

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WESLEY PETTY,)
)
 Petitioner,)
)
 vs.) Case No. 04-3058
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on October 12, 2004, in Cross City, Florida.

APPEARANCES

For Petitioner: Joseph Lander, Esquire
Lander & Lander, Attorneys at Law
Post Office Box 2007
Cross City, Florida 32628

For Respondent: Spencer Kraemer, Assistant General Counsel
Department of Management Services
Office of the General Counsel
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STATEMENT OF THE ISSUE

The issue is whether the Department of Management Services, Division of Retirement, correctly excluded Petitioner from

participation in the Florida Retirement System from August 18, 1995, through November 17, 1996.

PRELIMINARY STATEMENT

Mr. Wesley Petty began working for Dixie County on August 18, 1995. In January of 1998, Dixie County first reported Mr. Petty for retirement purposes. Because the county reported Mr. Petty but had not enrolled him in the retirement system, the Division of Retirement ("Division") investigated to determine whether Mr. Petty was filling an established position and was, therefore, eligible for membership. Subsequent to its review of available information, the Division determined that Mr. Petty was eligible for retirement service credit beginning November 18, 1996. The Division denied Mr. Petty service credit from August 18, 1995, through November 17, 1996. According to the Division's Final Agency Action letter, Mr. Petty was determined to be an "on-call" or "temporary" employee with Dixie County from August 18, 1995 through November 17, 1996, and, therefore, he was correctly excluded from the Florida Retirement System (FRS) for that time period.

At the hearing, Petitioner presented the testimony of Howard Reid, Joseph Ruth, and Arthur Bellot and offered no exhibits into evidence. Petitioner failed to appear at the final hearing. Respondent presented the testimony of Cathy

Smith and Monica Jones and offered Exhibit Nos. 1 through 7 into evidence.

A Transcript was filed on October 27, 2004. Also on October 27, 2004, Respondent filed a Motion to Reopen the Record and Motion Offering New Evidence for the Record, which was granted after Petitioner filed no response, thereby adding Respondent's Exhibit No. 8 to the record. After the hearing, Respondent filed Proposed Findings of Fact and Conclusions of Law on November 16, 2004. Petitioner did not file a proposed recommended order.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner was hired by Dixie County on August 18, 1995, to work the roll-off site in Jena, Dixie County, Florida.

2. At the time of his hiring, Petitioner's position was described as "Temporary Roll-Off Site Fill In."

3. A roll-off site is where people take their garbage which is then transferred to the main facility for disposal.

4. A "Temporary Roll-Off Site Fill In" is defined as someone who is called to work as needed.

5. According to the Dixie County Payroll Records, Petitioner was employed as a "Temporary Roll-Off Site Fill In" from August 19, 1995, until November 18, 1996, when he became a

"Part-Time Fill In Roll-Off" with an 80-hour biweekly schedule, until a permanent position could be filled.

6. In July 1998, Petitioner's position became classified as permanent and his position description was changed to "Full Time Roll-Off Site."

7. Testimony from Howard Reid, the road superintendent who was Petitioner's supervisor at the Jena roll-off site during the time period of August 18, 1995, to November 17, 1996, was that Petitioner was employed to fill the full-time position of Houston O. ("Hugh") Markham who had been fired from his employment with Dixie County in August 1995. Mr. Reid testified that Petitioner was employed in a regularly established position during this time period.

8. No documentation was produced to substantiate the claim that Petitioner worked in a regularly established position from August 18, 1995, to November 17, 1996.

9. Respondent's records show that Houston O. Markham was employed by Dixie County during the period of August 18, 1995, to November 17, 1996.

10. Houston Markham was paid by Dixie County until December 1, 1996.

11. December 1, 1996 is the pay date for the period beginning November 18, 1996.

12. Based upon the payroll records, Petitioner began working 80 hours, biweekly, on November 18, 1996. This date coincides with Respondent's records for the last pay date of Houston Markham.

13. The only time records in evidence for Petitioner are for the time period of November 3, 1996, to July 26, 1998. For the pay date of November 3, 1996, Petitioner was paid for 42 hours of work. For the pay date of November 17, 1996, Petitioner was paid for 53 hours of work. Thereafter, for the next 43 pay periods, Petitioner was paid for 80 hours of work biweekly (with one exception, the pay date of July 13, 1997, for which he was paid 76 hours).

