

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD S. MITCHELL,)
)
 Petitioner,)
)
 vs.) Case No. 03-0417
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Section 120.569, Florida Statutes, and Subsection (1) of Section 120.57, Florida Statutes, on March 18, 2003, in Miami, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Richard S. Mitchell, pro se
7931 Northwest 169th Terrace
Miami Lakes, Florida 33016

For Respondent: Thomas E. Wright, Esquire
Department of Management Services
4050 Esplanade Way, Suite 260
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STATEMENT OF THE ISSUE

Whether Petitioner is "vested," as that term is defined in Subsection (45) of Section 121.021, Florida Statutes.

PRELIMINARY STATEMENT

By letter dated December 18, 2002, the Division of Retirement (Division) advised Petitioner, in response to Petitioner's inquiry, that, notwithstanding that Petitioner had more than six years of creditable service with a Florida Retirement System (FRS) employer, Petitioner was not "vested," within the meaning of Subsection (45) of Section 121.021, Florida Statutes, because he had not been "employed in a regularly established position on July 1, 2001," nor had he been "employed in a covered position for at least 1 work year after July 1, 2001." Petitioner, thereafter, submitted to the Division a letter in which he indicated his desire to "appeal th[is] decision" by the Division. On February 6, 2003, the matter was referred to DOAH for the assignment of an Administrative Law Judge "for the purpose of disposing" of Petitioner's "appeal."

As noted above, the final hearing in this case was held on March 18, 2003. Two witnesses testified at the hearing: Petitioner and Doug Cherry, the Division's Benefits Administrator. In addition to Petitioner's and Mr. Cherry's testimony, nine exhibits (Petitioner's Exhibit 1 and

Respondent's Exhibits 1 through 8) were offered, and ultimately received, into evidence.

At the close of the evidentiary portion of the final hearing, a March 28, 2003, deadline was established for the filing of proposed recommended orders.

On March 28, 2003, the Division filed a Proposed Recommended Order, which the undersigned has carefully considered. To date, Petitioner has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Prior to July of 2000, Petitioner worked on a permanent part-time basis as an adult education teacher for the Miami-Dade County School Board (School Board), accumulating 7.10 years of retirement credit.

2. On Sunday, July 2, 2000, Petitioner was hospitalized because of a "blood disorder."

3. Since his hospitalization on July 2, 2000, Petitioner has been under a doctor's care and has not been physically able to return, and therefore has not returned, to work.

4. Petitioner was hospitalized again in 2001 and for a third time in 2002 for the same ailment.

5. After each visit he has made to the doctor during the time he has been out of work, Petitioner has apprised the principal of the South Dade Adult Education Center (South Dade), where he had worked before his July 2, 2000, hospitalization, of his condition.

6. It is now, and has been at all times following his July 2, 2000, hospitalization, Petitioner's intention "to return to work upon clearance from [his] doctor."

7. Petitioner has not been paid by the School Board during the time he has been out of work.

8. In April of 2001, Petitioner spoke separately with a representative of the United Teachers of Dade (UTD) and with a School Board staff member concerning his employment situation.

9. The UTD representative advised Petitioner that Petitioner "was on an approved leave of absence."

10. The School Board staff member told Petitioner that he "should be on an approved leave of absence"; however, she was unable to "find that authorization in the computer." She suggested that Petitioner go to School Board headquarters and inquire about the matter.

11. Petitioner went to School Board headquarters, as the School Board staff member had suggested. The persons to whom he spoke "couldn't locate the [leave] authorization either." They suggested that Petitioner contact the principal of South Dade.

12. Taking this advice, Petitioner wrote two letters to the principal inquiring about his employment status. He received no response to either letter.

13. During the summer of 2001, Petitioner contacted the Division to ask about his eligibility to receive retirement benefits.

14. Lisa Skovalia, a Benefits Specialist with the Division, responded to Respondent's inquiry by sending him the following letter, dated August 22, 2001:

Our records indicate that you were neither actively employed (physically working and earning salary) as of July 1, 2001, nor on a school board approved leave of absence through that date. As such, you must return to active employment, to earn one additional year of service credit, before you will be vested in the Florida Retirement System and eligible for retirement benefits.

I have enclosed a copy of the FRS Retirement Guide for the Regular Class for your information. Please call or write if you have any further questions.

15. In February of 2002, Petitioner again made contact with School Board personnel and "was told that [his] name [had been] removed from the computer (school records)."

