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STATE OF FLORIDA
DIVISION OF RETIREMENT

MADONNA SUE JERVIS WISE,

Petitioner,

vs.

Final Order No. DMS – 05-069

DSM Closed

DOAH Case No. 04-4020
DMS DOR No. 04-03665

AP

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT

Respondent.
_____/

FINAL ORDER

PRELIMINARY STATEMENT

After being formally notified of the Division of Retirement's intent to deny her request for creditable service in the Florida Retirement System (FRS) for a period of employment with Florida Virtual School (FVS), Madonna Sue Jervis Wise timely filed a petition for hearing and the case was referred to the Division of Administrative Hearings.

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Daniel Manry, held a formal hearing in the above-styled case on January 25, 2005, in Dade City, Florida.

At the formal proceeding, Petitioner testified on her own behalf and offered 12 exhibits, which were admitted. Respondent offered the testimony of Cathy Smith, Bureau Chief, Division of Retirement, and Linda Peters, Human Resources Director, Florida Virtual School. Respondent offered 10 exhibits, which were admitted. Official Recognition was taken of Chapter 121, Florida Statutes, and specifically, Sections 121.021(52) and (53), and of Rules 60S-1.004 and 60S-6.001, Florida Administrative Code.

The Parties filed proposed Recommended Orders and an Amended Recommended Order was issued March 28, 2005, which is incorporated by reference into this Final Order. No exceptions have been filed to the Recommended Order. A transcript

of the hearing has been reviewed in the preparation of this Final Order, and references to it will be (T-).

STATEMENT OF THE ISSUE

The issue in this case is to determine whether the Petitioner is entitled to creditable service in the FRS for her employment with FVS from September 15, 2001, through June 30, 2002.

STANDARD OF REVIEW

Subsection 120.57(1)(l), Florida Statutes (2002), provides that an agency reviewing a Division of Administrative Hearings (DOAH) recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla., 1975). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of fact. See Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347, 1348 (Fla. 1st DCA, 1987).

Subsection 120.57(1)(l), Florida Statutes (2002), provides that an agency may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretations are "as or more reasonable" than the interpretation made by the ALJ. Florida courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon

the ALJ's application of legal concepts such as collateral estoppel and hearsay; but not from reviewing conclusions of law containing the ALJ's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA, 2001); Barfield v. Department of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA, 2001). Further, an agency's interpretation of the statutes and rules that it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. See State Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA, 1998).

FINDINGS OF FACT

The Division of Retirement accepts the Findings of Fact set forth in the Recommended Order with the following exceptions:

1. Finding of Fact 11 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding. In addition, the unrebutted expert testimony established that the FVS is a local agency employer under the FRS. (T-72-73).

2. Findings of Fact 15 and 16 are rejected. A careful review of the transcript and exhibits reveals no competent evidence to support these findings. Further, the unrebutted expert testimony established that for FRS purposes, the FVS is a local agency employer, rendering these findings irrelevant. (T-72-73).

3. Finding of Fact 17 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding. Further, this

finding is in direct conflict with Finding of Fact 14. Orange County School Board, identified as the fiscal agent in number 14, is a local agency, not a state agency.

4. Finding of Fact 18 is rejected as it is actually a conclusion of law. In addition, a general discussion of state agencies is irrelevant to the issue because a regularly established position in a state agency for FRS purposes is specifically defined in Chapter 121, Florida Statutes. Further, it is contrary to the unrebutted expert testimony in the record. (T-72-73).

5. Finding of Fact 19 is rejected. A careful review of the transcript and exhibits reveal no evidence on this issue. Further, as the FVS is a local agency employer, the issue of OPS employment is irrelevant.

6. Finding of Fact 20 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding.

7. Finding of Fact 21, insofar as it finds that FVS is a state agency, is hereby rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding. In addition, it is essentially a conclusion of law, as is the remainder of Finding of Fact 21. (see also paragraph 4 above). Finally, the unrebutted expert testimony established that, for FRS purposes, the FVS is a local agency employer.

8. The second sentence of Finding of Fact 23 is rejected as contrary to the evidence. The form is clearly dated "9-15-01", and no evidence was produced to rebut this. (Respondent's Exhibit 4).

9. Finding of Fact 24 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding. No evidence was

presented to show that Petitioner was required to perform other functions as part of her job duties during the period in question.

10. Finding of Fact 25 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding. There was no discussion on the record of any IRS regulations, and none are cited in the Amended Recommended Order.

