

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHILIP J. COBB,)
)
 Petitioner,)
)
 vs.) CASE NO. 96-1450
)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A hearing was held in this case in Clearwater, Florida, on September 5, 1996, before Carolyn S. Holifield, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert F. McKee, Esquire
Kelly and McKee, P.A.
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Tampa, Florida 33675-0638

For Respondent: Stanley M. Danek, Esquire
Division of Retirement
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STATEMENT OF THE ISSUE

Whether Petitioner may purchase retirement credit for the period of time from his suspension date to his reinstatement date as creditable service in the Florida Retirement Service.

PRELIMINARY STATEMENT

By letter dated March 5, 1996, Respondent, Division of Retirement, notified Petitioner, Philip J. Cobb, that his request for reinstatement in the Florida Retirement System was being denied. Further, Petitioner was denied the right to purchase, as time for creditable service, the period of time between his suspension and reinstatement. The denial was based on the following determinations made by Respondent: (1) no bona fide suspension and reinstatement without compensation had occurred, and (2) the sole purpose of the purported suspension and reinstatement was to allow Petitioner to purchase the necessary amount of time in the Florida Retirement System to vest and become eligible to receive retirement benefits. Petitioner challenged the denial and timely requested a formal hearing. On or about March 25, 1996, the matter was forwarded to the Division of Administrative Hearings and this proceeding followed.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of William Faulkner, a Senior Assistant County Attorney with Pinellas County. Respondent presented the testimony of Larry Hunnicutt, Retirement Administrator, Bureau of Retirement Calculations, Division of Retirement. Petitioner and Respondent offered and had admitted into evidence sixteen joint exhibits. One late-filed exhibit offered by Respondent, a copy of rules applicable in this case, was also admitted into evidence. The transcript was filed on September 12, 1996. Both parties timely filed Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Petitioner, Philip J. Cobb, was employed by the Pinellas County Board of County Commissioners (County) in May 1985, as a property manager. As a permanent employee of the County, Petitioner was enrolled as a member of the regular class of the Florida Retirement System (FRS). In order to vest and be eligible to receive retirement benefits under state law, Petitioner needed to complete ten years of creditable service.

2. Petitioner continued to work for the County until he was terminated on August 1, 1992. The reason Respondent terminated Petitioner was because he allegedly failed to support his supervisor and was insubordinate.

3. At the time Petitioner's employment with the County was terminated, he had earned approximately seven years and two months of creditable service and was thirty-four months short of vesting in the FRS.

4. Petitioner challenged his termination by instituting legal proceedings against the County, alleging that his termination was illegally motivated by age discrimination. The lawsuit, Case No. 94-1054-CIV-T-21C, was filed in June 1994, in the U. S. District Court for the Middle District of Florida, Tampa Division, and sought Petitioner's reinstatement to his former position. At the time of his termination, Petitioner was sixty-seven years old, and at the time of this proceeding he was one day shy of being seventy-three years old.

5. After discovery had been undertaken and prior to the case being set for trial, the Court ordered the parties into mediation. During settlement negotiations, the parties specifically discussed the importance of Petitioner purchasing credit in the FRS as necessary for vesting.

6. In light of this consideration, before of the Agreement was finalized, counsel for Petitioner contacted Respondent regarding the cost of Petitioner's purchasing the service credit required to vest in the FRS. In a letter dated November 30, 1995, from Maurice Helms, Chief, Bureau of Retirement Calculations, to counsel for Petitioner, Mr. Helms noted that Petitioner had only 7.25 years of creditable service in the FRS, not the ten years required to vest. Nevertheless, the letter stated, "If [Petitioner] were eligible to purchase the service credit required to vest and then retire, we estimate the cost would be \$30,273.69". This projected amount was considered in negotiations and was represented in the settlement amount.

7. In January 1996, as a result of the mediation, Petitioner and the County entered into a Settlement Agreement, Release and Disclaimer (Agreement), in exchange for Petitioner's dismissing his lawsuit. Paragraph Two of the Agreement provides that the County would make a lump sum payment distribution of \$64,000.00 to Petitioner. Of the total amount, \$34,000.00 was designated as

back pay and liquidated damages. The remaining \$30,00.00 was for "fees and other costs associated with the above-captioned case." Further, the County agreed to rescind Petitioner's termination, convert the termination to a suspension without pay, and reinstate Petitioner to his former position. Finally, the Agreement included a provision that Petitioner would resign from that position on the date he was reinstated.

