

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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|--------------------------|---|------------------|
| ANTOINETTE MUNRO, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Case No. 03-4409 |
| |) | |
| DEPARTMENT OF MANAGEMENT |) | |
| SERVICES, DIVISION OF |) | |
| RETIREMENT, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |
| ERIC EGGEN, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Case No. 03-4412 |
| |) | |
| DEPARTMENT OF MANAGEMENT |) | |
| SERVICES, DIVISION OF |) | |
| RETIREMENT, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in these consolidated cases on January 29, 2004, in Pensacola, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: George R. Mead, II, Esquire
Moore, Hill & Westmoreland, P.A.
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For Respondent: Thomas E. Wright, Esquire
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Division of Retirement
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STATEMENT OF THE ISSUE

Whether the Petitioners are entitled to participate in the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

These cases were referred to the Division of Administrative Hearings for formal proceedings based upon the Respondent's preliminary finding and determination that the Petitioners, Antoinette Munro and Eric Eggen, are not eligible to participate in the FRS. The Petitioners timely challenged those determinations. There are no disputed procedural issues regarding those determinations.

At issue is whether the Petitioners should have been included among officers or employees entitled to participate in the FRS. Because of the relationship inherent in the working circumstances of the individuals, the facts and legal issues shared by the cases, and the common witnesses, the cases were consolidated for hearing for the convenience of all parties. Similarly, for convenience sake and to avoid the repetition of findings that would prove identical to both cases, a single Recommended Order is issued. Findings of fact unique to one or the other Petitioner are clearly delineated. The employment status of the Petitioner Eggen governs whether or not the Petitioner Munro should be considered eligible. That is to say,

and the parties would agree, if Mr. Eggen is not eligible, then Mrs. Munro cannot be deemed eligible to participate in the FRS. Conversely, if Mr. Eggen is eligible, Mrs. Munro may also be deemed eligible.

The parties do not agree as to the burden of proof in this cause. The Petitioners maintained that once the prima facie case of establishing Mr. Eggen an "officer" nor "employee" is established, the burden shifts to the Respondent to prove he is an "independent contractor." Because Mr. Eggen has not established that he is an "officer" nor "employee," the issue of whether or not the burden should shift is not addressed. Essentially, Mr. Eggen is neither an officer or an employee within the meaning of the Florida Statutes.

At hearing, in support of their contentions the Petitioners testified in their own behalf and presented testimony from Deedra Abernathy Benham. The Petitioners' Exhibits A through E were admitted into evidence. The Respondent presented testimony from Ellen Vickery and Cathy Smith. The Respondent's Exhibits 1-3, 7, 10-12, and 14-17 were also received in evidence.

The parties requested and official recognition has been taken of the provisions of law as set forth in the record. Portions of those provisions are included within this order.

The transcript of the proceedings was filed with the Division of Administrative Hearings on February 17, 2004. Thereafter the parties timely filed Proposed Recommended Orders that have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent, Department of Management Services, Division of Retirement (Respondent or Department), is the state agency charged with the responsibility of administering the FRS. Accordingly, the Respondent must resolve as part of its normal course of duties whether or not individuals are eligible to participate in the FRS.

2. The Petitioner, Eric Eggen, is an attorney authorized by the Florida Bar to practice law within the State of Florida. Mr. Eggen has practiced law since 1974.

3. On March 15, 1991, Mr. Eggen was appointed by the Chief Judge of the First Circuit to serve as a "part time Child Support Hearing Officer." Mr. Eggen was directed to perform such duties as part of a program that coordinates the enforcement of child support.

4. Although Florida's First Circuit encompasses more than two counties, the vast majority of Mr. Eggen's work has been performed for and funded primarily by Escambia County and Santa Rosa County.

5. The child support program pertinent to these cases is a federally funded program that channels monies from the federal government to local governments through the State Department of Revenue. Local governments are required to "match" a certain percentage in order to receive the federal funds. In these cases, the First Circuit (when the program was initiated) decided to use non-Article V hearing officers to perform the work. This process had been approved by the Florida Supreme Court and allows the judges of the First Circuit more time to perform their other responsibilities. Accordingly, for reasons not fully set forth in this record, Mr. Eggen was selected to be the hearing officer for the First Circuit child support enforcement program. How or by whom Mr. Eggen would be compensated for his efforts was not set forth by any written document. He was simply designated by the Chief Judge to be the person who would do the work.

6. The work consisted of conducting child support hearings to determine whether child support was owed, whether someone had the ability to pay child support, and whether someone might be willfully refusing to pay child support. Issues such as paternity required an Article V judge. Mr. Eggen was not authorized to make such determinations.

