STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

vs.

CASE NO. 93-5937RX

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent.

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Hearing Officer, Joyous D. Parrish, held a formal hearing in the above-styled case on January 19, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Sheryl G. Wood
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For Respondent: Stanley M. Danek, Division Attorney
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STATEMENT OF THE ISSUES

Petitioner's challenge to determine the invalidity of Rule 60S-6.001(6), (11), and (16), Florida Administrative Code, as an invalid exercise of delegated legislative authority as alleged in the petition filed October 15, 1993.

PRELIMINARY STATEMENT

This case began when the South Florida Water Management District (District) filed a petition to determine the invalidity of an agency rule of the Department of Management Services, Division of Retirement (Retirement). More specifically, the District alleged that it is substantially affected by the challenged rule, Rule 60S-6.001, Florida Administrative Code [subparts (6), (11), and (16)], as are all of its former employees who have retired, and its current employees who will retire, who have based or will base their average final compensation relying on contributions made during the period July 1, 1989 through February 19, 1993. Because retirement benefits will not be calculated to include those

amounts designated as lump sum performance payments, and the District made contributions based upon such amounts, the District claims it is adversely affected by the rule.

Further, the District is affected because its employees anticipated that the disputed payments were considered compensation. The District alleged that Retirement, in adopting the cited rule and its interpretation of it, has exceeded its authority because the requirements of the rule are not appropriate to the ends specified by the legislative act and the legislative history. And, that the requirements of the rule are not reasonably related to the purpose of the enabling legislation.

This rule challenge case was consolidated with a prior Section 120.57 case involving the same parties and similar issues of law and fact (DOAH case no. 93-3377) on November 2, 1993. Issues related to DOAH case no. 93-3377 are addressed in a separate recommended order.

At the hearing, the District presented the testimony of the following witnesses: Richard Stelling, the District's department director for administration; Lewis M. Dennard, an assistant director with the Division of Retirement; Kathy Smith, retirement administrator in the bureau of enrollment and contributions; Sarabeth Snuggs, chief of the bureau of enrollment and contributions; and Mary Beth Brewer, a research associate with the Division of Retirement responsible for legislation and rule analysis and drafting. The District's exhibits numbered 1 through 8, 10, 11, 16, 17, 18, 20, 24, and 25 were admitted into evidence. Kathy Smith and Mary Beth Brewer also testified on behalf of Retirement as did Lawrence J. Gibney, a state retirement actuary. Its exhibits numbered 3, 4, 5, 7, and 9 were admitted into evidence. Official recognition has been taken of the matters identified in the parties' joint prehearing stipulation (Petitioner's exhibit 25) as Respondent's exhibits 1, 2, and 6.

The transcript of the proceedings was filed on January 26, 1994. The parties filed proposed recommended orders which have been considered in the preparation of this order. Specific rulings on the proposed findings of fact are included in the appendix at the conclusion of this order.

FINDINGS OF FACT

1. The District is a public corporation in the State of Florida existing by virtue of Chapter 25270, Laws of Florida, 1949, and operating pursuant to Chapter 373, Florida Statutes, and Chapter 40E, Florida Administrative Code, as a water management district.

2. Retirement is an agency of the State of Florida existing by virtue of Section 20.22(2)(i), Florida Statutes, and operating pursuant to Chapter 121, Florida Statutes, and Chapter 60S, Florida Administrative Code, as the retirement and pension administrator for the Florida Retirement System (FRS).

3. The District is an employer and its employees are eligible to be members of the FRS.

4. The District is a member of the FRS pursuant to Section 121.051(2)(b)1., Florida Statutes, and, as such, makes regular contributions (based upon its employees' total compensation) to Retirement.

5. Until February, 1993, and for the period of time at issue in this case, the District provided its employees with a total compensation package which included: one performance appraisal with a base pay increase depending on merit, and one interim performance appraisal with a lump sum performance payment also depending on merit.

6. The District's lump sum performance payments were funded on a sound actuarial basis.

7. The District's performance appraisals are based on merit and the procedure for both base pay and lump sum performance appraisals are identical.

8. The District's lump sum performance payments are paid according to a formal written policy which was adopted as a rule and applies to all eligible employees equally. In order to receive the lump sum amount, the employee must requalify for it each year based on merit.

9. Eligibility for the District's lump sum performance payments commences during the first year an employee works at the District.

10. The District's lump sum performance payments are paid at least annually to all employees who qualify for it. Not all District employees qualify for the payment. Less than one percent of the District's employees do not receive the lump sum performance payment.

11. The District has made contributions to Retirement based upon the total compensation paid to its employees, including the lump sum performance payments. However, the District did not pay contributions for the months of February, 1990, through April, 1990; this cumulative amount was paid in lump sum to Retirement in May, 1990.

12. Retirement accepted the contributions, including the lump sum performance payments, through February, 1993, when the plan was terminated and contributions ceased.