14. Petitioner's other witnesses, Joseph Ruth and Arthur Bellot, were not in a supervisory position over Petitioner from August 18, 1995, to November 17, 1996, and could not attest to Petitioner's employment during that time.

15. Membership in the Florida Retirement System is compulsory for any person who fills a regularly established position, as defined by statute.

16. A person filling a temporary position, as defined by statute, is not eligible to participate in the FRS. The agency would not report the temporary employee's work to Respondent.

17. The first time Dixie County ever reported Petitioner for retirement purposes was in January 1998.

18. After review, Respondent found that Petitioner was eligible to participate in the FRS effective November 18, 1996, based upon a Payroll Change Notice from Dixie County.

19. The number of hours a state employee works is not dispositive of the issue of whether he or she is an employee in a regularly established position. An employee who works only two days a week, for example, would be a participant in the FRS if employed in a regularly established position.

20. Based upon the documentation in its possession, Respondent enrolled Petitioner in the FRS effective November 18, 1996.

21. Respondent requested that Petitioner submit tax documentation to demonstrate that he had worked full-time for Dixie County during the August 18, 1995, to November 17, 1996, period, as he claimed.

22. Respondent submitted no documentation to support his claim to have been either a full-time employee or an employee in a regularly established position.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

24. Chapter 121, Florida Statutes (2004), is the Florida Retirement System Act. Section 121.051, Florida Statutes,

provides for compulsory participation in the FRS for all employees hired after December 1, 1970. Section 121.021(11), Florida Statutes, defines an officer or employee as "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."

25. A "regularly established position" is defined in Section 121.021(52)(b), 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.

26. Florida Administrative Code Rule 60S-1.004(5), provides, in pertinent part, the following:

An employee who is filling a temporary position shall not be eligible for membership in the Florida Retirement System. . . . A position meeting the definition below shall be a temporary position.

* * *

(d) The following types of positions in a local agency are considered temporary positions for retirement purposes.

* * *

5. On call positions (positions filled by employees who are called to work unexpectedly for brief periods and whose employment ceases when the purposes for being called is satisfied).

27. Section 121.021(45)(a), Florida Statutes, defines "vested" or "vesting," in pertinent part, as follows:

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.

The vesting requirement that applies to Petitioner pursuant to Section 121.021, Florida Statutes, is six years of creditable service.

28. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to retirement service credit for August 18, 1995, to November 17, 1996. Sections 120.57(1)(j) and (k), Florida Statutes; Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977); and Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

29. In 1998 Dixie County provided sufficient documentation to Respondent to support the fact that Petitioner filled a temporary on-call position at the Jena roll-out site from August 18, 1995, through November 17, 1996.

30. At hearing, Petitioner presented testimony from Howard Reid, Petitioner's former supervisor, to demonstrate that

Petitioner was employed as the sole employee at the Jena roll-out site from August 18, 1995, to November 17, 1996, once Houston Markham had been terminated from the position. Respondent's official records, however, nullify this testimony since they clearly demonstrate that Mr. Markham was paid a significant amount during the period when Petitioner was alleged to be the sole employee at the Jena roll-out site. Based upon Respondent's official records, which were admitted into the record uncontroverted by Petitioner, Mr. Markham was not terminated from his employment to make room for Petitioner.

31. Based upon the evidence presented, Petitioner worked in an on-call position with Dixie County from August 18, 1995, through November 17, 1996. Based upon the statutory and rule definitions, from August 18, 1995, through November 17, 1996, Petitioner worked in a temporary position for the purpose of determining eligibility for service credit in the FRS.

32. Petitioner, as a person filling a temporary position, as defined by Florida Administrative Code Rule 60S-1.004(5), is not eligible for service credit in the FRS. Therefore, the only time worked by Petitioner that is eligible for service credit runs from November 18, 1996, through September 30, 2002. Accordingly, since Petitioner completed less than 6 or more

years of creditable service at the time he retired (and attained age 62), he is not entitled to retirement benefits from the FRS as of the date of the hearing.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is,

RECOMMENDED that the Division of Retirement enter a Final Order denying Petitioner's request for participation in the Florida Retirement System for the period of August 18, 1995, through November 17, 1996.

DONE AND ENTERED this 30th day of November, 2004, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2004.

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.