

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES C. BURLINGAME and)
CITY OF PANAMA CITY,)
)
 Petitioners,)
)
vs.) Case No. 99-5348
)
DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF)
RETIREMENT,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 28, 2000, in Panama City, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Cecilia Redding Boyd, Esquire
Bryant & Higby, Chartered
Post Office Box 860
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For Respondent: Larry D. Scott, Esquire
Division of Retirement
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STATEMENT OF THE ISSUE

The issue is whether Charles C. Burlingame's request to purchase and upgrade prior regular service with the City of

Panama City under the Senior Management Service Class should be approved.

PRELIMINARY STATEMENT

This matter began on November 4, 1999, when Respondent, Department of Management Services, Division of Retirement, issued a letter advising Petitioners, Charles C. Burlingame and City of Panama City, that their request to upgrade prior service by Charles C. Burlingame under the Senior Management Service Class had been denied on the ground that the "duties of his [former] position were different from the duties of [his] current position." By Petition filed on November 30, 1999, Petitioners requested a formal hearing under Section 120.569, Florida Statutes, to contest the proposed action.

The matter was referred by Respondent to the Division of Administrative Hearings on December 22, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated January 19, 2000, a final hearing was scheduled on February 28, 2000, in Panama City, Florida.

At the final hearing, Petitioners presented the testimony of Frances H. Locke, City Employee Benefits Specialist, and Charles C. Burlingame. Also, they offered Petitioners' Exhibits 1-5. All exhibits were received in evidence. Respondent presented the testimony of David W. Ragsdale, Benefits Administrator of

Enrollment. Also, it offered Respondent's Exhibits 1 and 2, which were received in evidence.

There is no transcript of the hearing. Proposed Findings of Fact and Conclusions of Law were filed by Petitioners and Respondent on March 14 and 15, 2000, respectively, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this retirement dispute, Petitioner, Charles C. Burlingame (Burlingame), seeks to have certain prior service with Petitioner, City of Panama City (City), upgraded under the Senior Management Service Class (SMSC) so that his retirement benefits will vest at an earlier date. Respondent, Department of Management Services, Division of Retirement (Division), has denied the request on the ground that "the duties of [Burlingame's former] position were different from the duties of [his] current position," and that under these circumstances, Section 121.055(1)(i), Florida Statutes (1997), required that the request be denied.

2. Burlingame was first hired by the City on February 14, 1994, as Human Resources Director/Safety. As such, he was one of approximately 16 City department directors. At that time,

Burlingame was enrolled in the "regular" class of the Florida Retirement System (FRS).

3. In 1998, the Legislature authorized local governments (as well as state agencies) who employed at least 200 individuals to designate an additional employee under the SMSC. Because the City employed that number of individuals, it was allowed to designate another employee for SMSC. Burlingame was selected as the employee, and he was promoted to a new position with the title Assistant City Manager/Human Resources/Safety Director. At the same time, his old position was abolished.

4. In conjunction with his promotion, Burlingame prepared a job description for his new position. The old and new duties are described in the documents attached to Respondent's Exhibit 2. They reflect, at least on paper, that the functions and illustrative duties of the two positions are not identical. For example, in his new position, Burlingame is now in charge when the City Manager is absent from the City. He also assists the City Manager "in directing the overall operations of the City," as well as performing his former duties. According to Burlingame, however, these new duties account for no more than five percent of his total duties. The remainder coincide with the duties performed under his old position.

5. Under the terms of the City's retirement system, the retirement benefits for a SMSC employee vest after 7 years of service, while a regular employee does not vest until after 10

years of service. Therefore, Burlingame wished to upgrade his prior service between February 14, 1994, and September 29, 1998, when he was changed to SMSC, since this would allow him to vest in fewer years. It would also allow him to accumulate more retirement points (2 per year) under the FRS for each year of service than he would have earned as a regular employee (1.6 per year).

6. When Burlingame was approved for membership in the SMSC in October 1998, the City began processing an application with the Division on his behalf for the purpose of determining the "cost to upgrade past service to [SMSC] to 2-14-94." Because of a large backlog of work caused by Deferred Retirement Option Program applications, the Division was unable to act on Burlingame's request until the early fall of 1999.

7. After the City made several inquiries concerning its pending request, a Division Benefits Administrator, David W. Ragsdale, wrote the City on September 15, 1999, and advised that "[s]ince the position Mr. Burlingame filled as Human Resources/Safety Director had different duties than the Assistant Manager/Human Resources/Safety Director, he is ineligible to upgrade because the position of Human Resources/Safety Director no longer exists." This was followed by another letter on November 4, 1999, which reconfirmed the earlier finding and offered Petitioners a point of entry to contest the proposed action. Petitioners then initiated this proceeding.

8. There is no rule or statute which provides that if the job duties of a position upgraded from regular to SMSC do not remain the same, prior regular service cannot be upgraded. However, since the inception of the SMSC in 1987, the Division has consistently ascribed that meaning to the words "within the purview of the [SMSC]" in Section 121.055(1)(i), Florida Statutes (1997), and Rule 60S-2.013(2), Florida Administrative Code. Thus, if the new duties are "not within the purview" of the past regular service class, that is, they are different in any respect, the employee cannot purchase and upgrade the prior service. This interpretation of the statute and rule was not shown to be clearly erroneous or outside the range of possible interpretations.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (1999).

10. As the parties seeking to purchase the prior service, Petitioners bear the burden of proving by a preponderance of the evidence that Burlingame is entitled to do so under the controlling statute and regulation.

11. Section 121.055(1)(i), Florida Statutes (1997), provides in part that

any member of the [SMSC] may purchase
additional retirement credit in such class

for creditable service within the purview of the [SMSC] retroactive to February 1, 1987, . . . This service credit may be purchased by the employer on behalf of the member.

12. The Division has implemented the foregoing statute by adopting Rule 60S-2.013(2), Florida Administrative Code, which provides in part that a member of the SMSC "who has earned creditable service within the purview of the [SMSC] may purchase additional retirement credit in the [SMSC] for such service retroactive to February 1, 1987."

13. Under the Division's interpretation of the foregoing statute and rule, in order for prior regular service to be "within the purview of the [SMSC]," the job duties under both FRS plans must be the same. While this interpretation may not be the most logical or fair, it was not shown to be clearly erroneous or outside the range of possible interpretations. See, e.g., Dep't of Prof. Reg. v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984). Therefore, Petitioners' request must be denied.

14. Finally, at the hearing, the question was posed whether such prior service could be upgraded if Burlingame's duties were now amended by the City to be identical to those that he performed while he was a regular class employee. While this alternative appears to be facially viable, it is unnecessary to reach that issue.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order denying Petitioners' request for an upgrade of Charles C. Burlingame's service under the Senior Management Service Class.

DONE AND ENTERED this 21st day of March, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 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.