STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VERNA M. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-3287
	)	
DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for final hearing, as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Gainesville, Florida on October 31, 2005. The appearances were as follows:

APPEARANCES

For Petitioner: Verna M. Johnson, pro se
3432 Northwest 52nd Avenue
Gainesville, Florida 32605

For Respondent: Thomas E. Wright, Esquire
Department of Management Services
Division of Retirement
4050 Esplanada Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner, Verna M. Johnson, terminated all

employment with a Florida Retirement System employer, or employers, as defined in Section 121.021(39)(b), Florida Statutes, when she concluded or terminated her "DROP" participation and therefore whether she actually, finally retired.

PRELIMINARY STATEMENT

This cause arose when the Petitioner requested a formal proceeding to contest an initial agency action of the Division of Retirement (Division) in which it determined that Ms. Johnson the Petitioner had never retired.

The Petitioner had been an employee of the Alachua County School Board and member of the Florida Retirement System (FRS). On August 1, 1998, while employed by the School Board, Ms. Johnson entered the Deferred Retirement Option Program (DROP) participating in it while continuing to work for the Alachua County School Board. On June 9, 1999, the Petitioner terminated her employment with the Alachua County School Board and ended her participation in the DROP program thus, in her belief, finally retiring and terminating employment.

In the meantime, and during her continuing employment with the Alachua County School Board, the Petitioner, with her husband, founded the Caring and Sharing Learning School, a Charter School, on January 28, 1998. On July 16, 1999, less than a month after the Petitioner terminated her employment with

Alachua County Schools and ended her participation in DROP, the Charter School where she worked in some capacity, joined the FRS as a participating employer. That election by the Division of Retirement for the Charter School to participate as a participating employer with the FRS was made retroactive, by their agreement, to August 24, 1998.

Some years passed an external compliance audit of the Charter School was conducted by the Division during the week of March 15, 2004. In that compliance audit it was discovered that the Petitioner had been employed by the Charter School continuously since the Charter School's inception. After requesting materials from the school to aid it in determining the Petitioner's employment status with the Charter School and after reviewing information provided by the school and the Petitioner, the final agency action at issue was issued on June 15, 2005, determining that Ms. Johnson had never retired because her employment had continued at the Charter School before and after it became an FRS employer and that therefore, even though she had terminated work for the Alachua County School Board, she had never ceased working for an FRS employer for at least one calendar month (the Charter School). In the view of the Division, therefore, she had never actually retired.

After requesting a formal proceeding to contest that initial action by the Division, the cause was referred to the

Division of Administrative Hearings and ultimately the undersigned Administrative Law Judge. The cause came on for hearing, as noticed, at which the Petitioner testified in her own behalf and offered six exhibits, which were admitted into evidence. The Respondent presented testimony from Joyce Morgan, the benefits administrator of the Division and offered 23 exhibits, which were admitted into evidence. Official recognition was also taken of Sections 121.021 and 121.091, Florida Statutes(2005), and Florida Administrative Code Rule 60S-1.004.

Upon concluding the proceeding the parties elected to file proposed recommended orders. The parties requested an extension on filing proposed recommended orders which was approved. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was employed by the Alachua County School Board in 1998 and 1999 and prior to that time. She was a regular class member of the FRS who begin participating in the DROP program on August 1, 1998. Thereafter, on July 9, 1999, the Petitioner terminated her employment with Alachua County Schools to begin receiving her DROP accumulation and her monthly FRS retirement benefits.

2. The Petitioner and her husband had founded the Caring and Sharing Learning School (Charter School) back on January 28, 1998, while the Petitioner was employed by the Alachua County School District and had not yet retired or entered the DROP program. She was a full-time FRS employee with the Alachua County School system. The Charter School was not then an FRS employer, nor were retirement contributions made on the Petitioner's behalf by the Charter School.

3. She worked most of the ensuing year after entering the DROP program, and on June 9, 1999, ended her employment relationship by exercising her resignation from the Alachua County School District employment, at which point she began receiving FRS benefits and her DROP accumulation. Thereafter, on July 16, 1999, the Director of State Retirement for the FRS, and the Charter School, entered into an agreement for admission of the Charter School to the FRS as an FRS employer. It had not been an FRS-enrolled employer before July 16, 1999, slightly over a month after the Petitioner had terminated her employment with the school district and began receiving her DROP accumulation and retirement benefits. That agreement provided that the effective date of admission of the Charter School into the status of an FRS employer (with attendant compulsory FRS membership by all employees) was related back with an effective date of August 24, 1998. The record does not reflect the reason

for this earlier effective date. The Petitioner continued to work as an administrator with the Charter School even through the date of hearing in 2005.