13. The District was aware that Retirement had a dispute regarding the reporting of lump sum performance payments in June, 1992, as the result of a calculation of a District employee's retirement benefit.

14. In May, 1993, after receiving notice of the disallowance, the District timely challenged Retirement's decision to exclude the lump sum performance payments from average final compensation.

15. As a result of changes in the law in 1984 and 1989, Retirement promulgated rules to advise all FRS members of how retirement benefits would be calculated. The rules and subsequent memoranda dealt with issues of how to define "compensation" and "bonuses" so that all agencies would have the proper method to report compensation and make appropriate contributions.

16. Each memorandum and the rules consistently stated the same criteria for determining whether or not a payment should be considered a "bonus."

17. Not at issue in this case are two of the four criteria noted in memorandum 90-189. The only criteria at issue are the provisions that the payments, once commenced, are paid for as long as the employee continues employment, and that the payments are paid at least annually. Since the District lump sum performance payment was tied to the employee's merit

performance, there is no assurance that the payment will be paid as long as the employee continues employment, and, therefore, that the payment will made at least annually.

18. Retirement uniformly and consistently applied the rule dealing with "bonuses" to all agencies where such issue arose.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

20. Section 120.56, Florida Statutes, provides, in pertinent part:

> (1) Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

21. Section 120.52(8), Florida Statutes, provides:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
>
> (e) The rule is arbitrary or capricious.

22. As the one who attacks the rule, the Petitioner has the burden to show that the agency adopting the rule has exceeded its authority, that the requirements of the rule are not appropriate to the ends specified in the legislative act, that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation, or that the rule requirements are arbitrary or capricious. Agrico Chemical Co. v. State Department of Environmental Protection, 365 So.2d 759, 763 (Fla. 1st DCA 1978) cert. den. 376 So.2d 74 (Fla. 1979) The challenger's burden "is a stringent one indeed." Agrico, supra.

23. Where, as here, the agency's interpretation of a statute has been promulgated in rulemaking proceedings, the validity of a challenged rule must be upheld if it is reasonably related to the purpose of the legislation

interpretated and it is not arbitrary and capricious. Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515, 517 (Fla. 1st DCA 1975).

> Moreover, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations. Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983) (Ervin, C.J., dissenting); Department of Administration v. Nelson, 424 So.2d 852 (Fla. 1st DCA 1982); Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So.2d 238 (Fla. 1st DCA 1981). (Emphasis in text)

Durrani, supra, at 517.

24. Special deference is owed to "an administrative agency's exercise of delegated discretion in respect to technical matters requiring substantial expertise." Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So.2d 209 (Fla. 1st DCA 1986). In this case, the Division of Retirement developed its rule to assure the effective and efficient administration of the FRS relying on its expertise as the entity charged by law to be the administrator of that system.

25. Section 121.021(24), Florida Statutes, provides:

> "Average final compensation" means the average of the 5 highest fiscal years of compensation for creditable service prior to retirement, termination, or death. For in-line-of-duty disability benefits, if less than 5 years of creditable service have been completed, the term "average final compensation" means the average annual compensation of the total number of years of creditable service. Each year used in the calculation of average final compensation shall commence on July 1. The payment for accumulated sick leave, accumulated annual leave in excess of 500 hours, and bonuses, whether paid as salary or otherwise, shall not be used in the calculation of the average final compensation. (Emphasis added)

26. Section 121.031, Florida Statutes, provides, in part:

> (1) The Department of Management Services, through the Division of Retirement, shall make such rules as are necessary for the effective and efficient administration of this system.

27. Rule 60S-6.001(6), (11), and (16), Florida Administrative Code, provides:

> (6) AVERAGE FINAL COMPENSATION--Means the average of the 5 highest fiscal years of compensation for creditable service prior to retirement, termination or death calculated in accordance with 60S-4.004(1).
>
> (a) The average final compensation shall include:
>
> 1. Accumulated annual leave payments as defined in 60S-6.001(1), not to exceed 500 hours.
>
> 2. All payments defined as compensation in 60S-6.001(16).
>
> (b) The average final compensation shall not include:
>
> 1. Compensation paid to professional persons for special or particular services.
>
> 2. Salary incentives paid to law enforcement personnel, firefighters or correctional officers, as provided in Section 943.22, f.s. and Section 633.382, F.S.
>
> 3. Payments made due to retirement or termination for accumulated sick leave as defined in 60S-6.001(3).
>
> 4. Payments for annual leave in excess of 500 hours.
>
> 5. Bonuses as defined in 60S-6.001(11).
>
> 6. Third party payments made on and after July 1, 1990.
>
> 7. Automobile allowances.
>
> 8. Housing allowances.
>
> * * *
>
> (11) BONUS--Means a payment made in addition to an employee's regular or overtime salary that is usually non-recurring, does not increase the employee's base rate of pay and includes no commitment for payment in a subsequent year. Such payments are not considered compensation and, effective July 1, 1989, shall not be reported to the Division as salary, and retirement contributions shall not be made on such payments.
>
> (a) A payment is a bonus if any of the following apply:
>
> 1. The payments are not paid according to a formal written policy applying to all eligible employees equally, or
>
> 2. The payments commence later than the eleventh year of employment, or
>
> 3. The payments are not based on permanent eligibility, or
>
> 4. The payments are paid less than annually.

