STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADONNA SUE JERVIS WISE, Petitioner, vs. DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT, Respondent.	)	Case No. 04-4020

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing in this proceeding on January 25, 2005, in Dade City, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Madonna Sue Jervis Wise, pro se
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Zephyrhills, Florida 33540

For Respondent: Thomas E. Wright, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner is entitled to creditable service in the Florida Retirement System

for service in the Florida Virtual School from September 15, 2001, through June 30, 2002.

PRELIMINARY STATEMENT

By letter dated June 23, 2004, Respondent denied Petitioner's request for creditable service. Petitioner requested an administrative hearing, and Respondent referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner testified in her own behalf and submitted 12 exhibits for admission into evidence. Respondent presented the testimony of two witnesses and submitted ten exhibits for admission into evidence. The ALJ granted Respondent's request for Official Recognition of Subsections 121.021(52) and (53), Florida Statutes (2001), and Florida Administrative Code Rules 60S-1.004 and 6.001. Pursuant to the agreement of the parties, Petitioner submitted three late-filed exhibits on February 8, 2005.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the official record of the hearing. Neither party requested a transcript of the record. Petitioner and Respondent timely filed their respective proposed recommended orders on February 25 and 21, 2005.

FINDINGS OF FACT

1. Petitioner is a regular class member of the Florida Retirement System (FRS). On October 23, 2003, Petitioner

entered the Deferred Retirement Option Program (DROP) and left her employment on June 30, 2004.

2. Petitioner worked most of her career as a teacher and an administrator for the Pasco County School Board (School Board). The School Board is a local education association (LEA) and a local agency employer within the meaning of Subsection 121.021(42)(a), Florida Statutes (2001).

3. Beginning with the 2001-2002 school year, Petitioner undertook additional employment by working in the Florida Virtual School (FVS) in accordance with former Section 228.082, Florida Statutes (2000).[1] Petitioner undertook additional employment to increase the average final compensation (AFC) that Respondent uses to calculate her retirement benefits.

4. From September 15, 2001, through June 30, 2004, Petitioner worked for the LEA and served in the FVS. During the 2001-2002 school year, Petitioner was a full-time employee for the LEA and also served part-time in the FVS. Beginning with the 2002-2003 school year, Petitioner served full-time in the FVS and also worked for the LEA during the summer.

5. The LEA paid Petitioner annual salaries as a full-time employee for all relevant school years and made the necessary contributions to the FRS. The AFC includes compensation Petitioner received from the LEA, and that compensation is not at issue in this proceeding.

6. With one exception, the AFC includes the compensation Petitioner received for service in the FVS. The AFC does not include $6,150 (the contested amount) that Petitioner earned during her first year of service in the FVS from September 15, 2001, through June 30, 2002 (the contested period).[2]

7. Sometime prior to April 2004, Petitioner requested that Respondent include the contested amount in her AFC. In a one-page letter dated April 6, 2004 (the preliminary denial letter), Respondent notified Petitioner that Respondent proposed to deny the request. The grounds for denial stated that Petitioner earned the contested amount in a temporary position and that FVS did not join the FRS until December 1, 2001. In relevant part, the preliminary denial letter states:

> . . . you filled a temporary instructional position as an adjunct instructor whose employment was contingent on enrollment and funding pursuant to Section 60S-1.004(5)(d)3, F.A.C., copy enclosed. As such, you are ineligible for . . . FRS . . . participation for the time period in question. The School joined the FRS on December 1, 2001 and past service was not purchased for you since you filled a temporary position.
>
> Effective July 1, 2002, you began filling a regularly established position with the Florida Virtual High School and were correctly enrolled in FRS. The School has reported your earnings from July 1, 2002, to the present to the FRS.

Respondent's Exhibit 2 (R-2).

8. A two-page letter dated June 23, 2004 (the denial letter), notified Petitioner of proposed final agency action excluding the contested amount from her AFC. The only ground for denial stated that Petitioner earned the contested amount in a temporary position. The denial omits any statement that FVS did not join the FRS until December 1, 2001. However, the denial letter includes a copy of the preliminary denial letter and is deemed to include, by reference, the stated grounds in the preliminary denial letter.

9. In relevant part, the denial letter states:

> By letter dated April 6, 2004 (copy enclosed). . . [Respondent] advised you filled a temporary instructional position as an adjunct instructor from September 15, 2001 through June 30, 2002.
>
> We have reviewed the information submitted in your recent letter and maintain our position that you were an adjunct instructor from September 2001 through June 2002, pursuant to Section 60S-1.004(5)(d)3, F.A.C. (copy enclosed). Your employment with the Florida Virtual School during the time period in question was contingent on enrollment and funding. Since you filled a temporary position, the School was correct in excluding you from the [FRS].
>
> This notification constitutes final agency action. . . .

R-3 at 1.