4. The Division performed an external audit of the Charter School during the week of March 15, 2004. In the process of that audit the Division received some sort of verification from the school's accountant to the effect that the Petitioner was employed as an administrator and had been so employed since August 24, 1998.

5. Because of this information, the Division requested that the Charter School and the Petitioner complete "employment relationship questionnaires." The Petitioner completed and submitted these forms to the Division. On both questionnaires she indicated that the income she receives from the school was reported by an IRS form W-2 and thus that the employer and employee-required contributions for employees had been made. She further indicated that she was covered by the school's workers' compensation policy. On both forms the Petitioner stated that her pay was "more of a stipend than salary." On the second form she added, however, "when it started, at this time it is salary." She testified that she was paid a regular percentage of her total income from the Charter School before her DROP termination and the stipend after. She added that she just wrote what she "thought they wanted to hear" (meaning on

the forms). The check registers provided to the Division by the Petitioner also indicate "salary" payments for "administrators" in September 1999. It is also true that the Petitioner from the inception of the Charter School in January 1998, and was on the board of directors of the Charter School corporation.

6. According to the Division, the Petitioner was provided at least "three written alerts" by the Division that she was required to terminate all employment relationships with all FRS employers for at least one calendar month after resignation, or her retirement would be deemed null and not to have occurred, requiring refund of any retirement benefits received, including DROP accumulations. The Division maintains that based on the material provided it by the Petitioner, that the Petitioner was an employee of the Charter School from August 24, 1998 (the date the "related-back agreement" entered into on July 16, 1999, purportedly took effect) through at least May 12, 2005. It is necessary that a member of the FRS earning retirement service credits, or after retirement or resignation, receiving retirement benefits have been an "employee," as that is defined in the authority cited below, in order for the various provisions of Chapter 121, Florida Statutes, and related rules to apply to that person's status. This status is determinative of such things as retirement service credit contributions and

benefits, including DROP benefits, entitlement, and accumulations and the disposition made of them.

7. In any event, the Division determined that the Petitioner had been an employee of the Charter School, as referenced above, and took its agency action determining that the Petitioner failed to terminate all employment relationships with all FRS employers (that is she kept working for the Charter School) before and during the month after resignation from the Alachua County School Board and continuing through May 12, 2005, as an employee in the Division's view of things. Therefore, because she was still employed by an FRS employer during the calendar month of July 1999 (only because of the agreement entered into between the Charter School and the division director on July 16, 1999,) her retirement (which had ended her employment with the Alachua County School System) was deemed null and void. The Division thus has demanded that she refund all retirement benefits and DROP accumulations earned or accrued between the date of entry into DROP which was August 1, 1998, through approximately May 12, 2005. This apparently totals approximately $169,000.00.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

9. The Florida retirement System was created by the Legislature in 1970 and is codified in Chapter 121, Florida Statutes (2004).

10. Section 121.091(13)(c)5.d., Florida Statutes (2004), provides:

> A DROP participant who fails to terminate employment as defined in s. 121.021(39)(b) shall be deemed not to be retired, and the DROP election shall be null and void. Florida Retirement System membership shall be re-established retroactively to the date of commencement of the DROP, and each employer with whom the participant continues employment shall be required to pay to the System Trust Fund the difference between the DROP contributions paid in paragraph (i) and the contributions required for the applicable Florida Retirement System class of membership during the period the member participated in the DROP, plus 6.5 percent interest compounded annually.

11. Section 121.021(39)(b), Florida Statutes (2004), provides:

> "Termination" for a member electing to participate under the Deferred Retirement Option Program occurs when the Deferred Retirement Option Program participant ceases all employment relationships with employers under this system in accordance with s. 121.091(13), but in the event the Deferred Retirement Option Program participant should be employed by any such employer within the next calendar month, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence shall constitute a continuation of the employment relationship.

12. Section 121.021(11), Florida Statutes (2004), provides:

> "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a city or specific district, employed in a covered group.

13. Florida Administrative Code Rule 60S-1.004(4)(b), provides:

> Membership in the Florida Retirement System shall be compulsory if the employee is filling a full-time or part-time regularly established position. An employee filling a regularly established position shall be enrolled on the first day of employment, even if the employee is serving a probationary period, or working part-time. A position meeting the definition below shall be considered a regularly established position. . . .
> (b) A regularly established position in a local agency (district school board, county agency, community college, city or special district) is an employment position which will be in existence beyond 6 consecutive months.