16. In July of 2002, Petitioner wrote United States Senator Bob Graham "seeking [Senator Graham's] assistance in helping [Petitioner] get [his] retirement form Miami-Dade Public Schools."

17. Petitioner's letter to Senator Graham was referred to the School Board's Superintendent of Schools, who responded by sending the following letter, dated August 29, 2002, to Petitioner:

Your letter . . . to Senator Bob Graham was referred to me for response. A review of our records indicates that your earnings as a part-time teacher ended in July 2000. As a part-time employee, you were not eligible for a Board-approved leave of absence. You were notified by letter (copy attached) dated August 22, 2001 from Ms. Lisa Skovalia, Benefits Specialist, State of Florida, Division of Retirement, that because ". . . you were neither actively employed (physically working and earning salary) as of July 1, 2001, nor on a school board approved leave of absence through that date," you would have to return to active employment and earn one additional year of service credit before being vested in the Florida Retirement System.

The State of Florida Division of Retirement is solely responsible for developing rules and procedures for implementing changes in the retirement law. If you disagree with their determination, you may request an administrative hearing by sending a written request to the Bureau of Retirement Calculations, Cedars Executive Center, 2639 North Monroe Street, Building C, Tallahassee, Florida 32399.

18. On September 12, 2002, Petitioner sent a letter to the Division's Bureau of Retirement Calculations (Bureau) "seeking [its] assistance in helping [him] get [his] retirement from Miami-Dade Public Schools."

19. The Bureau responded to Petitioner's letter by providing him with the following Statement of Account, dated September 20, 2002:

We audited your retirement account and you have 7.10 years of service through 07/2000.

Please note that the vesting requirement for FRS members has been changed to 6 years of creditable service effective July 1, 2001 for those members who were actively employed on that date or on a board approved leave of absence. Former members with 6 years, but less than 10 years of creditable service who were not employed with a participating FRS employer on July 1, 2001, must return to covered employment for one year to become eligible for the six-year vesting provision.

Per Maria Perez at the Miami-Dade County School Board you were not on a board approved leave of absence on July 1, 2001, nor were you eligible for a board approved leave of absence due to your position as a part time adult school instructor. Although your school may have allowed you to take a leave of absence, only board approved leaves fulfill the vesting requirements required by law.

20. On November 15, 2002, Petitioner sent the Bureau a letter expressing the view that it was not "fair that, after all [his] efforts as a teacher, [he] should lose out [on his] retirement" and requesting "an administrative hearing concerning [his] efforts to get retirement benefits from Miami-Dade Public Schools."

21. The State Retirement Director responded to Petitioner's letter by sending him the following letter, dated December 18, 2002:

This is in response to your recent letter concerning your vesting and eligibility for retirement benefits.

You currently have 7.10 years of retirement credit through July 2000, your last month of employment in a Florida Retirement System (FRS) covered position.

[Section] 121.021(45)(b)1, F.S., states that "Any member employed in a regularly established position on July 1, 2001, who completes or has completed a total of 6 years of creditable service shall be considered vested. . ."

An FRS employer (Dade School Board) last employed you in a regularly established position in July 2000 and you were not granted a leave of absence to continue the employment relationship. Dade School Board has informed us that as a part-time teacher, you were not eligible for an approved leave of absence. Therefore, you do not meet the statutory requirement for coverage under the six year vesting provision.

[Section] 121.021(45)(b)2, F.S., provides the vesting requirement for members who were not employed on July 1, 2001, as follows: "Any member not employed in a regularly established position on July 1, 2001, shall be deemed vested upon completion of 6 years of creditable service, provided that such member is employed in a covered position for at least 1 work year after July 1, 2001 (emphasis supplied).

It is certainly unfortunate that you had to leave your employment because of your illness, but the current retirement law

requires that you must return to covered employment and earn one year of service credit to be vested and eligible for retirement benefits.

This letter constitutes final agency action. If you do not agree with this decision and wish to appeal this action, you must file a formal petition for review in accordance with the enclosed Rule 28-106.201, Florida Administrative Code (F.A.C.) within 21 days of receipt of this letter. Your petition should be filed with the Division of Retirement at the above address. Upon receipt of the petition, you will be notified by the Division or the Administrative Law Judge of all future proceedings and hearings. If you do not file an appeal within the 21-day period, you will waive your right to request a hearing or mediation in this matter in accordance with Rule 28-106.111, F.A.C.

22. By letter dated January 2, 2003, Petitioner "appeal[ed]" the "final agency action" announced in the State Retirement Director's December 18, 2002, letter.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57, Florida Statutes.