10. The legal definition of a temporary position varies depending on whether the employer is a state agency or a local

agency. If the employer is a state agency, a position is temporary if the employer compensates the position from an account defined as "an other personal services (OPS) account" in Subsection 216.011(1)(dd), Florida Statutes (2001) (OPS account). If the employer is a local agency, a position is temporary if the position will exist for less than six consecutive months; or as otherwise provided by rule. § 121.021(53), Fla. Stat. (2001). The distinction is based, in relevant part, on the practical reality that local agencies do not maintain OPS accounts for "the fiscal affairs of the state." § 216.011(1), Fla. Stat. (2001).

11. The employer that paid Petitioner the contested amount was not an LEA. Three different employers may have been responsible for payment of the contested amount.

12. Some evidence supports a finding that the employer was the Board of Trustees of FVS (the Board). Contracts of employment for service in FVS identify the employer as the Board.[3] The Board has statutory authority over personnel serving FVS and has statutory authority to govern FVS.

13. Other evidence supports a finding that the employer that paid Petitioner the contested amount was FVS. The record evidence identifies the employer that enrolled in FRS and made contributions on behalf of Petitioner as FVS.

14. Finally, there is evidence that the Orange County School Board, acting as the statutorily designated fiscal agent for FVS (the fiscal agent), was the employer that paid Petitioner the contested amount. The contested amount was paid from funds administered by the fiscal agent in the name of FVS.

15. The Board, FVS, and the fiscal agent each exemplify distinct characteristics of a state agency defined in Subsection 216.011(1)(qq), Florida Statutes (2001). The Board consists of seven members appointed by the Governor for four-year staggered terms. The Board is a public agency entitled to sovereign immunity and has authority to promulgate rules concerning FVS. Board members are public officers and bear fiduciary responsibility for FVS. The Board has statutory authority to approve FVS franchises in each local school district. §§ 228.082, Fla. Stat. (2000) and 1002.37, Fla. Stat. (2001).

16. FVS is administratively housed within an office[4] of the Commissioner of Education, as the Head of the Department of Education (Commissioner). The fiscal year of FVS is the state fiscal year. Local school districts cannot limit student access to courses offered statewide through FVS.[5]

17. The fiscal agent of FVS is a state agency. The fiscal agent receives state funds for FVS and administers those funds to operate FVS for students throughout the state.

18. The Board, FVS, and the fiscal agent each satisfy judicial definitions of a state agency pursuant to "territorial" and "functional" tests discussed in the Conclusions of Law. Each agency operates statewide in accordance with a statutory mandate to serve any student in the state. Each serves students in public and private schools; in charter schools; in home school programs; and in juvenile detention programs. Unlike an LEA, the scope of authority and function of the employer that paid the contested amount to Petitioner was not circumscribed by county or other local boundaries; regardless of whether the employer was the Board, FVS, or the fiscal agent (collectively referred to hereinafter as the employer).

19. The employer did not pay the contested amount from an OPS account. The fiscal agent for FVS is the presumptive repository of funds appropriated for FVS. The fiscal agent is organically structured as a local agency even though it functions as a state agency in its capacity as fiscal agent. Unlike a state agency, an organic local agency does not maintain an OPS account, defined in Subsection 216.011(1)(dd), Florida Statutes (2001), for the "fiscal affairs of the state."

20. The legislature funded FVS during the contested period in lump sum as a state grant-in-aid provided in a line item appropriation pursuant to Subsection 228.082(3)(a), Florida Statutes (2000). The legislature subsequently began funding of

FVS through the Florida Education Finance Program (FEFP). Each FVS student with six-credit hours required for high school graduation is included as a full-time equivalent student for state funding. Each student with less than six-credit hours counts as a fraction of a full-time equivalent student. A local LEA cannot report full-time equivalent student membership for courses that students take through FVS unless the LEA is an approved franchise of FVS and operates a virtual school. As student enrollment in FVS increased, the legislature changed the funding formula to avoid paying twice for students in FVS; once to fund FVS and again to fund local LEAs that were authorized to earn FTE funding for students enrolled in FVS.

21. The employer that paid the contested amount to Petitioner was a state agency that did not compensate Petitioner from an OPS account defined in Subsection 216.011(1)(dd), Florida Statutes (2001). Petitioner did not earn the contested amount in a temporary position within the meaning of Subsection 121.021(53)(a), Florida Statutes (2001), and Florida Administrative Code Rule 60S-6.001(62).

22. Respondent argues that Petitioner earned the contested amount in a temporary position in a local agency defined in Subsection 221.021(42), Florida Statutes (2001), and Florida Administrative Code Rule 60S-6.001(36). A temporary position in a local agency is generally defined to mean a position that will

last less than six months, except as otherwise provided by rule. By rule, Respondent defines a temporary position to include temporary instructional positions that are established with no expectation of continuation beyond one semester. Fla. Admin. Code R. 60S-1.004(5)(d)3. Respondent supports its argument with limited documentary evidence (the documents).

