

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD P. BALEZENTIS,)
)
 Petitioner,)
)
 vs.) Case No. 04-3263
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondents)
 _____)

RECOMMENDED ORDER

In accordance with notice, this cause came on for formal hearing in Jacksonville, Florida, on December 13, 2004, before P. Michael Ruff, Administrative Law Judge.

APPEARANCES

For Petitioner: Richard P. Balezentis, pro se
1126 Ward Place
Jacksonville, Florida 32259

For Respondent: Robert B. Button, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-9000

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner is eligible to purchase out-of-state creditable service under the Florida Retirement System (FRS), for employment in September and October 1973, with the Maryland

State Teachers Retirement System (MSTRS), in accordance with Section 121.1115, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose upon the issuance of a final agency action letter on June 4, 2004, by the Respondent, Department of Management Services, Division of Retirement (Division) in which it denied the Petitioner's request to be credited with two months of out-of-state services as a teacher with the Harford County Public Schools in Maryland. The Petitioner petitioned for a formal proceeding based upon that denial and the cause was ultimately transferred to the undersigned administrative law judge for hearing.

The cause came on for hearing in Jacksonville, Florida, on December 13, 2004. The Petitioner testified on his own behalf and Joint Exhibits 1-5, consisting of official records of the Department of Management Services, as well as correspondence from the MSTRS, were submitted into evidence. Additionally, the Respondent adduced the testimony of Douglas Cherry, the benefits administrator, testifying on behalf of the Division. Upon conclusion of the hearing, the parties requested a transcript thereof, which was filed, and submitted Proposed Recommended Orders, which were due on February 22, 2005. The Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Richard P. Balezentis, is a vested member of the Florida Retirement System. He has a total of 29.80 years of creditable service as of August 1, 2004, according to the FRS. That creditable service includes 4.8 years of creditable out-of-state past service with the Maryland State Teachers Retirement System. The Petitioner is seeking to add .20 years of creditable service (2 months) representing employment under the MSTRS for the months of September and October 1973. It is undisputed that the Petitioner became employed by the Harford County Public School System on August 28, 1973. The evidence shows that he was not actually enrolled in the MSTRS however, until November 1, 1973. The reason for the two-month gap in his enrollment in the retirement system, when he was clearly employed and in an eligible position with the Harford County Public School System is unknown at this time. The Petitioner was not required to pay retirement contributions, and contributions on his behalf were not made for those two months, however.

2. If the Petitioner receives .2 years creditable service for employment under the MSTRS for the months of September and October 1973, he would have 30 years of service established as of August 1, 2004, which would become his "normal retirement

date." Therefore, he would be able to commence participating in the deferred retirement option plan (DROP) effective that date.

3. The Division determined, however, that Mr. Balezentis was ineligible to receive retirement credit for his employment with the MSTRS in Harford County Maryland Public Schools for the months of September and October 1973. Therefore, his "normal retirement date" when he may begin participating in DROP is October 1, 2004, according to the Division's position.

4. The Division determined that October 1, 2004, should be his "normal retirement date" because, although employed as a teacher for the Maryland School System involved (since August 28, 1973), he was not a participating member of the MSTRS during the two months in question. His enrollment and participation in the MSTRS did not begin until November 1, 1973. The Petitioner could have purchased credit for the months of September and October 1973 under the MSTRS, during his employment in Maryland with the Harford County School System but he failed to do so. Although the Petitioner's failure to be recorded as a member of the MSTRS for the two months in question may have been a clerical error of the MSTRS or his Maryland employer, the Petitioner had an opportunity to cure the error by purchase of credit for those two months before he left the MSTRS retirement plan but he failed to do so. See letter of Audrey

Simpson, supervisor of benefits of the MSTRS, in evidence as Respondent Exhibit 5.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.57(1), and 120.569, Fla. Stat.

6. The Petitioner seeks to change the status quo, and thus bears the burden of providing eligibility to purchase his out-of-state service for the months of September and October 1973. See Young v. Department of Community Affairs, 625 So. 2d 837 (Fla. 1993); Department of Transportation v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

7. Section 121.1115, Florida Statutes, provides in pertinent part:

121.1115 Purchase of retirement credit for out-of-state and federal service.--

Effective January 1, 1995, a member of the Florida Retirement System may purchase creditable service for periods of public employment in another state and receive creditable service for such periods of employment Upon completion of each year of service earned under the Florida Retirement System, a member may purchase up to 1 year of retirement credit for his or her out-of-state service, subject to the following provision:

(1) LIMITATIONS AND CONDITIONS.--To receive credit for the out-of-state service:

(a) The out-of-state service being claimed must have been:

1. Performed in a position of employment with the state or a political subdivision thereof or with the Federal Government;
2. Covered by a retirement or pension plan by the state or political subdivision, or by the Federal Government, as appropriate; and
3. Performed prior to a period of membership in the Florida Retirement System. [emphasis supplied]

* * *

8. The unrefuted evidence and the above legal authority establishes that the Petitioner did not possess retirement coverage under the MSTRS for the months of September and October 1973. He could have obtained that coverage by purchasing those two months while he was employed in an entity covered by the MSTRS, but he failed to do so. Because he did not have covered service with the MSTRS for those two months, under the above legal authority, he is ineligible to purchase the two months of service under the FRS.

9. The Petitioner contends that the Division should be equitably estopped from denying his eligibility to purchase the two months of uncovered service with the MSTRS. Even if the failure of his coverage for those two months with the MSTRS was due to a clerical error by the Maryland employer, the school system, or by the MSTRS itself, the FRS cannot be assigned error

by the actions of another party. The Petitioner did not show any conduct on the part of the Division that would give rise to an equitable estoppel. See Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264 (Fla. 1st DCA 1994). The Petitioner did not show that representations were made by any employee of the Division or by any Florida employer to the effect that he was entitled to credit for those two months of service without having purchased credit for them while employed under the MSTRS. The Division cannot perform a service or accord credit to a member of the FRS which by law it is not authorized to do. Further, the Petitioner failed to purchase MSTRS retirement service credit or to make any member contributions for the two months at issue when he was a member of the MSTRS. The above statutory provision clearly establishes that if he was not "covered" by the out-of-state retirement plan then he cannot purchase credit for it or be accorded credit for it by the FRS.

10. The Division's construction and application of the provisions of Chapter 121, Florida Statutes, are entitled to great weight and will be followed by courts unless clearly erroneous or amounting to an abuse of discretion. See Okeechobee Health Care v. Collins, 726 So. 2d 775 (Fla. 1st DCA 1998). The Division is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction. It has properly denied the request of the member

who is ineligible to now purchase out-of-state service credit because he was not a covered member of the out-of-state retirement system for the period of time in question, and did not purchase that credit while still covered by the MSTRS. The statute does not authorize departure from that procedure and position.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Management Services, Division of Retirement, denying the Petitioner's request to purchase out-of-state service credit for the months of September and October 1973.

DONE AND ENTERED this 2nd day of March, 2005, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
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 2nd day of March, 2005.

COPIES FURNISHED:

Richard P. Balezentis
1126 Ward Place
Jacksonville, Florida 32259

Richard B. Button, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-9000

Sarabeth Snuggs, Director
Division of Retirement
Department of Management Services
Post Office Box 9000
Tallahassee, Florida 32399-9000

Alberto Dominguez, General Counsel
Division of Retirement
Post Office Box 9000
Tallahassee, Florida 32399-9000

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.