

Paragraph f: Rejected as constituting a conclusion of law, rather than a proposed finding of fact; a conclusion which is, in any event, not warranted by the evidence in this case.

Findings submitted by Respondent:

All of the proposed findings of fact submitted by the Respondent have been accepted in whole or in substance in the Findings of Fact made in this Recommended Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.