23. The documents consist of several items. An undated FVS Information Sheet indicates the employer started Petitioner as an adjunct instructor on September 15, 2001. An FVS memorandum dated several years later on March 16, 2004, indicates Petitioner started an adjunct position on September 6, 2001, and includes a parenthetical statement that it was seasonal employment.[6] The employer paid Petitioner $3,150 during 2002 as miscellaneous income and reported it to the Internal Revenue Service (IRS) on a "Form 1099-Misc." An undated letter of intent for the 2002-2003 school year, which requests submission before March 8, 2002, indicates that Petitioner intended to continue her adjunct employment status and requested a full-time position if one became available.[7]

24. Use of labels such as "adjunct" to describe employment status during the contested period would be more probative if the duties Petitioner performed were limited to the duties of a part-time, on-line instructor. As discussed hereinafter, Petitioner earned the contested amount while occupying a dual-

purpose position in which she performed both the duties of an instructor and significant other duties unrelated to those of an instructor. The trier of fact would be required to disregard a substantial body of evidence to find that Petitioner's position was limited to that of a part-time, on-line instructor.

25. The IRS requires taxpayers to report miscellaneous income paid to independent contractors on Form 1099-Misc. Neither the denial letter nor the preliminary denial letter includes a statement that Petitioner occupied a non-employee position as an independent contractor.

26. Judicial decisions discussed in the Conclusions of Law give little weight to the use of IRS Form 1099-Misc in cases such as this one where there is little other evidence of independent contractor status or where the evidence establishes an employer-employee relationship. The record evidence discussed hereinafter shows that Petitioner and her employer enjoyed a continuing employment relationship within the meaning of Florida Administrative Code Rule 60S-6.001(32)(f).

27. Respondent was not a party to the employment contract and did not witness the employment relationship between Petitioner and her employer. Nor did Respondent call a witness from FVS who was competent to testify about events that occurred during the contested period.

28. The testimony of Petitioner is supported by the totality of evidence. In relevant part, Petitioner disclosed to her supervisors at FVS at the time of her employment that she sought employment to enhance her retirement benefits. The proposed exclusion of the contested amount from the AFC is inconsistent with a material condition of employment.

29. Respondent asserts that the documents satisfy requirements for notice and documentation of a temporary position in Florida Administrative Code Rule 6.1004(5). The rule requires an employer to notify an employee at the time of employment that the employee is filling a temporary position and cannot participate in the FRS; and to document the intended length of the temporary position. However, the terms of the documents from Respondent are ambiguous and insufficient to provide the required notice and documentation.

30. The documents did not expressly notify Petitioner she was filling a temporary position that did not qualify as a regularly established position in the FRS. None of the documents use the term "temporary" or "temporary position." The notice and documentation requirements of the rule must be satisfied, if at all, by implication from terms on the face of the documents such as "adjunct," "adjunct position," and "adjunct employment status."

31. Unlike the term "temporary position," neither the legislature nor Respondent defines the term "adjunct." One of the several common and ordinary uses of the term "adjunct" can mean, "Attached to a faculty or staff in a temporary . . . capacity." The American Heritage Dictionary of the English Language, at 21-22 (4th ed. Houghton Mifflin Company 2000).

32. The employer used an undefined term such as "adjunct" as an ambiguous euphemism for a temporary position. The ambiguity of the term "adjunct" is underscored when each document from Respondent is considered in its entirety.

33. The letter of intent form requested Petitioner to indicate whether she intended to continue her "adjunct employment status" and whether she would be interested in "a full-time position." The form did not refer to either a "temporary position," or a "part-time position." Petitioner reasonably inferred that "adjunct employment status" was the part-time alternative to "a full-time position." The inference was consistent with the announced purpose for serving in FVS and the evidence as a whole. Respondent also does not define part-time employment to exclude a regularly established position.

34. The FVS utilized different contracts for adjunct and part-time instructors. The contracts of record pertaining to Petitioner are not contracts for adjunct instructors (adjunct contracts). The contracts are annual contracts.

35. Even if Petitioner were to have signed a contract for adjunct instructors, the contract used for adjunct instructors was ambiguous. In relevant part, the adjunct contract included a caption in the upper right corner labeled, "Terms of Agreement for Part-Time Instructional Employment." (emphasis supplied) As previously found, a part-time position may be a regularly established position. Use of the term "part-time employment" on a contract for an adjunct instructor supported a reasonable inference that the employer was using the terms "adjunct" and "part-time" synonymously to differentiate part-time employment from full-time employment.

36. The employer required Petitioner, unlike adjunct instructors, to sign in on an instructor log sheet and to attend training sessions and staff meetings. Petitioner attended training sessions on September 8 and 22, and October 24, 2001. Petitioner attended other training sessions on February 26 and 27, 2002, and on March 27 and April 10, 2002. The employer also issued office equipment to Petitioner that the employer did not issue to adjunct instructors.

37. Petitioner performed significant duties in addition to those required of a part-time instructor. Petitioner wrote grant applications and assisted in writing a procedures manual for FVS. By November 30, 2001, Petitioner had completed and submitted a federal "Smaller Learning Communities Grant" for

$230,000. On December 27, 2001, Petitioner began working on the procedures manual, finalized the work on January 3, 2002, and was listed in the credits in the manual.