7. Initially the work was considered part-time, but as the volume of cases increased over time Mr. Eggen's ability to perform other legal work diminished. He maintains that the child support enforcement work now consumes his full-time schedule. Exactly when Mr. Eggen went to full-time work as a hearing officer was not proved.

8. The contracts governing how monies are treated by Escambia County and Santa Rosa County do not include any specification regarding the Petitioners by name. Presumably any individual performing Mr. Eggen's duties would be entitled to the compensation he receives for the work performed. In fact, when Mr. Eggen substitutes for another hearing officer he is similarly compensated.

9. Mr. Eggen does not have a permanent office within the court facilities, does not receive office supplies through the court or county facilities, and does not have sick leave or annual leave through any agency. When Mr. Eggen performs the work, he is paid by submitting invoices to the counties for whom the work is performed. Neither the First Circuit, the Court Administrator's Office, nor the Department of Revenue pays Mr. Eggen directly for the work performed. In remitting funds to Mr. Eggen the counties do not deduct social security, withholding, or any other amount such as medical insurance costs. There is no evidence that Mr. Eggen receives any benefits such as medical insurance, dental insurance, or deferred compensation through any entity. Further, there is no evidence that those types of benefits were made available to Mr. Eggen but declined by him. Typically those types of benefits are available to full-time state employees.

10. At all times prior to the initiation of these cases, the Petitioner Eggen held himself out as "self-employed." Mr. Eggen's work as a hearing officer did not preclude him from representing private clients on matters not in conflict with his

role as the child support enforcement hearing officer. The extent of Mr. Eggen's private practice before the volume of child support enforcement hearings caused him to work full-time as a hearing officer is not proved. Whether or not he could perform other legal work at this time is also unknown.

11. The Petitioner Munro is a full-time employee of Mr. Eggen. She is paid a salary and receives a W-2 from Mr. Eggen. Her services to the child support enforcement program are billed to the counties at a daily rate as "clerical assistance." Mrs. Munro designates herself as a "judicial assistant." Mr. Eggen uses monies from the paid county invoices to partially fund Mrs. Munro's monthly wage.

12. Mrs. Munro was hired by Mr. Eggen in approximately 1975. No one from the counties, the Court Administrator's Office, or the Judges of the First Circuit had any input to Mr. Eggen's selection of Mrs. Munro. No one from those entities can fire Mrs. Munro, discipline her, reward her, or pay her. Her sole source of remuneration flows through Mr. Eggen.

13. How Mrs. Munro accounts for her work time to Mr. Eggen was not proved. Neither Mr. Eggen nor Mrs. Munro is required to account for time spent on child support cases to the Court Administrator's Office, the Judges of the First Circuit, or the Department of Revenue.

14. The Petitioners Eggen and Mrs. Munro set the hearing schedule for the child support cases, coordinate the hearings with court space available to conduct the cases, and complete the paperwork associated with the cases at their own designated pace.

15. No one instructs Mr. Eggen as to when he must work, how he must work, or whether he must work. If Mr. Eggen chose not to work, he would not be paid. The completion of the work drives the payments. No work and no invoice to counties would lead to no compensation to Mr. Eggen. Whether Mrs. Munro would be paid by Mr. Eggen under those circumstances was not proved.

16. Neither Petitioner is identified or specified as an employee of the Court Administrator's Office.

17. Neither Petitioner is identified or specified as an employee of the First Circuit.

18. Neither Petitioner is identified or specified as an employee of the Department of Revenue.

19. Neither Petitioner holds a position or job classification that has been identified, specified, or funded by the Florida Legislature.

20. Prior to the initiation of this action, neither Petitioner had ever publicly claimed to be a "state employee."

21. There is no evidence that either Petitioner received a

statement of benefits accrued from any state entity setting forth the Petitioners' entitlements or declined benefits.

22. Whether or not any entity pays workers' compensation, leave, or insurance benefits for the Petitioners was not proved. There is no evidence that any state, court or county agency does so.

23. The Court Administrator of the First Circuit is a state agency as contemplated by Chapter 121, Florida Statutes.

24. When the Petitioners first believed they were entitled to benefits as an "officer" or "state employees" was not proved. Clearly, the first claim for FRS entitlement was not filed until 2001, some ten years after Mr. Eggen had been designated to do the work as a child support enforcement hearing officer.

25. Other child support enforcement hearing officers who are considered "state employees" for purposes of working through the Court Administrator's Office are designated "OPS." As such, those employees are not eligible to participate in the FRS nor do they receive other benefits afforded to state employees.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(1), Fla. Stat.