14. The Division thus contends that the Petitioner was filling a regularly established position with the Charter School from the date the Charter School's FRS membership as an employer became effective on August 24, 1998, by virtue of the agreement entered into on July 16, 1999, between the Charter School and the director of the Division of Retirement. It thus maintains, that since the Petitioner continued employment with the Charter School before and after the Petitioner's termination date and

end of DROP participation on June 9, 1999, that, in effect, by virtue of the agreement entered into between the Charter School and the Division on July 16, 1999, that the Petitioner effectively was an employee continuing to work for an FRS employer, in a regularly established position, during the first calendar month (July 1999) after her resignation and termination of DROP participation. It thus contends that she never effected her retirement, her retirement was null, and that she must reimburse the Division with all retirement contributions and DROP accumulations previously credited to her.

15. The Petitioner presented differing versions of her pay, status, and work duties with the Charter School apparently, in essence, maintaining she was an independent contractor and not a regularly established employee in a regularly established employment position. However, even if she were in a regularly established and compensated employment position with the Charter School (as an FRS employer,) that determination is not dispositive of the ultimate dispute between the parties concerning the Petitioner's true retirement status, including the issue of whether or not she must reimburse the Division for retirement benefits and DROP accumulations received.

16. In fact, the Petitioner, in reliance on her legal status as an FRS employee of the Alachua County School Board on August 1, 1998, submitted her resignation (post-dated) necessary

to beginning on that day her participation in the DROP program. Neither at that time, nor at the time of her resignation from school board employment and termination in participation of the DROP program, on June 9, 1999, was the Charter School an FRS employer or member of the FRS system. That membership was enacted pursuant to the agreement entered between the FRS Division, or the Division director, and the Charter School entity on July 16, 1999, over one month after the Petitioner had resigned her employment with the Alachua County School System and terminated her participation in the DROP program, under the agreement which arose when she entered the DROP program and elected retirement status on August 1, 1998, which entitled her to her monthly FRS benefits and DROP accumulation.

17. When she entered that DROP/Retirement status by her election on August 1, 1998, an agreement, a contract if you will, arose between her and the Alachua County School District and the Division of Retirement. That agreement or DROP participation thus predated even the Division's conceived date for FRS employer status for the Charter School. She relied on that agreement and that legal arrangement, established by the above-cited legal authority, in entering her retired/DROP participation status and in terminating that status on June 9, 1999, in anticipation of receiving her retirement benefits and DROP accumulation.

18. She relied on that effective agreement to her detriment. The execution of the agreement between the FRS and its Division director and the Charter School on July 16, 1999, by its relating back to a prior effective date of August 24, 1998, would under the Division's theory, allow a change in the Petitioner's status, render her to be still employed with an "FRS employer" within one calendar month of her resignation from the Alachua County School Board, thus abrogating her retirement, abrogating her drop accumulation benefits, and effectively requiring her to reimburse monies because under the legal theory she had never retired. Such an eventuality would amount to the abrogation and impairment of a pre-existing agreement which arose between the Alachua County School District, the Petitioner, and the FRS. Under that lawful arrangement the Petitioner's status as retired and entitled to her benefits and her DROP accumulations upon termination had occurred well before the agreement was entered into rendering the Charter School be an FRS employer and member of the FRS system, regardless of whether it related back to its effective date of August 24, 1998. Such an impairment of the preexisting obligation or contractual relationship, or abrogation of it, is simply unlawful, whether one considers it so under the theory of the prohibition against impairment of a pre-existing contractual agreement or whether one considers that the FRS is estopped to

deny the status she attained when she entered DROP on August 1, 1998, or when she terminated on June 9, 1999, before the agreement between the Charter School and the FRS was ever entered into. In any event, the Petitioner should be deemed to be lawfully retired, to be lawfully entitled to her retirement benefits and her DROP accumulation and to owe no reimbursement to the FRS.

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, determining that the Petitioner's retirement was effective and lawful, that she was entitled to the retirement benefits accrued and paid from June 9, 1999, forward, including the DROP accumulations that accrued up from August 1, 1998, until that date.

DONE AND ENTERED this 3rd day of March, 2006, 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 3rd day of March, 2006.

COPIES FURNISHED:

Sarabeth Snuggs, Director
Division of Retirement
Department of Management Services
Post Office Box 9000
Tallahassee, Florida 32399-0950

Alberto Dominguez, General Counsel
Division of Retirement
Department of Management Services
Post Office Box 9000
Tallahassee, Florida 32399-0950

Verna M. Johnson
3432 Northwest 52nd Avenue
Gainesville, Florida 32605

Thomas E. Wright, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

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.