38. The additional duties assigned to Petitioner continued through the second semester of the contested period. On February 26 and 27, 2002, FVS asked Petitioner to develop their "FCAT" course for the eighth grade. Petitioner wrote and developed the course. By May 30, 2002, Petitioner had written and submitted three more grant applications and was a member of a team that developed strategies for additional fundraising. For the 2002-2003 school year, Petitioner entered into an annual contract for a full-time non-instructional position, as Grants Manager, and a separate contract for employment in a part-time instructor position. Each contract was terminable only for "good cause" within the meaning of Subsection 1002.33(1)(a), Florida Statutes (2002).

39. The expectation of continued employment is further evidenced by the general business experience of FVS leading up to the contested period. In the 1997-1998 school year, approximately 25 students were enrolled statewide in FVS. In the next three years, enrollment grew to 5,564. Professional staff grew from 27 teachers to 54 full-time teachers. Legislative funding was adequate for the growth FVS experienced,

and the legal contingency of enrollment and funding was not a realistic condition of continued employment.

40. There was nothing temporary in the expectations of the employer and Petitioner during the contested period. FVS staff had legitimate business reasons to expect continued student enrollment and legislative funding during the contested period. The employer also had legitimate reasons to expect continued employment of Petitioner based on the individual experience the employer enjoyed with Petitioner, the ongoing and continuous nature of Petitioner's work, and the significant additional duties assigned to Petitioner. The employer, in fact, employed Petitioner continuously after the contested period.

41. When FVS enrolled in the FRS on December 1, 2001, some employees purchased past credit. Petitioner was not on the list of employees for whom past credit was purchased. That omission is consistent with Petitioner's understanding that she was already receiving FRS credit. By rule, Respondent required the employer to make an affirmative disclosure that Petitioner did not occupy a position qualifying for FRS credit.

42. After FVS enrolled in the FRS on December 1, 2001, FVS was required to make contributions to the FRS on behalf of Petitioner for approximately 208 days during the remainder of the contested period. FVS did not make the required contributions to the FRS.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the parties and the subject matter in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004). DOAH provided the parties with adequate notice of the administrative hearing.

44. Petitioner has the burden of proving by a preponderance of the evidence that Respondent should include the contested amount in the AFC. § 120.57(1)(j) and (k), Fla. Stat. (2001); 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). The decision of the employer to treat Petitioner as a temporary employee during the contested period established the status quo. Petitioner has the burden of showing that she earned the contested amount while occupying a regularly established position. Cf. The Board of Trustees of the Northwest Florida Community Hospital v. Department of Management Services, Division of Retirement, 651 So. 2d 170, 172 (Fla. 1st DCA 1995)(hospital's treatment of individual as independent contractor established the status quo and placed burden on Division to prove individual was an employee).

45. The statutory definition of a temporary position varies depending on whether an employer is a state agency or a

local agency employer. In relevant part, Subsection 121.021(53), Florida Statutes (2001), provides:

> "Temporary position" is defined as follows:
>
> . . .
>
> (a) In a state agency, the term means an employment position which is compensated from an other personal services (OPS) account, as provided for in s. 216.011(1)(d).
>
> (b) In a local agency, the term means an employment position which will exist for less than 6 consecutive months, or other employment position as determined by rule of the division, regardless of whether it will exist for 6 consecutive months or longer.

46. Subsection 121.021(32), Florida Statutes (2001), defines the term "state agency" to mean the Department of Management Services (DMS).[8] That definition would lead to the absurd result that only DMS is a state agency and only temporary employees at DMS can fill temporary positions in a state agency. All other state agencies would be local agencies, and temporary employees in those agencies would fill temporary positions in a local agency.

47. The legislature does not intend its enactments to have absurd results. When the literal interpretation of statutory terms frustrates legislative intent, the literal meaning must yield to legislative intent for the statute as a whole. Vildibill v. Johnson, 492 So. 2d 1047, 1049 (Fla. 1986);

Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association, Inc., 612 So. 2d 646, 654 (Fla. 1st DCA 1993); cf. State v. Perez, 531 So. 2d 961, 963 (Fla. 1988)(rejecting literal meaning leading to illogical result).

48. The term "state agency" is defined in Section 216.011, Florida Statutes (2001). The legislature refers to "Section 216.011" in defining a temporary position as well as a regularly established position. The legislature apparently intended to rely on "Section 216.011" in defining both terms, and reliance on "Section 216.011" to define a state agency is consistent with legislative intent. The manifest intent of the legislature for the statute as a whole prevails over the specific definition of a state agency in Subsection 121.021(32), Florida Statutes (2001). Schoettle v. State, Department of Administration, Division of Retirement, 513 So. 2d 1299 (Fla. 1st DCA 1987).

49. Subsection 216.011(1)(qq), Florida Statutes (2001), defines a "state agency," in relevant part, to mean a "board . . . of the executive branch of state government." The Board that governs FVS is a board of the executive branch of state government.[9] § 1002.37(1)(a), Fla. Stat. (2004); accord § 228.082(1)(a), Fla. Stat. (2000).