8. Paragraph Three of the Agreement provides that the \$64,000.00 is not a "mere recital, but is the cash consideration for this Agreement and the full and final release affected thereby."

9. Notwithstanding the provision in the Agreement that the \$34,000.00 is for back pay and liquidated damages, Paragraph Three of the Agreement expressly states that the settlement amount paid by the County and accepted by Petitioner was not to compensate Petitioner for back wages, benefits, or other forms of compensation. Rather, the settlement amount was part of the compromise to settle and compromise the matter. In this regard, Paragraph Three of the Agreement provides in pertinent part the following:

...The parties hereto recognize that substantial questions of law and of fact exist as to any possible claim or claims by Cobb for any compensation, back pay, forms of compensation, benefits or damages, liquidated/compensatory or otherwise, interest and any other claim for relief; therefore, [this settlement is being made purely on a compromise basis in order to avoid further trouble, litigation and expense, and the settlement amount is considered to be a part of the compromise, paid by Defendant and accepted by Cobb not to compensate Cobb for back wages, benefits or other forms of compensation, but to settle and compromise the matter relative to the trouble, interference, damage, and expense which would have been and would otherwise continue to be claimed and/or associated therewith]. [Emphasis supplied.]

10. Paragraph Eleven of the Agreement addresses changes in Petitioner's employment status and delineates the method by which the County would accomplish these changes. That paragraph provides the following:

11. The parties hereto further agree that, without any waiver of the sufficiency of the grounds and cause for Cobb's termination, and [in settlement of all claims of Cobb as set forth hereinabove, a personnel action form will be prepared changing Cobb's termination action on July 31, 1992, to a suspension without pay through the date this Agreement is signed. Additionally, a personnel action will be issued reinstating Cobb to paid status effective the date this Agreement is signed.] Cobb agrees to sign and submit the attached letter of

resignation, effective the date he signs this Agreement, and further agrees to waive any pay and/or benefits to which he may be entitled from Defendant since July 31, 1992. [Emphasis supplied.]

11. After the Agreement was executed and pursuant to the terms thereof, the County prepared and processed the required paperwork which effectively rescinded Petitioner's termination, changed the termination to a suspension without pay, and reinstated Petitioner to paid status. Petitioner did not return to work with the County, but resigned on the day he was reinstated. Petitioner's resignation was consistent not only with the terms of the Agreement, but with Petitioner's intentions at the time he was being considered for employment by the County. At or near the time Petitioner was initially employed by the County, he indicated to County officials that he was committed to remaining with the County for ten years so that he could vest in the FRS.

12. Based on his understanding of the Agreement, Petitioner did not intend to return to work with the County after the Agreement was executed. Petitioner believed that the County's action of rescinding his termination, changing his status to suspension without pay, and reinstating him provided him with more than the thirty-four months he needed to vest in the FRS. Had Petitioner not been terminated by the County, he would have vested in the FRS in May 1995, and would have thereupon retired.

13. Although the Agreement provided that Petitioner would resign, there is no indication that the County was opposed to Petitioner's returning to work. In fact, one of the negotiators for the County, testified that "I am not sure that Pinellas County didn't want Mr. Cobb to return to employment. We wanted to settle the lawsuit that was pending...."

14. After the Agreement was finalized, in a letter dated February 12, 1996, Petitioner provided Respondent with a copy of the executed Agreement and "copies of personnel actions completed in accordance therewith." The letter requested that Respondent do the following: (1) reinstate Petitioner in FRS in accordance with Section 121.011(3), Florida Statutes, and Rule 60S-2.016, Florida Administrative Code; and (2) provide Petitioner "with the amount of his required contributions for retirement credit for his period of suspension up to and including the date of his vesting."

15. Petitioner was prepared to pay into the State Retirement Fund the contribution required to receive retirement credit.