11. Finding of Fact 28 is rejected. A careful review of the transcript reveals no such testimony. Although Petitioner testified that retirement enhancement was her motivation, she did not testify that she discussed it with the employer. Quite the contrary, if Petitioner had discussed it with the employer, she would have known that the agency was not a participating FRS employer at the time of hire.

12. Findings of Fact 29 and 30 are rejected as irrelevant. These Findings ignore the unrebutted evidence in the record is that FVS was not an FRS employer in September, 2001, when Petitioner was hired. Further, Petitioner's Exhibit 7, a copy of the FVS Policies and Procedures Manual, clearly shows that adjunct teachers were considered temporary and did not receive benefits.

13. Findings of Fact 31, 32, 33, 34, and 35 are rejected. A careful review of the transcript and exhibits does not reveal competent substantial evidence to support this finding. The handbook Petitioner acknowledged receiving, the intent letter she signed, and the method of payment clearly demonstrated that adjunct teachers were considered temporary and did not receive benefits.

14. Finding of Fact 36 is rejected. The evidence clearly showed that Petitioner was not required to attend staff meetings, although she testified that she did attend some

meetings. Further, neither Petitioner nor anyone from FVS testified that she was required to "sign in". (T-48; Petitioner's Exhibit 3, p. 160).

15. Finding of Fact 37 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding. Further, Petitioner testified that she did apply for some grants and assist with certain teaching materials, no evidence was presented to show that she was required to perform these functions as part of her job duties. Petitioner did testify that she was hoping for a full time position, and these other efforts may simply have been designed to demonstrate her worth to the employer.

16. Finding of Fact 38 is rejected. A careful review of the transcript and exhibits does not reveal competent evidence to support this finding. No evidence was presented to demonstrate that these functions were part of her job duties. In addition, the finding is inconsistent with Finding 37. If Petitioner was hired in 2001 as a grant writer, why did the FVS not enter a contract with her for that position until the 2002-2003 school year? This demonstrates that these were not her official duties until her second year with FVS, which is consistent with the unrebutted expert testimony that she was not filling a regularly established position during the time period in issue. (T-73-74).

17. Finding of Fact 39 is rejected as pure supposition not supported by any competent evidence.

18. Finding of Fact 40 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support this finding. No testimony was offered from the employer regarding expectations of the employer during the period in issue.

19. Finding of Fact 41 is rejected. A careful review of the transcript and exhibits does not reveal any competent evidence to support the "Petitioner's understanding that she was already receiving FRS credit..." because her "understanding" was not reasonable, and was contrary to all evidence presented that the FVS was not an FRS participating employer at the time of hire.

20. Finding of Fact 42 is rejected as contrary to the evidence. The unrebutted expert testimony offered at hearing was that Petitioner was not filling a regularly established position during the contested period. (T-73-74).

CONCLUSIONS OF LAW

The Division of Retirement accepts the Conclusions of Law set forth in the Recommended Order, which are incorporated herein by reference, with the exception of the following:

21. Conclusions of Law 46, 47, 48, 49, 50, 51, 52, 53, 54, and 55, are rejected as irrelevant. The definition of a regularly established position, as set forth above, is clear for state employees under the FRS. No other discussion of state agency is relevant. In the instant case, no evidence was presented demonstrating that Petitioner was "compensated from a salaries appropriation pursuant to s. 216.011(1)(dd)...".

22. Conclusion of Law 56 is rejected as incorrect and contrary to the evidence. The unrebutted expert testimony established that, for FRS purposes, the FVS was a local agency employer as defined in Section 121.021(42), Florida Statutes (2001). Further, the conclusion contradicts the recommendation. If the agency were a state agency, it would have been so from it's inception and would have been a mandatory FRS employer.

23. Conclusion of Law 57 is rejected as incorrect and contrary to the evidence presented. The unrebutted expert testimony showed that Petitioner did fill a temporary

position. See Burns v. Department of Management Services, Division of Retirement, DOAH Case 02-3242 (2002)("The evidence clearly established that Petitioner was employed as an adjunct instructor on a class-by-class, term-by-term basis, with no expectation of employment beyond any one term."). Just because Petitioner testified that she had a continued expectation of employment, [just as she testified she thought she was enrolled in FRS at hire (even though the agency did not participate in FRS at that time)], did not create a legal obligation on the part of the employer to continue the relationship, nor did it create a right to participation in the FRS.