24. Chapter 121, Florida Statutes, contains the Florida Retirement System Act (Act). Section 121.011(1), Florida Statutes.

25. Section 121.1905, Florida Statutes, "create[s] the Division of Retirement within the Department of Management

Services," and it further provides that "the mission of the Division of Retirement is to provide quality and cost-effective retirement services as measured by member satisfaction and by comparison with administrative costs of comparable retirement systems."

26. The issue that the Division must resolve in the instant case is whether Petitioner is "vested," and therefore eligible to receive retirement benefits, under the Act.

27. "Vested," as that term is used in the Act, is defined in Subsection (45) of Section 121.021, Florida Statutes.

28. Since July 1, 2001, when it was amended by Section 4 of Chapter 2000-169, Laws of Florida, Subsection (45) of Section 121.021, Florida Statutes, has read as follows:

(a) "Vested" or "vesting" means the guarantee that a member is eligible to receive a future retirement benefit upon completion of the required years of creditable service for the employee's class of membership, even though the member may have terminated covered employment before reaching normal or early retirement date. Being vested does not entitle a member to a disability benefit. Provisions governing entitlement to disability benefits are set forth under s. 121.091(4).

(b) Effective July 1, 2001, a 6-year vesting requirement shall be implemented for the defined benefit program of the Florida Retirement System. Pursuant thereto:

1. Any member employed in a regularly established position on July 1, 2001, who completes or has completed a total of 6

years of creditable service shall be considered vested as described in paragraph (a).

2. Any member not employed in a regularly established position on July 1, 2001, shall be deemed vested upon completion of 6 years of creditable service, provided that such member is employed in a covered position for at least 1 work year after July 1, 2001. However, no member shall be required to complete more years of creditable service than would have been required for that member to vest under retirement laws in effect before July 1, 2001.[1/]

29. A "regularly established position," as that term is used in the Act, is defined in Subsection (52)(b) of Section 121.0121, Florida Statutes, 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.

30. Pursuant to Subsection (11) of Section 121.021, Florida Statutes, one is considered an "employee," and therefore "employed," under the Act, if he or she is "receiving salary payments for work performed in a regularly established position."

31. Subsection (39)(a) of Section 121.021, Florida Statutes, however, clarifies that, under the Act, "[a] leave of absence . . . constitute[s] a continuation of the employment relationship, except that a leave of absence without pay due to

disability may constitute termination for a member, if such member makes application for and is approved for disability retirement in accordance with s. 121.091(4)."

32. Rule 60S-2.006, Florida Administrative Code, addresses the subject of "[c]redit for [l]eaves of [a]bsence [u]nder the Florida Retirement System." Subsection (1) of the rule provides as follows:

A member may receive retirement credit for a total of two work years of creditable service for authorized leaves of absence under the Florida Retirement System, subject to the following:

(a) A leave of absence must be authorized in writing by a member's employer prior to or during the leave of absence.

(b) The member must complete a minimum of 10 years of creditable service, excluding any periods of leave of absence, except for military leaves of absence as provided in 60S-2.005(1), prior to receiving retirement credit for leaves of absence.

(c) The member must return to active employment performing service with a Florida Retirement System employer in a regularly established position immediately upon termination of the leave of absence and remain on the employer's payroll for one calendar month. The exceptions to this requirement are:

1. A member placed on a leave of absence for medical reasons who retires on disability while on the leave of absence shall not be required to return to employment in order to be eligible to receive credit for the leave of absence; and

2. A member whose work year is less than 12 months and whose leave of absence terminates between school years shall be eligible to receive credit for the leave of absence as long as he or she returns to covered employment at the beginning of the next school year and remains on the employer's payroll for one calendar month.

(d) The leave of absence must occur after the employee becomes a member of the Florida Retirement System.

(e) The required contributions must be made in accordance with Section 60S-3.007.

(f) Such leave of absence shall include an unpaid leave as provided under the federal Family and Medical Leave Act of 1993 granted for up to 12 weeks to care for children at birth or adoption, or to care for a seriously ill child, spouse, or parent, or for the member's own serious illness.

33. It is undisputed that, as of July 1, 2001, Petitioner had completed in excess of a total of 6 years of creditable service as a School Board employee in a covered position.

34. What the parties disagree about is whether Petitioner was "employed in a regularly established position on July 1, 2001."

35. Petitioner claims that he was so "employed" on July 1, 2001, and that he therefore met the "6-year vesting requirement" as of that date.