16. On March 5, 1996, Respondent issued a letter to Petitioner denying him the right to make contributions for retirement for the period of suspension without pay, July 31, 1992, through the date of his reinstatement, January 22, 1996. The denial letter stated that the purported "reinstatement" did not occur. As rationale for its position, Respondent found that: (1) after being "reinstated", Petitioner never performed work in a regularly established position and, therefore, was not compensated for services or work performed; (2) the County never intended to reinstate Petitioner "to employment with pay, nor was there an expectation of Petitioner to be "made whole" by the County; and (3) Petitioner and the County never intended to "enter into an employer and employee relationship retroactively for the period in question."

17. Respondent stated that the purported reinstatement of Petitioner "was more in the nature of a ruse or sham to achieve a goal other than gainful

employment." Moreover, Respondent believed that "neither the member nor the employer intended to enter into a regular employer and employee relationship." Respondent thus concluded that the reinstatement was not "bona fide" and was solely for the purpose of allowing Petitioner to vest in FRS and obtain retirement benefits.

18. Respondent also objected to the form of Petitioner's reinstatement of employment with the County, declaring that it was not a "bona fide" as signified by his failure to receive back pay for the period of suspension and his failure to enter into an employer-employee relationship with the County for the equivalent of one calendar month.

19. Respondent acknowledged that once Petitioner's termination was changed to a suspension without pay Rule 60S-2.016, Florida Administrative Code, applies to the case. This rule is interpreted by Respondent to require that for reinstatement to occur, an individual must work in a regularly established position for at least one calendar month following the suspension.

20. Respondent admits that the "one calendar month" requirement is not contained in either Section 121.011(3)(e), Florida Statutes (1991), or in Rule 60S-2.016, Florida Administrative Code, both of which govern retirement credit for periods of suspension without pay. Nevertheless, Respondent's interpretation of Rule 60S-2.016, Florida Administrative Code, is that a person must work thirty days after a suspension without pay to be deemed "reinstated". Respondent derives this interpretation by applying language from the rule that governs granting credit for leaves of absence.

21. Respondent's interpretation of "reinstatement," as it relates to members who have been suspended without pay, is not evident from the language of the applicable statute or rule and may be ascertained only upon reviewing individual member files. The Florida Retirement System currently has 600,000 active members and 140,000 retirees, for a total of 740,000 files.

CONCLUSIONS OF LAW

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

23. Pursuant to Section 121.031(1), Florida Statutes, Respondent is authorized to promulgate rules for the effective and efficient administration of the Florida Retirement System.

24. Petitioner has the burden of proof in this case. See *Balino v. Department of Health, etc.*, 348 So.2d 349 (Fla. 1st DCA 1977). To meet the burden of proof, Petitioner must prove by a preponderance of evidence that he should receive retirement credit service for the period of suspension to the date of reinstatement and that he should be allowed to pay into the Retirement System Trust Fund the total cost of providing such retirement credit.

25. Section 121.011, Florida Statutes (1991), and Rule 60S-2.016, Florida Administrative Code, are the applicable statutory and rule provisions governing the instant case.

26. Section 121.011(3)(e), Florida Statutes (1991), provides in relevant part the following:

Any member of the Florida Retirement System or any member of an existing system under chapter 121 on July 1, 1975, who is not retired and who is, has been, or shall be, suspended and reinstated without compensation shall receive retirement service credit for the period of time from his date of suspension to his date of reinstatement, upon the member paying into the Retirement System Trust Fund the total cost of providing said retirement credit. The cost to the members shall be the total employer contributions plus the total employee contributions..."

27. Rule 60S-2.016, Florida Administrative Code, provides the following:

60S-2.016 Credit for Periods of Suspension Without Pay. A member who has been or is suspended without compensation and later reinstated, may receive retirement credit for the period of suspension without compensation by paying the required contributions in accordance with Section 60S-3.014. A period of suspension without compensation will not be considered a break in service if the member elects to purchase credit for the entire period of suspension.

28. It is a cardinal rule of statutory construction that when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory construction. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). In such instances, the statute must be given its plain and obvious meaning.

29. Agency rules duly promulgated under authority of law have effect of law. *State v. Jenkins*, 469 So.2d 733 (Fla. 1985). There being no dispute as to the validity of Rule 60S-2.016, Florida Administrative Code, the rule has the force and effect of law. Thus, the same general rules of construction which apply to statutes also govern the construction of rules.

