

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID W. FELDER,)
)
 Petitioner,)
)
 vs.) Case No. 03-0486
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was conducted in this case on June 6, 2003, in Tallahassee, Florida, before the Division of Administrative Hearings, by its duly-assigned Administrative Law Judge, Ella Jane P. Davis.

APPEARANCES

For Petitioner: Arthur Lewis Stern, III, Esquire
1904 West Indianhead Drive
Tallahassee, Florida 32301

For Respondent: Larry D. Scott, Esquire
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUES

Whether Petitioner can transfer service from the State University Optional Retirement Program to the Florida Retirement System Pension Plan.

PRELIMINARY STATEMENT

The Division of Retirement notified Petitioner by a letter dated January 28, 2003, that his request to transfer previous service from the State University Optional Retirement Program (ORP) to the Florida Retirement System Pension Plan (FRS) was denied. Petitioner timely requested a disputed-fact hearing, and the Division of Retirement referred the case to the Division of Administrative Hearings on or about February 12, 2003.

At the disputed-fact hearing, Petitioner testified in his own behalf and had Exhibits P-1 through P-8 and P-10 through P-11 admitted in evidence. Respondent presented the oral testimony of Cathy Smith and Robert Henning. Respondent's Exhibits 1, 3, 4, 5, and 6, were admitted in evidence. Joint Exhibit A, the parties' Pre-hearing Stipulation, as interlineated at hearing, was admitted in evidence. It has been utilized in this Recommended Order as necessary, but not word-for-word.

Official recognition was taken of Section 121.35, Florida Statutes (2003), and Chapter 60U, Florida Administrative Code.

A Transcript was filed on June 23, 2003. Both timely filed Proposed Recommended Orders have been considered in preparation of this Recommended Order. ^{1/}

FINDINGS OF FACT

1. Petitioner is currently employed as a professor of philosophy and religion at Florida Agricultural and Mechanical University (FAMU). He was first employed as an Assistant Professor at FAMU in 1971.

2. During Petitioner's employment with FAMU, he became an associate professor and was given years toward tenure in 1980, after filing an action with the Office of Civil Rights.^{2/}

3. Petitioner has published a dozen books, has been awarded the Teacher Incentive Program Award and the Professorial Excellence Program Award, and has been a National Endowment for the Humanities Scholar at Boston University, New York University, and the University of Chicago.

4. By stipulation, the parties agreed that Petitioner accrued retirement benefits under FRS and the Division of Retirement has credited Petitioner's service as a participant in FRS during the academic years 1971-72, 1972-73, 1974-75, 1975-76, 1978-79, 1980-81, 1981-82, 1982-83, and 1983-84. Note that this stipulation is silent as to the academic years 1973-74, 1976-77, 1977-78, and 1979-80.

5. During the period from August 1984 through the present, Petitioner has been considered by the Division of Retirement to be a participant in ORP, and ORP has been credited with employer contributions for Petitioner's service at FAMU accordingly.

6. The Division of Retirement stipulated that if Petitioner had not undertaken acts which, in its opinion, constituted an election to participate in ORP, Petitioner's service, which has been credited in ORP, would have qualified for the continued accrual of benefits under FRS.

7. In 1984, Petitioner became aware that he could make an election to join ORP, a retirement option created that year by the legislature, and that he must make his election to join that program by June 1, 1984, or he would be forever barred from utilizing ORP. The effective date of salary contributions was July 1, 1984.

8. In 1984, it was necessary for a state employee to work 10 years in a FRS position in order for his or her retirement to vest. Effective July 1, 2001, the requirement changed to six years of creditable service for those members actively employed on that date.^{3/}

9. Other Personal Services (OPS) is a category of temporary employee which does not accrue creditable time toward FRS retirement benefits.

10. Petitioner's pre-1980 employment contracts with FAMU had not indicated whether he was in FRS, as opposed to being an OPS employee, but there is no evidence to suggest this information was provided on anyone else's contract, either.