24. Conclusion of Law 58 is rejected as merely supposition.

25. Conclusions of Law 59, 60, and 61 are rejected as contrary to the unrebutted expert testimony, and the lack of any testimony that these tasks were assigned by the employer as part of her job duties. As pointed out previously, Petitioner wanted a full time position involving grant work, and was offered such a position by contract the following school year. If this were her job in the first year, presumably the employer would have hired her as such at that time. In addition, the only evidence offered by the employer was that there was no expectation of continued employment for adjunct instructors. (T- 54-57; Respondent's Exhibits 4-8, and 10).

26. Conclusions of Law 62, 63, 64 and 65 are rejected as irrelevant. A careful review of the transcript and exhibits reveals no evidence or finding of fact that Petitioner suffered any break in continuity of service.

27. Conclusion of Law 66 is rejected. The handbook, that Petitioner acknowledged receipt of, clearly showed the use of the term adjunct teacher to be one of

a temporary position. This finding also ignores the unrebutted expert testimony that Petitioner was filling a temporary position during the period in issue with FVS.

28. Conclusion of Law 67 is rejected as irrelevant. The handbook materials clearly defined adjunct positions as temporary and not entitled to benefits.

29. Conclusions of Law 68 and 69 are rejected as incorrect. A careful review of the transcript and exhibits offers no evidence at all of any misrepresentation by the employer or the Division to Petitioner. An omission does not and cannot support a finding of estoppel. In each case cited in these conclusions, as well as a substantial body of case law, a misrepresentation of a material fact is required by the party against whom estoppel is to be applied. No evidence was presented that the Division made any misrepresentations to Petitioner. See Warren v. Department of Administration, 554 So. 2d 568, 570 (Fla. 5th DCA 1989). See also Bright v. Department of Management Services, Division of Retirement, DOAH Case No. 03-2142 (2004); and Gohlke v. Department of Management Services, Division of Retirement, DOAH Case No. 03-3103 (2004). ("Assuming for a moment that it had been shown that Mr. Tanner provided inaccurate advice to the Petitioner, the Petitioner must show not only the regular elements of estoppel, but must also demonstrate conduct which goes beyond mere negligence, showing that the government's conduct will cause serious injustice and that application of the doctrine will not unduly harm the public interest.") (citing Alachua County v. Cheshire, 603 So. 2d 1334, 1337 (Fla 1st DCA 1992). See also Mills v. Department of Management Services, Division of Retirement, DOAH Case No. 03-0733 (2003)("The Division has no jurisdiction to award equitable relief. See Section 26.012, Florida Statutes (2002).").

30. Conclusions of Law 70, 71, and 72 are rejected as not based on any evidence presented, and likewise it fails to refer to any statute or regulation upon which it may be based. No evidence was offered at the hearing or after regarding any IRS regulations. As the Administrative Law Judge pointed out, the basis for the rejection of this service for FRS purposes was based on the fact that Petitioner occupied a temporary position, not that of an independent contractor.

31. Conclusion of Law 73 is rejected as incorrect. The determination of temporary employment in local agencies is an issue which is infused with agency expertise, and in this case, the unrebutted expert testimony established that Petitioner was filling a temporary position during her first year with FVS.

32. Conclusion of Law 74 is rejected as incorrect. A careful review of the transcripts, exhibits, and Proposed Recommended Order demonstrates that Respondent relied on expert interpretation of all materials, not on "the common and ordinary meaning" of the term adjunct. The interpretation of agency rules is a function uniquely suited to that agency, and such interpretations are entitled to great weight. See Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

33. Conclusion of Law 75 is rejected as incorrect. As previously noted, the unrebutted expert testimony established that Petitioner was filling a temporary position during the time in question, and an agency's interpretation of it's rules is entitled to great weight. See paragraph 23 above.

ORDER

Based on the foregoing, it is hereby ORDERED AND DIRECTED that the Petitioner's request for service credit for her employment with FVS for the period from September 15, 2001, through June 30, 2002, is hereby DENIED.

DONE AND ORDERED this 19th day of August 2005, in Tallahassee, Leon County, Florida.

Sarabeth Snuggs

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF MANAGEMENT SERVICES, 4050 ESPLANADE WAY, SUITE 160, TALLAHASSEE, FLORIDA 32399-0950, AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

I HEREBY CERTIFY that this Final Order was filed in the official records of the Division of Retirement, and copies distributed by U.S. Mail to the parties below, on the 19th day of August, 2005.

DEBBIE SHOUP
Clerk
Department of Management Services

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