27. The FRS is set forth in Chapter 121 of the Florida Statutes. The parties do not dispute the provisions of that law, nor do they assert any difference in the interpretation of those provisions. All acknowledge that employees of state agencies are mandatory participants in the FRS.

28. Section 121.021(52)(a), Florida Statutes (2002), defines a regularly established position 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 §. 216.011(1)(dd), or an established position which is authorized pursuant to §. 216.262(1)(a) and (b) and is compensated from a salaries account as provided by rule.

29. Section 216.001(1)(dd), Florida Statutes (2002), provides:

(dd) "Other personal services" means the appropriation category used to fund the compensation for services rendered by a person who is not filling an established position. This definition includes, but is not limited to, services of temporary employees, student or graduate assistants, persons on fellowships, part-time academic employees, board members, and consultants and other services specifically budgeted by each agency, or by the judicial branch, in this category. In distinguishing between payments to be made from salaries and benefits appropriations and other-personal-services appropriations:

1. Those persons filling established positions shall be paid from salaries and benefits appropriations and those persons performing services for a state agency or for the filling established positions, shall be paid from other-personal-services appropriation.

2. Those persons paid from salaries and benefits appropriations shall be state officers or employees and shall be eligible for membership in a state retirement system and those paid from other-personal-services appropriations shall not be eligible for such membership.

30. Section 2163262(1), Florida Statutes (2002), provides in relevant part:

(1)(a) Unless otherwise expressly provided by law, the total number of authorized positions may not exceed the total provided in the appropriations acts. In the event any state agency or entity of the judicial branch finds that the number of positions so provided is not sufficient to administer its authorized programs, it may file an application with the Executive Office of the Governor or the Chief Justice; and, if the Executive Office of the Governor or Chief Justice certifies that there are not authorized positions available for addition, deletion, or transfer within the agency as provided in paragraph (c) and recommends an increase in the number of positions, the Governor or the Chief Justice may, after a public hearing, authorize an increase in the number of positions for the following reasons only:

1. To implement or provide for continuing federal grants or changes in grants not previously anticipated;
2. To meet emergencies pursuant to Section 252.36;
3. To satisfy new federal regulations or changes therein;
4. To take advantage of opportunities to reduce operating expenditures or to increase the revenues of the state or local government; and
5. To authorize positions which were not fixed by the Legislature through error in drafting the appropriations acts.

The provisions of this paragraph are subject to the notice and review procedures set forth in Section 216.177. A copy of the application, the certification, and the final authorization shall be filed with the Legislative Budget Commission, the appropriations committees, and with the Auditor General.

(b) The Governor and the Chief Justice may, after a public hearing, delete supervisory or managerial positions within a department and establish direct service delivery positions

in excess of the number of supervisory or managerial positions deleted. The salary rate for all positions authorized under this paragraph may not exceed the salary rate for all positions deleted under this paragraph. Positions affected by changes mad under this paragraph may be funded only from identical funding sources.

31. The crux of these cases is that the Petitioners claim they should have been considered "employees" of the state for the period from November 1, 1992 through the present. As a matter of law, the Petitioner Eggen has failed to establish himself as either an "officer" or an "employee" as those terms are defined. Mr. Eggen is not subject to the control and direction of any employer. Mr. Eggen works when he chooses to do so. For at least a portion of the time claimed, Mr. Eggen did not even work full-time on the child support enforcement cases. If he does not work, he cannot submit invoices for payment. He has been designated as someone who may do the work, but presumably only his desire to receive payment for the work dictates when the work is done and whether he gets paid. And when he does complete the work, the invoice for the work is paid by the county, not a state agency. Practically, if the Chief Judge sought to designate someone else to do the work, Mr. Eggen would have little recourse. He is not designated as a career service employee of the state, he holds no established position of employment, and the "at will" term of his ability to do the work merely suggests that the "contract" could be extended to someone else.

32. Similarly, as a matter of law, the Petitioner Munro has also failed to establish she is an employee of the state such

that she would be eligible for FRS benefits. Just as with Mr. Eggen, there is no budgeted position that covers this Petitioner. Neither the Supreme Court or the Court Administrator's Office or the Department of Revenue or any other state entity has listed Mrs. Munro as its employee. There is no "regularly established position" this Petitioner fills. The state has never issued a salary warrant to this Petitioner. All wages to this employee were through Mr. Eggen's law practice. As such she has established herself to be his employee. Her employment benefits are determined by those available through his law practice.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, issue a Final Order denying eligibility to these Petitioners.

DONE AND ENTERED this 1st day of April 2004, in Tallahassee,
Leon County, Florida.

S

J. D. Parrish
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2004.

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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.