

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRED O. SIMONS, JR.,)
)
 Petitioner,)
)
 vs.) Case No. 99-4475
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal proceeding before P. Michael Ruff, Administrative Law Judge of the Division of Administrative Hearings. Pursuant to notice a Final Hearing was conducted on May 10, 2000, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Fred O. Simons, Jr., pro se
9138 McDougal Court
Tallahassee, Florida 32312

For Respondent: Emily Moore, Esquire
Division of Retirement
2639 North Monroe Street
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STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner, Fred O. Simons, Jr., is entitled to retirement service credit in the Florida Retirement System (FRS)

for employment with the State University System of Florida (SUS) at the Florida Agricultural and Mechanical University-Florida State University College of Engineering (FAMU-FSU) for the summer sessions of 1994, which are alleged by the Respondent to be Other Professional Service (OPS) employment.

PRELIMINARY STATEMENT

The Petitioner was employed for the Summer Term of 1994 with the FAMU-FSU College of Engineering and paid by FAMU by OPS compensation. He requested that that OPS compensation for the Summer Term of 1994 be included as "creditable service" under the FRS, contending in essence that he was in an established position, was mistakenly paid as an OPS employee and should have been paid from a regular salary account and therefore be entitled to creditable service for the employment period and compensation earned for that Summer Term of 1994. After it communicated with FAMU, the SUS and the Department of Management Services (DMS), office of the Inspector General, in an effort to clarify its understanding of the Petitioner's employment relationship during that Summer Term, the Division of Retirement (Division) concluded it had no legal authority to grant the Petitioner's request. Consequently a final agency action letter was issued July 15, 1999, in which the Division denied his request.

The Petitioner filed a timely request for an administrative proceeding and hearing due to that denial and requested that the case be abated for 90 days. The Division granted the request and placed the case in abeyance. Subsequently, on October 22, 1999, it was referred to the Division of Administrative Hearings for conduct of a formal proceeding and rendition of a recommended order in resolution of the dispute.

The cause came on for hearing as noticed. The Petitioner represented himself and was also allowed to testify in his own behalf. He also called as witnesses, Colonel Robert L. Rollins of FAMU, Vice President of Academic Affairs, Office of the Provost; Allen Reams, Chief, Bureau of Accounting and State Payrolls of the Office of the Comptroller, Department of Banking and Finance; Maurice Helms, Chief, Bureau of Calculations, DMS; and the video-taped testimony of Dr. Allen George, Professor of Engineering, University of Florida, a former employee of the FSU-FAMU College of Engineering. The Petitioner's Exhibits A through R were admitted into evidence.

The Respondent presented the testimony of Larry Hunnicutt, the Benefits Administrator, Bureau of Retirement Calculations and the testimony of Harry Hooper, General Counsel, Office of the Comptroller, Department of Banking and Finance. The Respondent offered Exhibits 1 through 20, which were also

admitted into evidence. Identical motions for official recognition of relevant statutes and rules were filed by both parties and were granted. Additionally, the Petitioner had served a subpoena on May 8, 2000, on A. J. McMullian, III, State Retirement Director and Agency Head designee. A Motion for Protective Order to preclude Mr. McMullian from testifying was filed and was argued at hearing. The Motion was granted. Subsequent to the hearing the parties submitted timely Proposed Recommended Orders which have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Fred O. Simons, Jr., the Petitioner, is a tenured Professor in the SUS of Florida. He serves at the FAMU-FSU College of Engineering and has been compensated at times relevant hereto for a complete "full-time equivalency" (FTE) by FSU for a nine-month academic year. He has been compensated by FAMU for summer terms when he has worked. He has more than 30 years of creditable service in the FRS and in July 1999, he retired from the FRS by entering the Deferred Retirement Option Program (DROP).

2. When he made his application for entry into the DROP program the Petitioner requested inclusion of his Summer 1994 OPS service in the calculation of his monthly earned retirement

benefits. He was advised by the Respondent agency that it could not be included in the calculation of his monthly earned retirement benefits because he was not in an "established position" for the Summer Term of 1994 and he was paid for that term from OPS funds rather than from a regular salary appropriation. The Petitioner worked during the 1993 Summer Term for FAMU and verbally agreed that that employment be as an OPS employee. He neither signed an OPS contract for the 1993 Summer Term nor was he actually paid from OPS funds for the Summer Term of 1993. He contends that FAMU apparently acted upon his Summer 1993 agreement and issued a written OPS contract for the 1994 Summer Term, which he executed. Indeed he signed several OPS appointment forms and employment contracts for the entire summer term of 1994. He states that he did not recall reading any of those OPS contracts which he signed for the Summer of 1994 but merely signed them as they were presented. He contends that his signing of the OPS appointments and contracts and FAMU's offer of OPS appointments for the Summer Term of 1994 was in error and was contrary to direction from the SUS and/or the Chancellor for the SUS.

3. The Petitioner's signature is affixed to four separate FAMU OPS appointment forms, as well as to FAMU contracts for less than one academic year. See Petitioner's Exhibit E and

Respondent's Exhibits 20 and 19 in evidence. Each Summer Term 1994 employment contract, both before and after attempted revision, covered appointments for less than one academic year and provided:

"your employment hereunder will cease on the dates indicated." The Petitioner's Summer Term of 1994 contract provided that the appointment status was "adjunct" and/or that "this appointment offer is contingent [sic] your assigned class (ES) materializing."