11. There is no direct evidence whether Petitioner's FAMU salary warrants and/or pay-stubs, throughout all the years, indicated withholding for social security, although that is probable (See Finding of Fact 52). If they did, it would go to show that Petitioner always had monthly or bi-weekly notice of whether or not he was a regular employee. It is also probable that his FAMU warrants throughout all the years, as they do now, showed a fund code, a class code, and his type of retirement contributions.

12. At all times material, Petitioner at least knew he had been in FRS his first two years at FAMU. This would seem to be academic years 1971-72 and 1972-73.

13. Petitioner was "laid off" for the 1973-74 academic year. Petitioner was refunded all his FRS accruals up to that date. This meant that those FRS accruals would have to be paid back to FRS in order for Petitioner to be able to count those academic years toward retirement in FRS, but it is not clear when Petitioner knew this was the result of his withdrawal of the accruals. The record is unclear as to whether he has paid back these accruals.^{4/} Under FRS, he would have had the option to pay them back anytime before retirement.

14. When Petitioner applied for promotion at FAMU in 1978, he had been told by FAMU officials that he could not be promoted because he was in the OPS category. However, after settling his

civil rights action in 1980, he knew he was put in a permanent position, as associate professor with the promotion he had been denied, and had been given years towards tenure since 1978. Apparently, he did not comprehend that this adjustment also resulted in his receiving FRS credit for all those years. In 1984, Petitioner somehow believed that he had only been credited with FRS membership for 1980 through 1984.

15. In June 1984, Petitioner already had a tenured contract for the following year, which, per the parties' stipulation, would have been his tenth year in FRS, with vesting. Cf. the collective endnotes.

16. Petitioner found out about the option to join ORP in the spring of 1984. Petitioner testified that he had not wanted to elect ORP in 1984 unless he could find out how many years of credited service he had in FRS. This was because he understood the illustrations provided with the ORP election literature to indicate that if an employee had only one, two, or three years of credit in FRS, making the election to participate in ORP might be advisable, whereas the election should not be made by one who had eight or nine years of FRS credit. The ORP election literature itself was not offered in evidence.

17. Petitioner first testified that he had sought clarification of his number of years in FRS from both the FAMU Personnel Office and the Division of Retirement prior to the

June 1, 1984, deadline for making an ORP election. However, the attempts he related amounted to filling out a form in the payroll section of the FAMU Personnel Office requesting his work history, which form he thought would be forwarded to the Division of Retirement; and filling out a form to make an appointment with a FAMU Personnel Officer to discuss his situation. His testimony is confused and contradictory as to whether he personally made direct contact with the Division of Retirement during this period, and upon the evidence as a whole, it is concluded that he did not.

18. Nonetheless, Petitioner completed a Division of Retirement Ballot/Enrollment Form, also known as an ORP-16 Form, to participate in ORP. The instructions attached to the form read, in pertinent part:

As an employee eligible to participate in the ORP you have the option to reject or elect membership in the ORP. If you reject the ORP, you will be a member of the FRS.

If you choose not to participate, so indicate in the space provided for rejecting the ORP and include the date. If you reject the ORP, it will not be necessary to complete the remainder of the Enrollment Form.

If you elect to participate, please complete the following:

Percent of salary to be contributed by your employer to each plan (the total must equal 6%).

Percent of salary to be deducted from your salary as an employee contribution (the total cannot exceed 6%) and to which plan(s).

Name of company or companies you have selected.

Read the three statements carefully, sign and date the Enrollment Form.

19. The form contains an admonition that ORP election is irrevocable.

20. Also on this Ballot/Enrollment Form, under "I elect to become a member of the ORP and have signed necessary contracts as follows," Petitioner filled in the investment provider name of TIAA-CREF, the State employer's contribution percentage, and the date of May 15, 1984. He did not fill in an employee contribution percentage. He did not sign in either the "elect to participate" or the "elect not to participate" portion of the form. FAMU certified this form as described infra.