50. The Board reports directly to the Governor, and FVS is administratively housed in an office of the Commissioner, as the

Head of the Department of Education. § 20.15(2), Fla. Stat. (2001). In comparison, a board of trustees of a community college that is not part of the executive branch of government is not a state agency. Compare Caldwell v. Board of Trustees of Broward Community College, 858 So. 2d 1199, 1200-1201 (Fla. 4th DCA 2003)(for the stated proposition) with Lindawood v. Office of the State Attorney, Ninth Judicial Circuit of Florida, 731 So. 2d 829, 832 (Fla. 5th DCA 1999)(assistant state attorney is employee of state agency).

51. The Board is a "public agency" entitled to sovereign immunity pursuant to Section 768.28, Florida Statutes (2001). § 1002.37(2), Fla. Stat. (2001); accord § 228.082(2), Fla. Stat. (2000). Section 768.28, Florida Statutes (2001), does not define the term "public agency." However, the statute defines the phrase "state agencies and subdivisions" to include "independent establishments of the state, including state university boards of trustees." § 768.28(2), Fla. Stat. (2001).[10]

52. The Board is established to govern a state high school[11] in a manner similar that by which the Florida Constitution established the Board of Governors to govern the state university system. Compare § 1002.37(2), (3), and (6), Fla. Stat. (2001) with Art. IX, § &(d), Fla. Const. (each describing the operational, management, and other

responsibilities of each board).[12] The former Board of Regents, the predecessor to the Board of Governors, represented to the Supreme Court that it was a state agency. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).[13] A constitutionally created board, analogous to the Board of Governors, has been held to be a state agency. Adlington v.Spooner, 743 So. 2d 1195 (Fla. 4th DCA 1999)(Parole Commission, created in Art. IV, § 8(c), Fla. Const., is a state agency).

53. Several judicial decisions have distinguished a state agency from a local agency. The judicial tests used to distinguish the two types of agencies are persuasive.

54. Courts generally distinguish a state agency from a local agency by either a territorial test or a functional test. The territorial test considers whether the agency has power to operate outside the limits of one county. The functional test considers whether the agency serves a public purpose and benefits the citizens of Florida in general. Compare Orlando-Orange County Expressway Authority v. Hubbard Construction Co., 682 So. 2d 566 (Fla. 5th DCA 1996)(territorial test showed expressway authority is state agency because it has authority to operate in more than one county) and Pepin v. Division of Bond Finance, 493 So. 2d 1013 (Fla. 1986)(functional test showed intra-county part of statewide system served a public purpose

and benefited the citizens of the state) with Booker Creek Preservation, Inc. v. Pinellas Planning Council, 433 So. 2d 1306 (Fla. 2d DCA 1983)(territorial test showed planning council was a unit of local government and not a state agency because council had authority within one county) and Rubinstein v. Sarasota County Public Hospital Board, 498 So. 2d 1012 (Fla. 2d DCA 1986)(territorial test showed hospital board is not a state agency because jurisdiction is confined to one county).

55. Under either the territorial test or the functional test, the employer satisfies the judicial definition of a state agency; regardless of whether the employer is the Board, FVS, or the fiscal agent. The employer has power to operate statewide for a public purpose that benefits the citizens of the state in general. See, e.g., §§ 1001.42(15)(a); 1002.02(6)(a); 1002.23(2)(d); 1002.37(1)(d), (f), (g), (i), (3), and (4); 1003.02(1)(i); 1003.52(4); § 1004.04(4); 1007.27(1); and 1011.61(1)(c)b III, Fla. Stat. (2001).

56. Contingencies of enrollment and funding are inapposite to employment by a state agency. Employees of a state agency fill either a regularly established position or an OPS position. Petitioner was not paid from an OPS account. Petitioner filled a regularly established position in a state agency as a part-time employee during the contested period. Cf. Department of Administration, Division of Retirement v. Albanese, 445 So. 2d

639, 641 (Fla. 1st DCA 1984)(state employees hold either a regularly established position or an OPS position).

57. If the employer were a local agency, the preponderance of evidence shows that Petitioner did not fill a temporary position with a local agency. Petitioner had a reasonable expectation of continued employment based on an ongoing and continuous relationship that included duties significantly greater than those of a part-time instructor.

58. The legal contingency that insufficient enrollment and funding for FVS would preclude continuing employment was neither a realistic contingency nor a material condition of employment.[14] Prior to the contested period, enrollment in FVS had grown from 25 students to 5,564 in three years, and the number of full-time instructors serving FVS had doubled. Legislative funding was adequate for the growth the school experienced.

59. The evidence demonstrates an expectation of continued employment before the employer enrolled in FRS on December 1, 2001. Cf. Fla. Admin. Code R. 60S-6.001(32)(f)(distinguishing an employee from an independent contractor on the basis of a continuing relationship). The employer acted with apparent alacrity to assign significant additional duties to Petitioner and enjoyed immediate benefits from Petitioner's job performance. Petitioner wrote grants, participated in the

development of an FVS procedures manual, and met with staff in strategy sessions in the first 75 days of service in FVS.