4. The Chancellor's July 12, 1995, memorandum: CM77-47.2, effective July 1, 1995, provides, in relevant part:

". . . compensation for appointments up to and including 1.0 FTE shall be paid from salary and those in excess of 1.0 FTE shall be paid from other personnel services (OPS) funds."

5. FAMU interpreted the July 12, 1995 Chancellor's Memorandum to include its appointment of tenured professors to OPS employment contracts, effective July 1, 1995, but not before that date.

6. Roberta Maddox, Associate Vice Chancellor, Office of Human Resources of the SUS sent a letter dated May 17, 1999, to the Petitioner advising him that his ". . . OPS appointment contract . . . clearly states the following:

OPS employees are not eligible for benefits such as free course waivers, paid vacation, sick leave and holidays, participation in group insurance, or retirement." (emphasis supplied).

7. The May 17, 1999, SUS letter further advised the Petitioner that ". . . there appears to be no authorized remedy for your situation. As such, the earnings from your Summer 1994 employment with Florida A & M University were correctly recognized as not compensable earnings."

8. James Ammons, the FAMU provost, acknowledged in a Memorandum dated June 22, 1999, that "we were not able to revise his [Petitioner's] C&G contract . . . [S]ince he was fully paid from his C&G account as an OPS employee . . ."

9. FAMU president Frederick Humphries, by letter dated October 28, 1999, asked the Division of Retirement "if possible," to grant retirement services credit for the Petitioner's Summer 1994 employment.

10. The Office of the Comptroller has never followed a policy or interpretation, in construing the relevant provisions of Chapter 216, Florida Statutes, and Rule Chapter 60S-1, Florida Administrative Code, of transferring retirement contributions from an employer to FRS for an employee's OPS employment. Chapter 121, Florida Statutes, the FRS law, does not authorize retirement service credit for OPS services. The Office of the Comptroller neither credits nor actually transfers contributions from employers to the FRS attributable to periods of OPS employment.

11. The Office of the Comptroller also does not retroactively remove employees from OPS appointments and place them in salaried positions in order to make them eligible for retirement service credit. The Division office of the Inspector General, by letter dated June 23, 1999, advised the Petitioner ". . . [B]ased on my review, I find that the Division of Retirement was correct . . . apparently, you were placed in this position when Florida A & M signed you to an OPS contract for the Summer of 1994. The Division of Retirement has no authority to undo this action . . . we are statutorily unable to provide you the relief you request."

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Subsection 120.57(1), Florida Statutes (1999).

13. The Petitioner has the burden of proof in this proceeding. See Young v. State Department of Community Affairs, 625 So. 2nd 831 (Fla. 1993). The Petitioner must demonstrate by a preponderance of evidence that he is entitled to the agency action he requested. See St. Johns River Water Management District v. Consolidated Tomoka Land Company, 717 So. 2nd 72 (Fla. 1st DCA 1998), re-hearing denied, 727 So. 2nd 904 (Fla. 1999); Agrico Chemical Company v. State Department of

Environmental Regulation, 365 So. 2nd 759 (Fla. 1st DCA 1978).

The Petitioner has not met his burden.

14. Although the Petitioner is a tenured Professor, with more than 30 years of service in the FRS, FAMU was not precluded by law or policy from extending to him an OPS employment appointment prior to July 1, 1995. Even if FAMU has erred in the application of its policy, in appointing the Petitioner to OPS employment, the Petitioner's claim, based on the Summer Term 1994 error is barred by the passage of time. Subsection 110.1165(3), Florida Statutes, provides that such a claim must be raised within 2 years of the error.

15. The Petitioner signed several FAMU OPS employment contracts and appointment forms for the Summer Term 1994 and was fully paid for his services pursuant to those contracts. Retirement service credit was expressly excluded from that compensation.

16. The Petitioner's service during the Summer Term of 1994 was temporary employment. He was not in an authorized or "regularly established position." See Subsections 216.001(1)(d) and (k), Florida Statutes, and Subsection 216.262(1)(a), Florida Statutes. See also Rule 60S-1.004(4)(a) and (5), Florida Administrative Code.

17. Both the legal authority cited and the FAMU OPS appointment forms established that the Petitioner is not entitled to retirement service credit for OPS services rendered during the Summer Term of 1994. He was neither filling an established position nor was he paid from salary appropriations during this period. Rather he was paid from OPS funds. Moreover, he was on written notice that he was in an OPS employment mode and that retirement service credit did not apply. His testimony reveals that he would have known he was on such notice had he read the OPS appointment forms and/or contracts. See Subsection 216.011(1)(z), Florida Statutes.

18. Neither FAMU, the SUS nor the Comptroller's office was able to determine a legally-authorized means whereby the Petitioner could be retroactively removed from his OPS employment status for the Summer Term of 1994 and retroactively placed in a salaried position, so that he could be afforded retirement service credit for the Summer Term 1994 employment period.

19. In summary, the Division of Retirement has no legal authority in the Statute or Rules applicable to grant the relief requested by the Petitioner. The preponderance of the evidence establishes, in conjunction with the legal authority apropos of

the facts established by the preponderant evidence, that the Petitioner's claim should be denied.

RECOMMENDATION

Accordingly, having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties it is, therefore,

Recommended that a final order be entered by the Department of Management Services, Division of Retirement holding that the Petitioner's request for retirement service credit for his Summer Term 1994 OPS employment, and his Petition, should be denied.

DONE AND ENTERED this 1st day of August, 2000, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of August, 2000.

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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.