

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RANCY F. SNYDER,)
)
 Petitioner,)
)
 vs.) CASE NO. 93-7163RU
)
 DEPARTMENT OF MANAGEMENT SERVICES,)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on January 28, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Rancy F. Snyder, pro se
1318 Northwest 11th Place
Fort Lauderdale, Florida 33311

For Respondent: Larry D. Scott, Esquire
Assistant Division Attorney
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUES

The issues raised by the petition filed in this proceeding, as amended, is whether the Respondent's Memorandum No. 82-73 is a rule and an invalid exercise of delegated legislative authority. To reach those issues, it must be determined whether Petitioner has standing to bring this action.

PRELIMINARY STATEMENT

On January 4, 1994, Petitioner filed a "Petition" alleging that Memorandum No. 82-73 issued by the Respondent is an unpromulgated rule that is an invalid exercise of delegated legislative authority. On January 10, 1994, Petitioner filed a "Motion for Summary Final Order", which was denied. On January 19, 1994, Respondent filed a "Motion to Dismiss", which was denied. Respondent filed an answer to the petition which raised as an affirmative defense the alleged failure of the Petitioner to assert his standing to bring this rule challenge. On January 28, 1994, immediately prior to the start of the formal hearing, the Petitioner filed, without objection from Respondent, an "Amendment to Petition". This "Amendment to Petition" was accepted by the undersigned.

At the formal hearing, Petitioner testified on his own behalf and presented the additional testimony of Lawrence J. Gibney, the actuary for the State Retirement System. Respondent presented the additional testimony of Sarabeth Snuggs, the Chief of Respondent's Bureau of Enrollment and Contributions. Petitioner presented five exhibits, three of which were accepted into evidence and two of which were rejected. In addition, a copy of the Florida Retirement System Handbook was accepted as a Hearing Officer exhibit. Official recognition was taken of Rule 60S-2.006(2), Florida Administrative Code.

No transcript of the proceedings has been filed. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the hearing. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the close of the hearing. Rule 60Q-2.031, Florida Administrative Code. Rulings on the parties' proposed findings of fact may be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an employee of Broward County, Florida. Broward County is an employer in the Florida Retirement System. As a result of his employment with Broward County, Petitioner is a member of the Florida Retirement System (FRS).

2. The Division of Retirement is the administrative agency for the FRS.

3. The FRS is a trust that is qualified under Section 401(a) of the Internal Revenue Code as a defined benefit plan.

4. The FRS is noncontributory for individual members. Contributions are made by participating FRS employers.

5. Respondent's Bureau of Enrollment and Contributions receives reports of contributions and service credit from the various participating FRS employers. The Bureau of Enrollment and Contributions reviews the information reported to determine if the reporting employer is paying the correct amount of contributions and reporting the correct service credit for the individual members of the FRS. The information provided to the Bureau of Enrollment and Contributions does not include the day-to-day employment responsibilities of the individual members of the FRS.

6. The leave status of an individual member of the FRS is irrelevant to the actuarial soundness of the FRS Trust Fund if the employing agency reports the individual member as one of its employees and the employing agency pays its contributions into the FRS Trust Fund for the individual.

7. On February 18, 1981, Respondent issued Memorandum No. 81-40, on the subject of "Membership in the Florida Retirement System for Employees on Leaves of Absence", which provides, in pertinent part, as follows:

Recently, a question arose as to the Florida Retirement System (FRS) status of employees who are granted leaves of absence to work with the employers who are not members of the Florida Retirement System. The specific inquiry was whether an FRS employer may continue to report such an employee on its payroll with the current employer reimbursing the FRS employer for all expenses

including retirement contributions. The answer to this question may be found in Section 121.021(10) and (11), Florida Statutes.

As stated in Section 121.021(11), Florida Statutes, "officer or employee" for retirement purposes is defined 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." Section 121.021(10) defines "employer" as, "... any agency, branch, department, institution, university, institution of higher education, or board of the state, or any county agency, branch department, board, district school board, or special district of the state, or any city of the state which participates in the system for the benefit of its employees."

Unless the employer with whom the employee is working during the leave of absence from the FRS employer satisfies the definition of "employer" in Section 121.021(10), Florida Statutes, and unless the employee is performing work in a regularly established position as specified in Section 121.021(11), Florida Statutes, it would be improper (not lawful) for the FRS employer to continue to report the employee on the monthly payroll submitted to the Division of Retirement.

Notwithstanding the foregoing, such employee may still receive retirement credit for the period of the leave of absence. Under the provisions of Section 121.121, Florida Statutes, ("Future Service to Include Leaves of Absence") and FRS Rule 22B-2.06 ("Credit for Leaves of Absence after November 30, 1970"), the employee may purchase retirement credit for the period of the leave of absence, provided the conditions stated in the retirement law are satisfied. Also, nothing in the retirement law would prohibit or in any way prevent the non-FRS employer with whom the employee is working while on leave of absence from his job with the FRS employer from compensating or reimbursing the employee for the cost of purchasing as creditable service the period of the leave of absence upon his or her return to covered employment with the FRS employer. . . .