21. Petitioner also completed an ORP Enrollment/Change Form, selecting, as his investment provider, TIAA-CREF. This form provided, "If you have elected participation in TIAA-CREF under the Florida Optional Retirement Program (ORP), please complete this form when enrolling in or making a change to TIAA-CREF noncashable Retirement Annuity or cashable Supplemental Retirement Annuity (SRA) contracts. This form applies only to TIAA-CREF contributions under the ORP." Petitioner checked

"enrollment" under "Reason for submitting form." He filled out all parts of the form concerning the State's contributions, including inserting the effective date of "7/1/84." He signed the form and dated it "5/15/84."

22. Petitioner also signed a contract with TIAA-CREF as his investment provider, dated "May 17, 1984." This document bears a certification by FAMU that his passport proved Petitioner's identity on that day.

23. Petitioner left the foregoing three 1984 forms with a FAMU Personnel Office employee. Petitioner testified that he had an agreement with the unnamed FAMU Personnel Office employee to the effect that only if Petitioner came in and signed the unsigned documents was he electing ORP, and that if Petitioner did not come in to sign by June 1, 1984, the forms should be destroyed. However, this testimony is only Petitioner's understanding of the agreement. No one from the FAMU Personnel Office testified, and there is no evidence that there was ever a meeting of the minds on this "understanding."

24. On May 17, 1984, a FAMU official dated and certified Petitioner's unsigned Ballot/Election form (see P-4 and Findings of Fact 18-20) and forwarded it to the Division of Retirement. The FAMU certification on this document was to the effect that Petitioner had executed a contract with a provider, which, in fact, Petitioner had. (See R-4 and Finding of Fact 22.) The

FAMU certification read, in whole part, "I certify that this employee has signed a contract(s) with the ORP carrier(s) as shown above and is filling a fulltime position." The certifier checked the box for "enrollment."

25. FAMU then forwarded the unsigned but certified Ballot/Enrollment Form to the Division of Retirement. The Enrollment/Change Form, signed by Petitioner, may or may not have gone to the Division, but the contract between Petitioner and TIAA-CREF was forwarded by FAMU to TIAA-CREF.

26. In 1984, as now, if anyone in the Division of Retirement had noticed that Petitioner had not signed the Ballot/Election Form, it was Division policy to write the employee and ask him to completely fill out a new form and sign it. Then the Division would honor the employee's election of ORP, even if the correctly completed form were received after the election deadline or the first payroll deduction.

27. Apparently, in 1984, due to the necessity of processing a huge quantity of ORP Ballot/Election forms between the June 1, 1984 election deadline and the dates of the electing employees' first July bi-weekly or monthly paycheck(s), no one in the Division of Retirement noticed the absence of Petitioner's signature on the Ballot/Election Form, and no letter was written to him. Instead, based upon the certified unsigned Ballot/Election Form, and probably the

Enrollment/Change Form, the Division of Retirement treated Petitioner as enrolled in ORP as of the June 1, 1984 deadline.

28. However, Both Ms. Smith, Administrator of the Enrollment Section of the Bureau of Enrollment and Contributions, and Mr. Henning, Administrator of the Optional Retirement Program and Optional Annuity Program Section, of the Division of Retirement, testified that if they had seen Petitioner's certified but unsigned Ballot/Enrollment Form in 1984 or today, they would have assumed the Petitioner had elected to be enrolled in ORP, because all the required information was there, including the certified information that he had signed a binding contract with the carrier/provider TIAA-CREF.

29. In August 1984, the employer began paying the maximum allowable State contributions to TIAA-CREF for Petitioner's ORP retirement benefits.