60. It is unlikely the employer had no expectation of a continuing employment relationship before employing Petitioner but fortuitously discovered a proverbial "diamond in the rough" in the 75 days Petitioner completed and submitted the first application for a federal grant on November 30, 2004. A finding based on serendipity would require some measure of credulity.

61. The preponderance of evidence demonstrates an expectation of continued employment throughout the contested period. The employer, in fact, continued the employment relationship with Petitioner for several years. Petitioner's position did not end with a particular task, but spanned legal interruptions in school terms when other employees enjoyed regular holidays.[15]

62. The arrangement by which Petitioner worked during the contested period in a part-time position with the employer and in a full-time position with the LEA was, inferentially, part of an exchange program maintained by the Board. § 1002.37(2)(f)2, Fla. Stat. (2001); accord § 228.082(2)(e)2, Fla. Stat. (2000). In relevant part, persons employed by the Board for service in FVS are either loaned to or exchanged with persons employed by local agencies. The legislature expressly mandates that such personnel "shall be deemed to have no break in creditable or

continuous service or employment" while they are in the exchange program. Id.

63. The foregoing expression of legislative intent embodies a longstanding practice in state education. Since 1961, employment service in the Department of Education has not interrupted the continuity of employment service in an LEA. Op. Atty. Gen., 061-41, March 13, 1961.

64. The FVS is administratively housed in the Department of Education. Petitioner's service in FVS did not interrupt her continuity of FRS service.

65. Even if no formal exchange program were to have existed, the relevant expression of legislative intent is instructive for the purpose of determining whether the legislature intended instructional staff in LEAs, including Petitioner, to suffer an interruption in creditable service while they served FVS. The manifest intent of the legislature prevails over the literal import of specific terms of the enabling legislation. Schoettle, 513 So. 2d at 1301. Use of a job title such as "adjunct" cannot frustrate legislative intent to ensure that those serving FVS will not suffer an interruption in creditable service. Cf. Hillsborough County Hospital Authority v. State, Department of Administration, Division of Retirement, 495 So. 2d 249, 253 (Fla. 2d DCA 1986)(in dicta

stating that job labels such as "pool nurses" cannot be used to deprive nurses of benefits of FRS).

66. Use of the term "adjunct" was ambiguous and inadequate to satisfy the notice and documentation requirements in Florida Administrative Code Rule 60S-1.004(5). In relevant part, use of the term "adjunct" as an alternative to a full-time position and use of the term "adjunct" on contracts for part-time employment of instructors, individually and collectively, created ambiguity. See New Amsterdam Casualty Company v. Addison, 169 So. 2d 877, 880 (Fla. 2d DCA 1964)(document must be construed in its entirety in determining the intent of the parties).

67. The employer authored each of the ambiguous documents. Respondent urges the ALJ to construe ambiguous terms against Petitioner. It is well settled that ambiguous terms in a document must be construed against the author of the document. The absence of the author as a party and witness in this proceeding does not obviate the rule of construction. Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association, 361 So. 2d 128, 133 (Fla. 1978). See also Alternative Development, Inc. v. St. Lucie Club and Apartment Homes Condominium Association, Inc., 608 So. 2d 822, 825 (4th DCA 1992); Enegren v. Marathon Country Club Condominium West Association, Inc., 525 So. 2d 488, 490 (Fla. 3d DCA 1988);

Santa Rosa BBFH, Inc. v. Island Echos Condominium Association, 421 So. 2d 534 (Fla. 1st DCA 1982); Addison, 169 So. 2d at 885.

68. The omission of adequate notice and documentation required by rule is a tacit representation that Petitioner filled a regularly established position and was entitled to FRS benefits. That representation is a mistake of fact that is contrary to the condition now asserted by the state. Petitioner relied on the tacit representation and changed her position in reliance on that representation. The judicial doctrine of equitable estoppel precludes Respondent from now denying benefits to Petitioner. See, e.g., Kuge v. State, Department of Administration, Division of Retirement, 449 So. 2d 389, 391 (Fla. 3d DCA 1984)(Division of Retirement estopped by representations of Department of Revenue). Cf., Warren v. Department of Administration, 554 So. 2d 568, 570 (Fla. 5th DCA 1989)(Department of Administration estopped from denying insurance benefits to state employee); Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3d DCA 1983)(Division of Retirement estopped from denying teacher right to purchase credit for eight years of service in foreign private school).[16]

69. Apart from the judicial doctrine of estoppel, Respondent cannot exercise agency discretion in a manner that is inconsistent with its own rule that requires the employer to

provide adequate notice and documentation that Petitioner was filing a temporary position. The exercise of agency discretion in a manner that is inconsistent with a valid, existing rule is subject to remand upon judicial review. Compare §§ 120.68(7)(e)2 and 120.68(7)(e)3, Fla. Stat. (2004). It would be improvident to issue an order that is subject to remand.