8. On October 13, 1982, Memorandum No. 82-73, addressed to all Florida District School Boards, was issued by Respondent as an "Addendum to Memorandum No. 81-40 Regarding Florida Retirement System (FRS) Membership for Employees During Leaves-of-Absences". Memorandum No. 82-73 contains the alleged unpromulgated rule that is being challenged by Petitioner, and provides, in pertinent part, as follows:

Memorandum No. 81-40 dated February 18, 1981 . . . was issued in response to an inquiry as to whether an FRS employer may continue to report an employee for retirement who is granted a leave-of-absence to work for a non-FRS employer. In that case, the FRS employer

was being reimbursed for the employee's salary expenses by the non-FRS employer. Our advice was that it would be improper to continue reporting such person for retirement credit since the employee was not performing work in a regularly established position. However, we did point out that such leave-of-absence could be claimed later as creditable service by the employee under certain conditions.

Upon reflection, it appears that our earlier advice was not entirely correct. Therefore, the following new instructions are issued to supersede those contained in Memorandum No. 81-40:

Anytime an employee of an FRS agency is granted a leave-or-absence and is continued in pay status by the FRS agency and is reported by that agency for wages on the IRS W-2 Form, the employee shall continue to be reported for retirement credit while on the leave-of-absence with pay, even if the employee's salary expenses are reimbursed to the FRS agency by the non-FRS entity. See FRS Rule 22B-2.06(2), F.A.C. . . .

9. Rule 22B-2.06(2), Florida Administrative Code, now numbered Rule 60S-2.006(2), Florida Administrative Code, provides, in pertinent part, as follows:

(2) If a member (an individual member of FRS) is granted a leave of absence with full pay at the rate he was being paid prior to the leave of absence, and the compensation received during such period is paid in accordance with 60S-1.004(a) or (b), the member shall not be considered on leave of absence for retirement purposes and the contributions required by Section (sic) 60S-3.003 shall continue to be made and he shall continue to receive full retirement credit for the period he is on leave of absence pay.

10. Rule 60S-2.006(2), Florida Administrative Code, is not being challenged in this proceeding.

11. Petitioner is a vested member of the FRS with over 17 years of creditable service. Petitioner paid to the FRS the sum of \$2,746.57, on February 27, 1990, in order to purchase credit for four years of military service.

12. Petitioner failed to establish that the policy reflected by Memorandum 82-73 will affect any recognizable interest that he might have. There will be no actuarial impact on the FRS and no diminution in value of the FRS as a result of this policy. Although Petitioner asserts that the policy may result in a disqualification of the FRS plan by the Internal Revenue Service, he presented no evidence, other than his speculation, in support of that assertion.

13. The policy statement contained in Memorandum 82-73 was addressed to all Florida District School Boards and it is not specifically incorporated in the FRS Handbook that is made available to members of the FRS. From those facts, Petitioner concludes that the FRS breached a fiduciary duty it had to its members by failing to notify all members of the policy. Even if Petitioner's conclusion is accepted, Petitioner failed to establish that this alleged breach of a fiduciary duty affected any recognizable interest that he might have.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Sections 120.535, 120.56, and 120.57(1), Florida Statutes.

15. The term "invalid exercise of delegated legislative authority" and the term "rule" are defined by Section 120.52(8) and (16), Florida Statutes, respectively.

16. Section 120.535, Florida Statutes, provides, in pertinent part:

(1) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule under s. 120.52(16) shall be adopted by the rulemaking procedure provided by s. 120.54 as soon as feasible and practicable. . . .

(2)(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates subsection (1).

17. Section 120.56(1), Florida Statutes, provides, in pertinent part, as follows:

(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.

18. In this proceeding, it is not necessary to reach the issues of whether the statement contained in Memorandum 82-73 meets the statutory definition of a rule or whether the statement is an invalid exercise of delegated legislative authority because the Petitioner does not have the standing to bring this action. Petitioner has not established that he has been affected by Memorandum 82-73 in any manner.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the subject rule challenge be, and the same hereby is, DENIED.

DONE AND ORDERED this 14th day of March 1994 in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
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 14th day of March 1994.

ENDNOTE

1/ The portion of the memorandum that constitutes the alleged unpromulgated rule has been underlined for emphasis.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-7163RU

The following rulings are made on the proposed findings of fact submitted by the Petitioner:

1. The proposed findings of fact in paragraph 1 are addressed as preliminary matters, but are rejected as being unnecessary as findings of fact.
2. The proposed findings of fact in paragraphs 2, 3, 4, 5, and 6 are adopted in material part by the Final Order.
3. The proposed findings of fact in paragraphs 7, 8, 9, 10, and 11 are rejected as being the recitation of testimony. These proposed findings are unnecessary to the conclusions reached.

The proposed findings of fact submitted by the Respondent are adopted in material part by the Final Order.

COPIES FURNISHED:

Rancy F. Snyder
1318 Northwest 11th Place
Fort Lauderdale, Florida 33311

Larry D. Scott, Esquire
Assistant Division Attorney
Cedars Executive Center
Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

A. J. McMullian, III, Director
Division of Retirement
Cedars Executive Center
2639 North Monroe Street
Tallahassee, Florida 32399-1560

Paul A. Rowell, General Counsel
Department of Management Services
312 Knight Building
2737 Centerview Drive
Tallahassee, Florida 32399-0950

William H. Lindner, Secretary
Department of Management Services
Knight Building, Suite 307
Koger Executive Center
2737 Centerview Drive
Tallahassee, Florida 32399-0950

Liz Cloud, Chief
Bureau of Administrative Code
The Elliot Building
Tallahassee, Florida 32399-0250

Carroll Webb, Executive Director
Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

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.