30. The language of Section 121.011 (3)(e), Florida Statutes (1991), and Rule 60S-2.016, Florida Administrative Code, is clear and unambiguous. The plain meaning of the former provision is that any member of the FRS, who is not retired, and who has been "suspended and reinstated without compensation" is entitled to receive retirement service credit for the period of time from the date of his suspension to the date of his reinstatement, upon such member paying the total cost of providing the retirement credit.

31. The plain meaning of 60S-2.016, Florida Administrative Code, is that a member of the FRS who is suspended without pay and later reinstated, is entitled to receive retirement credit for the period of suspension without compensation upon paying the required contributions. Also, based on the clear meaning of the rule, if the member elects to purchase credit for the entire period of the suspension, the period of suspension without compensation will not be considered a break in service

32. In the instant case, Petitioner and the County negotiated and executed a valid Agreement which resulted in the parties settling the age discrimination lawsuit. The Agreement provided for rescission of Petitioner's termination, with the termination being changed to a suspension without pay, and Petitioner's immediate reinstatement to paid status. Given Petitioner's particular change in status, clearly Rule 60S-2.016, Florida Administrative Code, entitled "Credit for Periods of Suspension without Pay", is the appropriate rule to apply.

33. In light of the plain meaning of Rule 60S-2.016, Florida Administrative Code, Petitioner is entitled to receive retirement credit for the period from his date of suspension to the date of his reinstatement if he pays the cost of providing the retirement credit. Neither the applicable statutory nor rule provision requires an individual to work a minimum of one calendar month after being reinstated in order to receive retirement credit. Obtaining retirement credit when one has been suspended without pay and reinstated is subject to and contingent only on the member's paying into the Retirement System Trust Fund the total cost of providing the retirement credit.

34. Based on his suspension without pay and subsequent reinstatement, Petitioner is eligible to receive retirement credit for the requisite time period if he pays the total cost of providing the retirement credit.

35. It is well-established that an administrative interpretation of the law being administered by an administrative agency is entitled to great deference, but such deference is not absolute. *Legal Environmental Assistance Foundation v. Board of County Commissions*, 642 So.2d 1081, (Fla. 1994). Thus an agency's construction cannot stand when it amounts to an unreasonable interpretation. *Id.* at 1083-1084.

36. Respondent's interpretation of Rule 60S-2.016, Florida Administrative Code, has been considered, but is rejected as inconsistent with and contrary to the plain and obvious meaning of the rule. According to evidence adduced at hearing, Respondent interprets the rule to require that an individual work at least one month following reinstatement to be deemed reinstated for the purpose of purchasing retirement. However, this requirement is not reflected in the statutory or rule provisions relative to members of the FRS receiving credit for periods of suspension without pay.

37. In construing Rule 60S-2.016, Florida Administrative Code, to impose a "thirty day" employment requirement, Respondent has admittedly relied on language contained in Rule 60S-2.006 (1)(c), Florida Administrative Code. Such reliance is misplaced in view of the fact that Rule 60S-2.006, Florida Administrative Code, entitled "Credit for Leaves of Absence Under the Florida Retirement System", addresses a separate and distinct category. As reflected in its title, Rule 60S-2.006, Florida Administrative Code, prescribes the criteria for receiving credit for leaves of absence, and the language contained therein is inapplicable to situations involving credit for periods of suspension without pay.

38. Agencies must honor their own substantive rules until they are amended or abrogated. *Gadsden State Bank v. Gerald A. Lewis*, 348 So.2d 343, (1st DCA 1977). A reading of Rule 60S-2.016, Florida Administrative Code, in no way informs an individual in Petitioner's situation that thirty days of employment is necessary in order for a reinstatement following a suspension without pay to be deemed valid. Consequently, Respondent is required to implement the rule as dictated by the plain meaning of the rule.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Division of Retirement enter a Final Order that awards Petitioner retirement credit for the period of time from his date of suspension to his date of reinstatement subject to his purchasing retirement credit for that period of time.

DONE and ENTERED this 30th day of October, 1996, in Tallahassee, Florida.

CARLOYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
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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.