30. In August 1984, Petitioner received, from TIAA-CREF, a copy of the contract he had signed with that ORP provider.

31. Although Petitioner claimed that he only asked to get out of ORP in 2002 when his number of years in FRS was finally revealed to him by a social security account calculation,^{5/} he simultaneously and inconsistently maintained that he went to the FAMU personnel office in August 1984 and orally complained that he did not want to be in ORP. However, Petitioner was

consistent throughout his testimony that a FAMU personnel office employee told him in August 1984 that the FAMU employee had telephoned the Division of Retirement and that the Division of Retirement had "said" that Petitioner's decision to join ORP was irrevocable.

32. Sometime in 1984, after being advised by FAMU's Personnel Office that his prior election to go into ORP was irrevocable, Petitioner sought the advice of an attorney, but he ultimately chose not to formally contest his membership in ORP.

33. Petitioner testified that, based on his prior civil rights action, he was not anxious to jump into an expensive lawsuit without knowing what his damages were and that his damages depended upon the number of years of accrued service he had in FRS as of June 1, 1984, which accrued service he believed he had lost by the election of ORP.

34. Then, as now, state employees frequently presented issues contesting their appropriate retirement fund or account to the Division of Retirement by phone or letter. Once an oral request for review of the account is presented in written form to the Division, it is reviewed and a decision made. The decision is reduced to a letter, which constitutes the (proposed) final agency action.

35. Petitioner's testimony that he repeatedly from 1984 until 2003 tried to obtain his FRS history from FAMU strains

credulity, but his claim that between 1984 and 1989 he had twice tried, without success, to secure information from the FAMU Personnel Office about how many years in FRS he had lost is credible.

36. He claimed to have sent certified letters concerning his years of service, apparently to FAMU, but there is no documentation at the Division of Retirement that anyone telephoned or wrote the Division of Retirement at any time prior to 2002 with any information that could be linked to Petitioner by social security number or his personnel file.

37. From 1984 to 1989, the employer's maximum contribution to TIAA-CREF was transmitted as requested by Petitioner's 1984 Ballot/Election and Ballot/Change Forms.

38. A member of ORP is allowed to make supplemental employee contributions.

39. In 1989, 1993, 1998, and 1999, Petitioner made employee contributions to his ORP provider company TIAA-CREF, utilizing Division of Retirement Ballot/Enrollment forms, also known as ORP-16 forms.

40. After the 1984 enrollment period, ORP-16 forms have been used for employees already in ORP to change their contribution amounts, as the respective maximum amounts the State and the employee were permitted to contribute were raised by statutory amendments. ORP-16 forms could also be used to

request divisions of the maximum percentages of the employer's and the employee's contributions between several ORP investment providers or to change from one ORP investment provider to another. Changing providers or adding providers would require that the employee also execute a new contract with the new provider. After June 1, 1984, ORP-16 forms could not be used by anyone employed and eligible on that date to initially elect to be in ORP because their deadline to elect ORP had been June 1, 1984. However, other persons becoming employed later had later election deadlines for ORP membership and could use the same ORP-16 forms to meet their later election deadlines. Employer certifications to the Division that valid provider contracts had been executed to cover all funds transmitted were still required.

41. On his 1989 ORP-16 Form, Petitioner signed under the words, "I elect not to participate in ORP," and inserted the date "1/9/89". He also signed under the words, "I elect to become a member of ORP and have signed necessary contracts..." He inserted "11%" for his employee contributions, the TIAA-CREF name, and the same date in this portion of the form. He did not indicate the new 11% employer contribution on this ORP-16 Form, because that percentage was statutorily defined. This ORP-16 Form was certified by FAMU to the Division of Retirement on 1/11/89, in the language set out above in Finding of Fact 24.

The certifier could have checked the boxes for "enrollment" or "plan change," but he or she checked the box for "other". The Division of Retirement transmitted the employer's maximum contribution and Petitioner's requested employee contribution to TIAA-CREF as requested by Petitioner's 1989 ORP-16 Form until 1993.

