

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

H. GLENN BOGGS, II,)
)
 Petitioner,)
)
 vs.) Case No. 01-2020
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A hearing was held pursuant to notice on July 13, 2001,
by Barbara J. Staros, assigned Administrative Law Judge of the
Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Lawrence A. Gonzalez, Esquire
Post Office Box 1876
Tallahassee, Florida 32302-3900

For Respondent: Thomas E. Wright, Esquire
Division of Retirement
Post Office Box 3900
Tallahassee, Florida 32315-3900

STATEMENT OF THE ISSUE

Whether Petitioner is eligible to receive retirement
credit for the period of his employment with the Florida Bar
from July 1, 1977 through June 4, 1981.

PRELIMINARY STATEMENT

In August of 1998, Petitioner requested that the Division of Retirement (Division) grant him service credit for his period of employment with the Florida Bar. By letter dated August 18, 2000, the Division of Retirement notified Petitioner that his request to receive credit under the Florida Retirement System for the time he was employed by the Florida Bar was denied.

Petitioner filed a Petition for Formal Administrative Hearing. The Petition was forwarded to the Division of Administrative Hearings on May 23, 2001. A formal hearing was scheduled for July 13, 2001, in Tallahassee, Florida.

A Joint Pre-Hearing Stipulation was filed. At hearing, Petitioner presented no witnesses. Petitioner requested Official recognition of Article 5, Section 15, Florida Constitution, and the Rules of the Florida Supreme Court. Respondent presented the testimony of David Ragsdale, who was tendered as an expert in the Florida State Retirement System. Respondent's Exhibits 1 through 3, which included the deposition testimony of George Dillard and Dan Bennett, were admitted into evidence. Respondent requested official recognition of Chapter 121, Florida Statutes, and Chapter 60S,

Florida Administrative Code. The parties' requests for official recognition were granted.

No transcript of the proceedings was filed. The time for filing post-hearing submissions was set for more than 10 days after the hearing upon request of the parties. Petitioner and Respondent timely filed Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner was employed by the Florida Bar from July 1, 1977 to June 4, 1981. The record is unclear as to the nature of his employment at the Florida Bar. He is presently employed as a professor at Florida State University and has approximately 24 years' credit in the Florida Retirement System (FRS).

2. Employees of the Florida Bar are paid as part of an overall budgetary process generated primarily from members' dues. Their salaries are not established by or funded by legislative appropriation.

3. The Florida Bar has its own pension system that is a defined contribution plan funded entirely by the Florida Bar. The Bar employees contribute nothing to their pension system. This system has been in place since approximately 1970.

4. Salaries of state officers and employees are reported from the State Comptroller to the Division of State

Retirement. No salaries of the Florida Bar were paid or reported to the Division for the period of time Petitioner was employed at the Florida Bar.

5. In the 1970's the FRS went from an employee/employer funded system to a strictly employer funded system which became known as a non-contributory system.

6. The Florida Bar does not participate as a paying agency of the FRS and employees of The Florida Bar do not participate in any state employee benefit system.

7. Beginning in 1955, until the establishment of the FRS, the Florida Board of Bar Examiners participated in the former public retirement system. When the FRS was created, participants, such as the Florida Board of Bar Examiners, began reporting into the new system and were allowed to participate in the new system. Mr. Ragsdale, administrator of the enrollment section of the Division, established that the employees of the Board of Bar Examiners participated by contributing into the former retirement system.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

9. The Florida Retirement System is codified in Chapter 121, Florida Statutes. Section 121.051, Florida Statutes (2001), states in pertinent part:

(1) COMPULSORY PARTICIPATION:

(a) The provisions of this law shall be compulsory as to all officers and employees . . . who are employed on or after December 1, 1970 . . . and each officer or employee, as a condition of employment, shall become a member of the system as of his or her date of employment . . .
(emphasis supplied)

10. Section 121.021, Florida Statutes, (2001), reads in pertinent part:

(11) 'Officer or employee' means 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.

(12) 'Member' means any officer or employee who is covered or who becomes covered under this system in accordance with this chapter.

* * *

(17)(a) 'Creditable service' of any member means the sum of his or her past service, prior service, military service, out-of-state or non-FRS in-state service, worker's compensation credit, leave-of-absence credit and future service allowed within the provisions of this chapter if all required contributions have been paid and all other requirements of this chapter have been met.

* * *

(52) 'Regularly established position' is defined as follows:

(a) In a state agency, the term means a position which is authorized and established pursuant to law and is compensated from a salaries appropriation pursuant to s. 216.011(1)(dd), or an established position which is authorized pursuant to s. 216.262(1)(a) and (b) and is compensated from a salaries account as provided by rule. (emphasis supplied)

11. The reference to Section 216.011(1)(dd), Florida Statutes, is to "other personal services" (OPS), which is defined in that paragraph as, "the appropriation category used to fund the compensation for services rendered by a person who is not filling an established position." Those employees paid from OPS appropriations are not eligible for membership in the state retirement system. Section 216.011(1)(dd)2., Florida Statutes (2001).

