

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT EDMONDS,)
)
 Petitioner,)
)
 vs.) Case No. 99-5281
)
 DEPARTMENT OF MANAGEMENT SERVICES,)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 26, 2000, at Miami and Tallahassee, Florida, by video teleconference before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert M. Edmonds, pro se
1729 26th Avenue
Vero Beach, Florida 32960

For Respondent: Larry D. Scott, Esquire
Department of Management Services
Division of Retirement
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUE

Whether Petitioner should be excluded from participating in the Florida Retirement System from January 8, 1989, through October 13, 1995.

PRELIMINARY STATEMENT

Petitioner, Robert M. Edmonds (Edmonds), requested Respondent, Department of Management Services, Division of Retirement (Department), to audit his retirement account to determine his years of eligible service in the Florida Retirement Service (FRS). The Department determined that Edmonds was eligible for retirement service credit from March 7, 1984, through December 1988, and denied retirement service credit from January 8, 1989, through October 13, 1995. Edmonds requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings for assignment to an Administrative Law Judge.

At the final hearing, Edmonds testified in his own behalf and called Leroy Kretschmar as his witness. Petitioner's Exhibits 1 and 2 were introduced into evidence. The Department called David Ragsdale, David Aldet, and Virginia Russell as its witnesses. Respondent's Exhibits 3-5, 10, 11, 15-18, and 20-23 were admitted into evidence. Respondent's Exhibit 22 was admitted relating to conversations on November, 21, 1997 and November 26, 1997, but not relating to conversations on January 23, 1998.

Official recognition was taken of Chapter 60S-1, Florida Administrative Code, and Chapter 121, Florida Statutes.

No transcript was ordered. The parties agreed to file proposed recommended orders on or before May 18, 2000. The

parties timely filed their proposed recommended orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. In March 1984, Edmonds was hired by the Village of El Portal Police Department. His position was described by the chief of police as a part-time position. Edmonds retired from the police department on October 13, 1995.

2. Edmonds was hired to work when other police officers were not available to work their shifts due to illness or annual leave. He did not have regularly scheduled shifts. The police chief would notify Edmonds when he was needed, and Edmonds would work the shift of the officer who was unavailable. Sometimes Edmonds would be scheduled months in advance. Edmonds could decline to work if he was unavailable. He had his own business, and there were times when he had a conflict and could not work when called. Edmonds did not receive annual or sick leave. He was not guaranteed a certain amount of work.

3. Sometime after Edmonds was hired, the police department instituted a reserve police officer program, in which volunteers rode with police officers employed by the Village of El Portal. The reserve officers were required to volunteer at least 18 hours a month.

4. From March 1984 through May 1988, the Village of El Portal made contributions to the FRS on Edmonds' behalf. Based on the evidence presented, it appears contributions on Edmonds'

behalf were discontinued because he was being treated as a reserve officer for purposes of retirement benefits. However, Edmonds was never hired as a reserve officer. Edmonds was not informed that the Village of El Portal had discontinued paying into FRS on his behalf.

5. The records from the police department do not show the amount of time that Edmonds worked from March 1984 through December 1988. Edmonds suffered a seizure in 1988 and did not work for at least six months during that year.

6. From 1989 to 1995, Edmonds worked a total of 38 days with the Village of El Portal Police Department. Edmonds worked two days in 1989, beginning on January 8. He work for two days in 1990. In 1991, he worked ten days. In 1992, he worked eight days. Edmonds worked three days in 1993, and ten days in 1994. He worked five days in 1995.

7. In 1997, Edmonds requested the Department to audit his retirement account to establish his retirement service credit. The Department requested information from the Village of El Portal concerning Edmonds' employment with the police department. Based on the information supplied by the Village of El Portal, the Department determined that at least from January 8, 1989, through October 13, 1995, Edmonds was a temporary "on-call" employee; thus, he was excluded from the FRS for that period of time.

CONCLUSIONS OF LAW

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

9. The FRS is codified in Chapter 121, Florida Statutes. Section 121.051, Florida Statutes, and provides for compulsory participation in the FRS for all employees hired after December 1, 1970. Section 121.021(11), Florida Statutes, defines employee as follows:

[A]ny 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.

10. Pursuant to Section 121.021(52)(b), Florida Statutes, "a regularly established position" is defined as follows:

In a local agency (district school board, county agency, community college, city, or special district), the term means a regularly established position which will be in existence for a period beyond 6 consecutive months, except as provided by rule.

11. Rule 60S-1.004(5), Florida Administrative Code, provides:

(5) An employee who is filling a temporary position shall not be eligible for membership in the Florida Retirement System. . . . A position meeting the definition below shall be a temporary position

* * *

(b) A temporary position in a local agency is:

1. An employment position which will not exist beyond 6 consecutive calendar months;
or

2. An employment position which is listed below in (d) regardless of whether it will exist beyond 6 consecutive months.

* * *

(d) The following types of positions in a local agency are considered temporary positions for retirement purposes.

* * *

5. On Call Positions (positions filled by employees who are called to work unexpectedly for brief periods and whose employment ceases when the purpose for being called is satisfied).

12. Edmonds had an on call position with the police department of the Village of El Portal from at least January 8, 1989, through October 13, 1995. He worked when he was needed and had no guarantee of further employment after he completed the work for which he was called to do. He did not have a regularly scheduled shift and did not earn either annual or sick leave. He could decline to work if he desired.

13. Edmonds' position was similar to the positions of pool nurses in Hillsborough County Hospital Authority v. State, Dept. of Admin. Div. of Retirement, 495 So. 2d 249, 253 (Fla. 2d DCA 1986), in which the court held that pool nurses occupied temporary positions and could not be considered as members of the FRS. The court described the pool nurses' positions as follows:

The nurses in the pool have no guarantee that they will be called and have no obligation to work if called. They may avoid their commitment to work a particular shift by giving as little as twenty-four hours' notice. They can and do work for other hospitals. They are paid more than regular employees, but they receive no fringe benefits. . . .

14. Because Edmonds occupied an on call position, he was not eligible to participate in the FRS from January 8, 1989, through October 13, 1995.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered finding that Robert M. Edmonds was not eligible to participate in the Florida Retirement System from January 8, 1989, through October 13, 1995.

DONE AND ENTERED this 15th day of June, 2000, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 2000.

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.