(b) Bonuses shall include but not be limited to the following:

1. Exit bonus or severance pay;

2. Longevity payments in conformance with the provisions of 60S-6.001(11)(a) above;

3. Salary increases granted due to an employee's agreement to retire, including increases paid over several months or years prior to retirement;

4. Payments for accumulated overtime or compensatory time, reserve time, or holiday time worked, if not made within 11 months of the month in which the work was performed;

5. Quality Instruction Incentives Program (QUIIP) Payments;

6. Lump sum payments in recognition of employees' accomplishments.

* * *

(16) COMPENSATION OR GROSS COMPENSATION--

(a) Compensation means the total gross monthly salary paid a member by his employer for work performed arising from that employment, including:

1. Overtime payments, except as provided in 60S-6.001(11)(b)4.;

2. Accumulated annual leave payments, as defined in Rule 60S-6.001(1);

3. Payments in addition to the employee's base rate of pay if all the following apply:

a. The payments are paid according to a formal written policy that applies to all eligible employees equally, and

b. The policy provides that payments shall commence not later than the eleventh year of employment, and

c. The payments are paid for as long as the employee continues his employment, and

d. The payments are paid at least annually;

4. Amounts withheld for tax-sheltered annuities or deferred compensation programs, or any other type of salary reduction plan authorized under the Internal Revenue Code;

(b) Compensation shall not include any bonuses or other payments prohibited from inclusion in the member's average final compensation as defined in 60S-6.001(6)(b).

28. It is not disputed that "bonuses" may not be included in "average final compensation." The statute clearly excludes such payments for retirement purposes. The statute, however, does not define "bonus." The agency's definition, as set forth in the rule, is reasonably related to the enabling legislation and is not arbitrary and capricious. The legislation enacted in

1989 corrected a conflict that existed that purported to allow retirement contributions on compensation (including bonuses) but did not allow bonus amounts to be included in the average final compensation computation.

29. Effective July 1, 1989, the law no longer contained the confusing language and Retirement, acting within the powers, functions and duties delegated by the legislature, continued to uniformly exclude bonuses from the average final compensation. To do so, Retirement developed criteria to explain to agencies when a payment should be considered a bonus. Those criteria are set forth in the rule and were discussed in memoranda issued by the agency.

30. In this case, the lump sum performance payment was based upon the merit of the employee receiving such payment. It was not paid for as long as the employee was employed but only as long as the employee qualified for the payment. Due to the reasonableness of the interpretation given by Retirement, the agency's construction of what "bonus" means is persuasive. Further, the agency's interpretations promote effective and efficient administration of the FRS.

ORDER

Based on the foregoing, it is, hereby,

ORDERED:

That the Petitioner's challenge to Rule 60S-6.001(6), (11), (16), Florida Administrative Code, is dismissed.

DONE AND ENTERED this 19th day of April, 1994, in Tallahassee, Leon County, Florida.

JOYOUS D. PARRISH
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 1994.

APPENDIX TO FINAL ORDER, CASE NO. 93-5937RX

Rulings on the proposed findings of fact submitted by the Petitioner:

1. Paragraphs 1 through 7, and 11 are accepted.
2. Paragraph 8 is rejected as contrary to the weight of the credible evidence or a conclusion of law.
3. Paragraph 9 is rejected as contrary to the weight of the credible evidence or a conclusion of law.

4. Paragraph 10 is rejected as contrary to the weight of the credible evidence.
5. Paragraph 12 is accepted to the extent that it addresses one of the purposes of the amendment; otherwise rejected as contrary to the weight of the credible evidence.
6. Paragraph 13 is rejected as contrary to the weight of the credible evidence.
7. Paragraph 14 is accepted to the extent that it addresses one of the purposes of the amendment; otherwise rejected as contrary to the weight of the credible evidence.

Rulings on the proposed findings of fact submitted by the Respondent:

1. Paragraphs 1 through 3, 7 through 11, 13 through 23, and 25 through 28 are accepted.
2. With the deletion of the last sentence which is rejected as a conclusion of law, paragraph 4 is accepted.
3. With the deletion of the last sentence which is rejected as a conclusion of law, paragraph 5 is accepted.
4. With the deletion of the last sentence which is rejected as a conclusion of law, paragraph 6 is accepted.
5. With the deletion of the third sentence which is rejected as irrelevant, paragraph 12 is accepted.
6. Paragraph 24 is rejected as irrelevant.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.