70. The IRS requires employers to use Form 1099-Misc to report income earned by an independent contractor. Neither the preliminary denial letter nor the denial letter included a statement that Petitioner was an independent contractor. The terms "independent contractor" and "temporary position" are defined as separate and distinct terms in Respondent's rules. Respondent cannot deny the request for inclusion of the contested amount based on grounds for which Petitioner had no notice prior to the administrative hearing. To do so, would deprive Petitioner of fundamental due process and frustrate the purpose of Chapter 120, Florida Statutes (2004).

71. The employer's use a Form 1099-Misc is not persuasive evidence that Petitioner earned the contested amount while occupying a temporary position. Form 1099-Misc is entitled to little weight without other evidence of temporary status or where other evidence establishes an employment relationship. Water-Pure Systems, Inc. v. Commissioner of Internal Revenue, 85

T.C.M. 934 (2003); Veterinary Surgical Consultants, P.C. v. Commissioner of Internal Revenue, 85 T.C.M. 901 (2003).

72. Even if the employer were to have originally intended Petitioner to be a temporary employee, the intention of the parties is not the sole determinant. The fulcrum of decision includes all of the facts and circumstances surrounding the relationship between the parties. Cf. Northwest Florida Community Hospital, 651 So. 2d at 172 (distinction between employee and independent contractor depends on all of the facts and circumstances rather than the intent of the parties). For reasons previously stated and not belabored here, all of the facts and circumstances show that the relationship between Petitioner and the employer was an ongoing and continuing relationship with significant duties in addition to those of a part-time, on-line instructor.

73. A determination of whether Petitioner earned the contested amount in a temporary position is a factual determination that is the exclusive province of the trier of fact. Such a determination is not one that is infused with agency expertise. Cf. And Justice For All, Inc. v. Florida Department of Insurance, 799 So. 2d 1076, 1078 (Fla. 1st DCA 2001)(construing contractual obligations does not require special agency expertise); Northwest Florida, 651 So. 2d at 173(determination of whether person is employee or independent

contractor is factual issue); Schoettle, 513 So. 2d 1299, 1301 (Fla. 1st DCA 1987)(teacher was entitled to credit in FRS for years teaching in foreign school).

74. Respondent's reliance on a common and ordinary meaning of the term "adjunct" to define the statutory term "temporary position" obviates the maxim that great deference should be given to an agency's interpretation of a statute. Schoettle, 513 So. 2d at 1301. Statutory construction is ultimately the province of the judiciary. Id.

75. Petitioner did not serve FVS during the contested period in a position analogous to positions that have been held to be temporary. Petitioner did not enjoy a less rigorous schedule than part-time instructors occupying a regularly established position. Petitioner was not entitled to refuse to work when called to work, did not suffer any breaks in service, did not lose her position when her work ended, and was not permitted to depart from course requirements or attendance schedules established by the School. Compare Rayborn v. Department of Management, etc., 803 So. 2d 747 (Fla. 3d DCA 2001) and Hillsborough County Hospital, 495 So. 2d at 249 (discussing the characteristics that make pool-nurses either temporary employees or independent contractors).

76. Petitioner is not entitled to include in her AFC compensation earned for 77 days before the employer enrolled in

the FRS on December 1, 2001. Employment by an employer that does not participate in the FRS does not constitute creditable service. Cf. Boggs v. Department of Management Services, 823 So. 2d 297 (Fla. 1st DCA 2002)(employee is not entitled to FRS benefits when employer does not participate in FRS).

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order including in the AFC that portion of the contested amount earned on and after December 1, 2001, and excluding the remainder of the contested amount from the AFC.

DONE AND ENTERED this 25th day of March, 2005, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2005.

ENDNOTES

1/ With a few exceptions, the Recommended Order refers to Section 1002.37, Fla. Stat. (2001), because that statute was enacted on July 1, 2001, with few substantial changes from former Section 228.082, Fla. Stat. (2000). The relevant differences in the two statutes pertain to legislative funding for the FVS and are discussed, infra, in the text of the Recommended Order.

2/ The LEA paid a salary to Petitioner as a full-time employee for school years identified in the record as 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, and 2002-2003. For the 2001-2002 school year, Petitioner earned an annual salary of $65,855.93 as a full-time employee of the LEA and earned $6,150 working in the FVS. For the 2002-2003 school year, the LEA paid Petitioner a salary of $11,149.00 as a full-time employee in July and August 2003. Prior to July, Petitioner earned a salary of $53,961.03 serving full-time in the FVS (for the 2002-2003 school year). For the 2003-2004 school year, Petitioner received combined salaries of $18,105.70 for her work with the LEA and in the FVS. The combined total included payments for accrued annual leave.