42. Ms. Smith and Mr. Henning testified that they would not have understood Petitioner's 1989 ORP-16 Form as a request to get out of ORP, because an employee could not change ORP contribution percentages unless he or she was already in ORP; because an employee in Petitioner's class could not elect for or against ORP after June 1, 1984; and because the form was certified by the employer.

43. On September 18, 1989, Petitioner signed an Application for TIAA-CREF Supplemental Retirement Annuity (SRA) and an Enrollment Memo for an ORP and Tax Deferred Annuity Program (TDA). On this latter item, Petitioner marked "already participating" beside the printed words, "ORP employer contributions"; checked the box for "voluntary ORP employee contributions"; and checked the box for "new contract" under "Supplemental retirement annuity (SRA) contracts." These forms were sent to TIAA-CREF. On October 1, 1989, TIAA-CREF issued Petitioner his SRA and TDA.

44. On the 1993 ORP-16 Form, Petitioner did not sign a new portion added to the form which allowed a certain class of employee to state, "In lieu of participating in the ORP, I elect to participate in FRS." Petitioner did not fall in this classification of employee, anyway. He did, however, increase his employee's contribution to ORP via TIAA-CREF, and signed and dated the ORP-16 Form "September 27, 1993," in the section under, "I elect to become a member of the ORP and have signed necessary contracts. . ." This ORP-16 Form also was certified by FAMU to the Division of Retirement in the usual language, and the box for "contributions change" was checked. The Division of Retirement transmitted the employer's maximum contribution and Petitioner's employee contribution to TIAA-CREF as requested by Petitioner's 1993 ORP-16 Form until 1998.

45. On November 3, 1996, Petitioner signed a Request for a TIAA Traditional Transfer Payout Annuity to TIAA Real Estate and/or CREF. This document was sent to TIAA-CREF.

46. On the 1998 ORP-16 Form, Petitioner again did not sign the portion which allowed a different class of employee to state, "In lieu of participating in the ORP, I elect to participate in FRS." He did, however, again increase his employee's contribution to ORP via TIAA-CREF, and signed and dated the ORP-16 Form, "Nov. 30, 1998," in the section under, "I elect to become a member of the ORP and have signed necessary

contracts. . ." This ORP-16 Form also was certified by FAMU to the Division of Retirement, in the usual language, and the box for "contributions change" was checked. The Division of Retirement transmitted the employer's maximum contribution and Petitioner's employee contribution to TIAA-CREF as requested by Petitioner's 1998 ORP-16 Form until 1999.

47. The 1999 ORP-16 Form states at one point that the employer's contribution must equal 10.14% of salary and the employee's contribution cannot exceed 10.14%, and then also states that if the employee chooses to have up to 11.57% of his adjusted gross taxable salary deducted, other issues including other investment funds must be considered. (See Finding of Fact 50.) On the 1999 ORP-16 Form, Petitioner did not sign the new portion which allowed a different class of employee to state, "In lieu of participating in the ORP, I elect to participate in FRS." He did, however, decrease his employee's contribution to ORP via TIAA-CREF, and signed and dated this ORP-16 Form "6/11/99" in the section under, "I elect to become a member of the ORP and have signed necessary contracts. . ." This ORP-16 Form also was certified by FAMU to the Division of Retirement in the usual language, and the box for "contributions change" was checked. Since that date, The Division of Retirement has continued transmitting the employer's maximum contribution and

Petitioner's employee contribution to TIAA-CREF as requested by Petitioner's 1999 ORP-16 Form.

48. Petitioner testified that he used the 1989-1999 ORP-16 forms and the TIAA-CREF contracts to set up supplemental accounts while protesting against being in ORP at all. The reason Petitioner gave for executing the four changes in contribution to ORP itself was that he had unilaterally concluded that he could not use any investment companies used in conjunction with FRS supplemental accounts.