12. "Authorized position" means "a position included in an approved budget." Section 216.011(1)(b), Florida Statutes (2001). Those persons filling established positions are paid from salaries and benefits appropriations and are state officers or employees who are eligible for membership in a state retirement system. Section 121.(1)(dd)1. and 2., Florida Statutes.

13. "Appropriation" is defined as, "a legal authorization to make expenditures for specific purposes

within the amounts authorized in the appropriations act."
Section 216.011(1)(d), Florida Statutes.

14. Rule 60S-6.001(52), Florida Administrative Code, tracks the statutory language of Section 121.021(52), Florida Statutes, defining a "regularly established position."¹

15. Reading the above-referenced statutes in para materia, employees of the Florida Bar are not part of the FRS in that their positions are not authorized and established by law and their salaries are not compensated from a salaries appropriation. No contributions have been made by the Florida Bar, as an employer, into the FRS. Accordingly, the years Petitioner worked for the Florida Bar do not constitute creditable service.

16. Petitioner relies on In re Florida Board of Bar Examiners, 268 So. 2d 371 (Fla. 1972) in which the Florida Board of Bar Examiners submitted a question to the Florida Supreme Court as to whether its employees are state employees for purposes of the state retirement system and state insurance. The Florida Supreme Court found that the Florida Board of Bar Examiners is an agency established by the Court and, therefore, is a state agency under the judicial branch. However, an important part of the Court's opinion noted that employees of the Florida Board of Bar Examiners had been

participating in the state's retirement system since approximately 1955. The Court noted:

The regular employees of the Florida Board of Bar Examiners compensated on a fixed periodic salary basis are eligible for state retirement and state group insurance benefits. As a matter of history such employees have been participating in the state's retirement system since approximately 1955. Even if there was no statutory basis for their participation, the State would appear to be collaterally estopped at this late date to deny these employees the right to so participate. (emphasis supplied)

268 So. 2d at 372.

17. Petitioner argues that since the Florida Bar is also an official arm of the Supreme Court of Florida, that the same reasoning applied in Florida Board of Bar Examiners, supra, should apply to employees of the Bar.

18. Florida Board of Bar Examiners can be distinguished. The Florida Supreme Court noted that the employees of the Board of Bar Examiners had been participating in the state retirement system since 1955. As Mr. Ragsdale of the Division confirmed, the Board of Bar Examiners have been participating through contributions to the system. In contrast, the Florida Bar has not. Clearly, the Florida Supreme Court's reference to estoppel in its opinion related to the fact that the Board of Bar Examiners' employees had been participants in the state retirement system. That rationale simply does not apply to

the employees of the Florida Bar in that they have not been participating through contributions into the retirement system.

19. Further, the Court in Florida Board of Bar Examiners relied on Chapter 122, and particularly Section 122.02(1), Florida Statutes (1971), in finding that the Board of Bar Examiners was a state agency for purposes of the retirement system.² Chapter 122, Florida Statutes, was, and is, entitled, "State and County Officers and Employees Retirement System."

20. By contrast, Petitioner's rights to retirement benefits, if at all, are determined in accordance with Chapter 121, Florida Statutes, entitled, "Florida Retirement System," which was created by Chapter 70-112, Laws of Florida. Chapter 121, Florida Statutes, covers persons employed as state officers and employees on or after December 1, 1970. As Petitioner's employment began after that date, it is appropriate to examine Petitioner's status under the definitions in Chapter 121, Florida Statutes, discussed above.

21. Petitioner does not come under the definition of officer or employee as contemplated by Section 121.051, Florida Statutes. Accordingly, Petitioner is not entitled to earn creditable service for purposes of the Florida Retirement System, for the time he was employed by the Florida Bar.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Department of Management Services, Division of Retirement, enter a final order denying Petitioner's request for retirement service credit for the period of his employment with the Florida Bar.

DONE AND ENTERED this 14th day of September, 2001, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 2001.

ENDNOTES

1/ Rule 60S-6.001(52), Florida Administrative Code, cites Section 216.011(1)(x), Florida Statutes, which was renumbered first to subsection (z), then to subsection (dd), by Chapters 98-73 and 2000-371, respectively.

2/ The Court also referenced Chapter 112, and particularly Section 112.075(2), Florida Statutes (1972 Supp.). That statute related to the state officers and employees group

insurance program. Moreover, Section 112.075, Florida Statutes, was repealed by Chapter 79-190, Laws of Florida.

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.