3/ Neither party submitted into evidence the actual contract for the contested period that began on September 15, 2001. Findings concerning contract terms during the contested period are based on contracts in subsequent years that Petitioner testified were identical to the contract for the contested period. Respondent did not question or otherwise impeach that testimony. The testimony is credible and persuasive and is consistent with the weight of the evidence. Petitioner and her employer entered into two contracts effective July 1, 2002, through June 30, 2003. One contract was an annual contract for non-instructional personnel naming Petitioner as "Grants Manager." The other contract was a Contract of Employment for Part-Time Instructional Personnel. The terms of each contract required termination to be based on "good cause" within the meaning of Subsection 1002.33(1)(a), Fla. Stat. (2001). If the contract during the contested period were identical to the two sample contracts, the actual contract was an annual contract that could be terminated only for "just cause." The use of so-called "just cause" contracts, rather than "adjunct" contracts, is consistent with the standard of practice in the public school system. § 1002.33(1)(a), Fla. Stat. (2001). Creditable service for instructional employees is measured by "contract years" or

school terms rather than by 12-month periods of employment. § 121.021(17)(a), Fla. Stat. (2001).

4/ The School is housed in the Office of Technology and Information Services.

5/ Students must register for the FVS through one of 65 affiliated public school districts, a private school, or a charter school.

6/ Seasonal state employees are expressly authorized to participate in the FRS. § 121.051(6), Fla. Stat. (2001).

7/ Respondent also relies on part of a statement in the procedures manual that adjunct instructors were not eligible for employee benefits. The entire statement is that adjuncts are not eligible for employee benefits except those required by law. From Petitioner's perspective, benefits required by law included statutorily mandated retirement benefits. The procedures manual grouped the term "adjuncts" as a synonym for independent contractors. Neither the preliminary letter of denial nor the final letter of denial includes as a ground for denial the allegation that Petitioner was an independent contractor.

8/ Numerous statutes, other than those discussed in the text infra, define the terms "state agency" or "agency" in a manner that provides more guidance than the definition in Subsection 121.021(32), Florida Statutes (2001). Compare, §§ 11.45(1)(j), 20.03(11), 112.3187(3)(a), 112.3189(1)(a), and 120.52(1), Fla. Stat. (2001), with § 11.45(1)(b), Fla. Stat. (2001)(defining a "county agency"). See also Board of Public Instruction v. State ex rel. Allen, 219 So. 2d 430 (Fla. 1969)(county school board is a state agency); accord Sublett v. District School Board of Sumter County, 617 So. 2d 374 (Fla. 5th DCA 1993); Canney v. Board of Public Instruction of Alachua County, 222 So. 2d 803 (Fla. 1969)(defining local school boards to be state agencies for purposes of Ch. 120).

9/ See generally, Chiles v. Children A, B, C, D, E, and F, etc., 589 So. 2d 260 (Fla. 1991)(declaring inclusion of a legislative or judicial agency in the statute to be a violation of the separation of powers and unconstitutional).

10/ Service of process for actions authorized in Section 768.28, Florida Statutes (2001), varies depending on the identity of the head of the agency. § 768.28(7), Fla. Stat. (2001). It is unclear from the enabling legislation whether the

Board or the Commissioner is the agency head for the employer. It is clear, however, that neither the Board nor the Commissioner is the head of a local agency.

11/ The FVS was initially identified by the legislature as "The Florida Virtual High School." Compare § 228.082(1)(a), Fla. Stat. (2000)(using the quoted name) with § 1002.37(1)(a), Fla. Stat. (2001)(referring to the Florida Virtual School).

12/ Compare § 1002.37(1)(a)(housing the FVS in an office of the Commissioner of Education, as the Head of the Department of Education, and requiring the Commissioner to monitor the School's performance and report its performance to the State Board of Education and the legislature) with 1002.37(2), Fla. Stat. (2001)(describing the powers and responsibilities of the Board to develop an educational system, develop and acquire intangible property rights, administer and control local school funds, accrue supplemental revenue, and administer and maintain personnel programs).

13/ The succession of authority over the state university system from the Board of Regents to the Board of Governors is described in NAACP, Inc. v. Florida Board of Regents, 876 So. 2d 636, 638-640 (Fla. 1st DCA 2004).

14/ By analogy, courts have consistently held that teachers under tenured contracts have an expectation of employment irrespective of the vicissitudes of enrollment and funding. See, e.g., Clark v. School Board of Glades County, 716 So. 2d 330 (Fla. 2d DCA 1998)(tenured professional contract) and Slater v. Smith, 142 So. 2d 767, 769 (Fla. 1st DCA 1962)(respective holders of professional service and continuing contracts acquire rights known as tenure). See also Davis v. School Board of Gadsden County, 646 So. 2d 766, 769 (Fla. 1st DCA 1994)(considering continuous relationship of non-instructional employee on annual contract over the previous 18 years in determining right to continued employment). Although Petitioner was not a legally tenured teacher for the FVS, the continuing relationship with FVS moot the legal contingency of funding and enrollment.

15/ During the holiday break in the first semester of the contested period, Petitioner attended a meeting with an attorney for FVS on December 27, 2001, to assist in the development of a procedures manual. On January 3, 2002, Petitioner participated in a "think tank" to complete the procedures manual.

16/ See also Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981); Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 212 (Fla. 1st DCA 1986, review denied, 506 So. 2d 1041 (Fla. 1987).

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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.