36. The Division, however, has preliminarily determined otherwise.

37. When the Division makes a preliminary determination that a member is not eligible to receive retirement benefits under the Act, as it has done in the instant case, it must advise the member of its proposed action and of the member's opportunity to request an administrative hearing pursuant to Chapter 120, Florida Statutes, at which the member will be able to make a presentation in an attempt to change the Division's mind. See Florida League of Cities v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991)("Until proceedings are had satisfying [S]ection 120.57, or an opportunity for them is clearly offered and waived, there can be no agency action affecting the substantial interests of a person."); Capeletti Brothers, Inc. v. Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983)("Capeletti misconceives the purpose of the [Section] 120.57 hearing. The rejection of bids never became final agency action. As we have previously held, APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind."); Capeletti Brothers, Inc. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978)("[A]n agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57."); and Couch Construction Company, Inc. v.

Department of Transportation, 361 So. 2d 172, 176 (Fla. 1st DCA 1978)("APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind.").

38. Where "there is a disputed issue of material fact which formed the basis for the proposed final action," the member is entitled to an evidentiary hearing held in accordance with Section 120.569, Florida Statutes, and Subsection (1) of 120.57, Florida Statutes. Florida Sugar Cane League v. South Florida Water Management District, 617 So. 2d 1065, 1066 (Fla. 4th DCA 1993).

39. At the hearing, the member bears the burden of establishing, by a preponderance of the evidence, his or her entitlement to retirement benefits. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996); Espinoza v. Department of Business and Professional Regulation, 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999); Pershing Industries Inc., v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute. . . ."). The member, however, need address only those entitlement issues raised in the Department's notice of denial. See Woodholly

Associates v. Department of Natural Resources, 451 So. 2d 1002, 1004 (Fla. 1st DCA 1984).

40. In the instant case, after receiving notice sufficient to afford him a "clear point of entry" to pursue an administrative hearing on the Division's preliminary determination that he did not meet the "6-year vesting requirement" and therefore was not eligible to receive retirement benefits, Petitioner requested such an administrative hearing.

41. The Division referred the matter to DOAH and the requested hearing was held.

42. Petitioner failed to meet his burden of proof at the hearing.

43. In attempting to establish that he met the "6-year vesting requirement," as it is described in Subsection (45)(b)1 of Section 112.021, Florida Statutes, Petitioner relied on his own testimony regarding his employment status on July 1, 2001. He testified that, although he has not been at work, nor received salary payments from the School Board, since July of 2000, when he was hospitalized, he was on an unpaid leave of absence, and therefore "employed" by the School Board, on July 1, 2001. The undersigned has no doubt that Petitioner sincerely believes that he was on leave, and still maintained an employment relationship with the School Board, as of July 1,

2001, as he testified; however, considering that Petitioner never worked on a full-time basis for the School Board and therefore at no time achieved tenured status giving him a property interest in continuing employment with the School Board, 2/ and further considering that Petitioner failed to produce any documentation supporting his claim that he continued his employment relationship with the School Board following his July 2, 2000, hospitalization through and beyond July 1, 2001, despite not being physically able to report to work (documentation, it is reasonable to expect, Petitioner would either have in his possession or be easily able to obtain from the School Board, if his claim were indeed true), the undersigned finds Petitioner's evidentiary presentation insufficient to persuade him, as the trier of fact, that he should rely on Petitioner's testimony and conclude that Petitioner was still "employed" by the School Board on July 1, 2001.

44. In view of the foregoing, the Division should finalize its preliminary determination that, contrary to Petitioner's assertion, he is not "vested," as that term is defined in Subsection (45)(b)1 of Section 112.021, Florida Statutes, and he therefore is not eligible to receive retirement benefits under the Act.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Division issue a final order finding that Petitioner is not "vested," as that term is defined in Subsection (45) of Section 121.021, Florida Statutes.

DONE AND ENTERED this 31st day of March, 2003, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2003.

ENDNOTES

1/ For Petitioner, this is ten years.

2/ See Section 1012.01(4)(formerly Section 228.041(20)), Florida Statutes ("Year of service--The minimum time which may be recognized in administering the state program of education . . . as a year of service by a school employee shall be full-time actual service"); and Switzer v. McFatter, No. 82-1353, 1983 WL 210084 (Fla. DOAH 1983)(Recommended Order)("Since Florida law requires that service by instructional personnel be 'full-time' in order to be counted as a year of service, 'part-time' service cannot be utilized in order to fulfill the continuing

contract requirements of Section 231.36(3)(a), Florida Statutes.")

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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.