49. In fact, Petitioner could not purchase his TIAA-CREF ORP-SRA and ORP-TDA without already being in ORP. Therefore, logically, his execution of the SRA and TDA documents described at Finding of Fact 43, further signify or ratify Petitioner's earlier election of ORP.

50. Also, Mr. Henning testified that at no time was there any impediment via ORP to Petitioner's setting up a regular 403b tax shelter annuity or a 457 tax-deferred compensation account outside ORP. Petitioner also could have set up such plans if he had remained in FRS, but if he had remained in FRS, he would not have been able to run these plans through the ORP process. Mr. Henning's testimony is competent, expert, and unrefuted. Moreover, information concerning a 457 plan is included on each ORP-16 Form, immediately above the signature line for the "I elect to become a member of the ORP and have signed necessary

contracts. . ." portion, by way of cautioning the employee that it is the employee's responsibility to be sure that in listing/changing any amount to be deducted for ORP, the employee must take into consideration that all payroll deductions, including credit unions, the 457 plan, or other supplemental accounts are fully funded.

51. From 1984 through the present, Petitioner has received quarterly statements from TIAA-CREF, reflecting his earnings in ORP.

52. In 2002, Petitioner received a calculation from the Federal Social Security Administration, which showed that he had been employed and that some employer(s) (not necessarily FAMU) had paid deductions in every year from 1971 to the present, with the exception of 1977. Petitioner then interpreted this to mean that he was in OPS with FAMU that year and was in FRS every other year between 1971 and 1984.^{6/} Only in 2002 did he contact the Division of Retirement.

53. Petitioner's calculations show that if he had stayed in FRS, he could expect approximately three times the annual retirement benefit that he can now expect via TIAA-CREF.

CONCLUSIONS OF LAW

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

55. Regardless of how the parties have characterized the legal issues of this case, the practical problem to be solved herein is whether Petitioner was properly enrolled in ORP between August 1984 and the present; alternatively, whether Petitioner's pre-August 1984 enrollment in FRS should have been continued between August 1984 and the present.

56. The Florida Retirement System is codified in Chapter 121, Florida Statutes, and provides for compulsory participation in the Florida Retirement System for all employees hired after December 1, 1970, with certain exceptions.

57. In 1984, the Florida Legislature established the State University Optional Retirement Program for the State University System. Chapter 83-197 in relevant part provides as follows:

121.35 System Optional retirement program for the State University System

(1) OPTIONAL RETIREMENT PROGRAM ESTABLISHED. The Division of Retirement of the Department of Administration shall establish an optional retirement program under which contracts providing retirement and death benefits may be purchased for eligible members of the State University System who elect to participate in the program. The benefits to be provided for or on behalf of participants in such optional retirement program shall be provided through individual annuity contracts, which may be fixed or variable, or a combination thereof, in nature. The state shall contribute as provided herein toward the purchase of such optional benefits which shall be fully and immediately vested in the participant.

58. Petitioner was a compulsory member of FRS in 1984 when the Legislature established ORP for eligible members of the State University System.

59. The new retirement program was afforded to eligible employees as an alternate to participation in FRS. In order to participate, an employee was required to notify the employer and the Division of his election in writing.

60. Section 121.35(3) Florida Statutes (1984), provided, as follows:

ELECTION OF OPTIONAL PROGRAM

(a) Any eligible employee, employed on or about March 1, 1984, may elect to participate in the optional retirement program in lieu of participation in the Florida Retirement System. Such election shall be made in writing and filed with the division and the personnel officer of the employer on or before June 1, 1984. Upon such election, participation in the optional program shall take effect July 1, 1984, and election to so participate shall terminate the person's membership in the Florida Retirement System. Any eligible employee who is employed on or before March 1, 1984, who fails to make an election to participate in the optional program by June 1, 1984, shall be deemed to have elected to retain his membership in the Florida Retirement system.

61. Petitioner contends that there could be no election of ORP until such time as Petitioner signed the May 15, 1984 ORP-16 Form, and since he has never signed it, he cannot be considered to have ever been enrolled in ORP.

62. However, the statute requires only that an election be made in writing and filed with the Agency (FAMU) and the Division of Retirement, and based upon the statute and the instructions on the forms, Petitioner timely and irrevocably elected to enroll in ORP in 1984.

63. Petitioner testified that at the time he was eligible to join ORP, he did not know for sure how many years had been credited to FRS on his behalf, and therefore he did not seek to overturn the ORP membership at his first opportunity. He also testified that, in 1984, he had believed he had been in FRS for 1971-72 and 1972-73 and for 1980 through 1984. If he believed this, then it logically follows that he must also have believed that he had six years in FRS as of 1984. Even assuming the unlikely concept that in 1984 Petitioner believed that the two years of accruals he had withdrawn were not credited to FRS, he still knew he had four FRS years, without the year he was laid off, and further knew he was about to enter into his fifth year in FRS. Since the election literature apparently recommended not entering ORP with more than four years in FRS, the undersigned is not persuaded that (1) receiving a definitive pronouncement from FAMU or the Division of Retirement in 1984 that he had four or more years in FRS would have caused Petitioner to not elect ORP in the first place or, that (2) in the second place, it would have caused Petitioner to contest his

ORP status in a timely manner.

64. The Division of Retirement inadvertently offended its own policy, never codified into a rule, when it processed Petitioner's 1984 Ballot/Enrollment Form without his signature on it, but based on the totality of the circumstances, everything Division personnel saw pointed to a valid election by Petitioner for ORP, and Petitioner never did anything to change that perception.

65. Also, it would be remarkable if the Division of Retirement could have discerned from Petitioner's subsequent behavior and multiple form filing that he was requesting to be let out of ORP. Everything he did pointed to a continued desire to be in ORP.

66. Petitioner's window of opportunity to challenge being put in ORP opened upon his notification from TIAA-CREF in August 1984, but Petitioner's second-hand oral inquiries through the FAMU Personnel Office cannot, by hindsight, be converted to a notification to the Division of Retirement that Petitioner wanted to be removed from ORP. Petitioner consulted an attorney, and, presumably fully informed, elected not to formally challenge his membership in ORP. The Division could not have been expected to remove Petitioner from ORP or furnish him with instructions on how to challenge its processing of his

ORP Ballot/Election Form, because Petitioner did not ask the Division to do anything.

67. Repeatedly asking FAMU to tell him how many years he had been in FRS does not amount to asking the Division of Retirement to remove him from ORP.

68. Petitioner knew in August 1984, that he was in ORP and that some action on his part was necessary to correct the so-called mistake. Despite consulting a lawyer, he did not act reasonably or timely to either get a statement of his creditable time in FRS or to remove himself from ORP.

69. Moreover, Petitioner proceeded to change contributions to ORP four times, each time signing forms stating he had a TIAA-CREF contract and was electing ORP. He could not elect employee contributions in addition to employer contributions in 1989 and change those employee contributions three more times without being a member of ORP in the first place. Petitioner ratified any inadvertent mistake the Division made in 1984 four times. It would be nonsensical for the Division or TIAA-CREF to assume that Petitioner's affirmative acts of placing different percentages of his own money in TIAA-CREF for ORP signified that he wanted to get out of ORP. It would be equally nonsensical for either the Division or the provider to assume that Petitioner's affirmative act of contributing to an ORP-SRA or

TDA, both of which could only be purchased by ORP members, signified that he wanted to get out of ORP.

70. While public policy militates, or at least should militate, against an employee being placed in one form of retirement fund over another without his informed and clear consent, and although the undersigned is loathe to penalize any citizen for mistakes of government in the absence of a clear election based on that citizen's signature, the fact remains that each State employee bears the burden of acting timely to protect his or her own interests with regard to retirement accounts, and Petitioner has not.

71. Petitioner's failure to seek redress directly from the Division of Retirement and his proactive investments with TIAA-CREF from 1984 to the present created the present situation. Petitioner was aware in 1984 that he did not sign his Ballot/Election Form. He was aware in 1984 that a so-called "mistake" had been made in placing him in ORP. He instructed and allowed the Division of Retirement to pay money on his behalf to TIAA-CREF for nearly 20 years, without notifying the Division or TIAA-CREF of any problem. Rather than notifying either the Division or the provider, Petitioner kept executing their forms, constituting his free-will participation in ORP.

72. Finally, although Petitioner suggested that his TIAA-CREF funds now be used to "cover" the lack of contributions to

FRS during the last 20 years, the amount of those investments would be insufficient to fully fund his FRS account. There seems to be some procedure whereby Petitioner can elect a different State-approved ORP provider, but neither Petitioner nor Respondent has demonstrated any law or procedure which permits Petitioner to cancel his contracts with TIAA-CREF prior to his retirement and pay that money into FRS. See peripherally Bradshaw v. University of West Florida v. Department of Management Services, Division of Retirement, DOAH Case No. 02-0212 (Recommended Order June 28, 2002).

73. The Division of Retirement is the agency charged by the Legislature with the task of maintaining the integrity of FRS, thus safeguarding the interests of all members of the system. The Florida Constitution and the Agency's enabling statutes require that FRS be funded and administered in a sound actuarial manner. To allow Petitioner to change in 2003 his election for ORP retroactively to 1984 would offend that trust and duty.

RECOMMENDATION

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

RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order, which determines Petitioner to have been a valid member of ORP since June 1,

1984, denies his request to retroactively transfer into FRS, and dismisses his Petition.

DONE AND ENTERED this 6th day of October, 2003, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of October 2003.

ENDNOTES

1/ All continuances of hearing and extensions of time for post-hearing proposals have been initiated and/or stipulated by the parties.

2/ It is not clear if this was an internal discrimination investigation, a case before the Florida Commission on Human Relations, or a civil lawsuit, but Petitioner employed an attorney at the expense of \$10,000.

3/ Petitioner received, in 2002 or 2003, from the Division of Retirement, an estimate, stating he was vested in FRS based on service through 5/1984 with retirement effective at age 62. This document contains the exculpatory language "Estimate only, subject to verification of all factors." Based on other evidence that an election to go into ORP in 1984 would wipe out all Petitioner's years toward FRS retirement and due to a subsequent social security calculation (See n. 5, below), this "estimate" by the Division is suspect for accuracy.

4/ A letter from Petitioner to the Director of the Division of Retirement dated August 6, 2002, (R-1) states that in June 2002, he went to the Division to "update [his] address and also to pay for the refund I had taken the year I was unemployed. ... The remedy I request is to have my future retirement funds go into the FRS Pension Fund and if possible to be given the opportunity to buy back years with my ORP funds." According to Petitioner's testimony, all his years in FRS were wiped out, effective June 1, 1984, but see n. 3, above.

5/ Oddly enough, this exhibit, Exhibit P-8D, shows a zero contribution in 1977, which may relate to the 1976-77 school year contract, but which certainly does not correlate with the year Petitioner was laid off in 1973-74. See Findings of Fact 12-14 and 52. It is entirely possible that Petitioner earned money other than from FAMU in 1973-74 and that amount would appropriately show up in his social security calculations. However, if he were paid "zero" in social security withholding in 1977 by FAMU, because he was in OPS, then his time in FRS might not match the information given in n. 4, above.

6/ See nn. 4 and 5, above.

COPIES FURNISHED:

Arthur Lewis Stern, III, Esquire
1904 West Indianhead Drive
Tallahassee, Florida 32301

Larry D. Scott, Esquire
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

Erin Sjostrom, Director
Division of Retirement
Department of Management Services
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

Monesia Taylor Brown
Acting General Counsel
4050 Esplanade Way
Tallahassee, Florida 32399-1560

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.