STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL HUNT, Petitioner, vs. DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT, Respondent.	)	Case Nos. 05-2559 05-3724F

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on October 12, 2005, in Melbourne, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Adrienne E. Trent, Esquire
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For Respondent: Robert B. Button, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner satisfies the eligibility requirements in Subsection 121.081(1)(f),

Florida Statutes (2005), to purchase past service credit in the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

By letters dated April 16 and May 25, 2004, Respondent proposes final agency action denying Petitioner's request to purchase past service from December 1976 through September 1999 when Petitioner was employed with the Harbor City Volunteer Ambulance Squad, Inc., as a state certified paramedic. Petitioner timely requested a formal hearing.

At the hearing, Petitioner testified, presented the testimony of one additional witness, and submitted 12 exhibits for admission into evidence. Respondent called one live witness and submitted the deposition testimony of another witness as Respondent's only exhibit.

The ALJ granted Petitioner's Request for Official Recognition of Subsections 121.081(1)(f) and 121.021(18), Florida Statutes (2005); Florida Administrative Code Rule 60S-2.003; and Strine v. Division of Retirement, DOAH Case No. 80-1378. The ALJ also granted Respondent's request for Official Recognition of Section 121.081 and Subsections 121.021(18), 121.051(2)(f)1., and 121.021(38), Florida Statutes (2005); Florida Administrative Code Rules 60S-1.0075 and 60S-2.003; and Futch v. Division of Retirement, DOAH Case No. 83-2239.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the one-volume Transcript of the hearing filed with DOAH on November 8, 2005. The undersigned granted Respondent's request for an extension of time to file proposed recommended orders (PROs). Petitioner and Respondent timely filed their respective PROs on December 23 and 22, 2005.

During the formal hearing, Petitioner also filed a Motion for Attorney's Fees and Costs based on Section 121.23, Florida Statutes (2005). On December 22, 2005, Respondent filed Respondent's Motion to Dismiss Petitioner's Request for Attorney Fees and Costs (Motion to Dismiss).

FINDINGS OF FACT

1. Petitioner was employed as a State Certified Paramedic by Harbor City Volunteer Ambulance Squad, Inc. (HCVAS), in Brevard County, Florida, from sometime in December 1976 through September 30, 1999. From October 1, 1999, through the date of the formal hearing, Petitioner was employed as a county employee in an identical capacity with Brevard County Fire Rescue (BCFR).

2. Petitioner's employment with HCVAS and BCFR was continuous, with no break in service. Petitioner performed identical services with HCVAS and BCFR and had identical duties and responsibilities. At BCFR, Petitioner received credit for

80 percent of the seniority and leave accrued while Petitioner was employed with HCVAS.

3. From sometime in October 1992 through September 30, 1999, HCVAS furnished emergency and non-emergency ambulance service in an area the parties refer to as the central part of Brevard County, Florida, that is legally described in Petitioner's Exhibit A (the service area). HCVAS furnished ambulance service pursuant to a contract with the Brevard County Board of County Commissioners (the County). HCVAS was an independent contractor with the exclusive right to provide ambulance service in the service area.

4. The County, rather than HCVAS, provided emergency ambulance service for that part of the County outside the service area. A company identified in the record as Coastal Health Services provided non-emergency ambulance service outside the service area.

5. HCVAS was an "employing entity which was not an employer under the [FRS]," within the meaning of Subsection 121.081(1)(f), Florida Statutes (2005). HCVAS was a private, non-profit company rather than a government entity. However, employees of HCVAS were not volunteers, but were full-time employees of HCVAS. HCVAS paid its employees, including Petitioner, from funds received from the County.

6. The County retained exclusive control of communication and dispatching of emergency calls for the entire County, including the service area. The County required HCVAS to maintain communication equipment that was compatible with the central communication system.

7. On October 1, 1999, the County effected an "assumption of functions or activities" from HCVAS within the meaning of Subsection 121.081(1)(f), Florida Statutes (2005). The County allowed the contract with HCVAS to expire on September 30, 1999.

8. On April 13, 1999, the County authorized BCFR to provide emergency ambulance service to the service area previously served by HCVAS. The County also authorized the county manager to purchase rescue units and equipment and required the county manager to give first priority to units and equipment of HCVAS.

9. Eligibility for HCVAS employees such as Petitioner to participate in the FRS arose through the assumption of HCVAS functions by the County. The County did not employ HCVAS employees, including Petitioner, as a result of competitive selection. The primary conditions of employment for HCVAS employees such as Petitioner were that each HCVAS employee must apply for employment with the County no later than May 29, 1999; possess a valid Florida driver's license; and pass a criminal background check.

10. The County directed its Public Safety Department (Department) to give special consideration to HCVAS employees, including Petitioner, by hiring as many HCVAS employees as possible. Applications for employment from the general public were to be accepted only if employment positions remained unfilled after placing all qualified HCVAS employees in available positions.

11. Approximately 95 HCVAS employees, including Petitioner, applied for employment with the County. The County employed approximately 90 of the 95 applicants. The five applicants who were not employed were rejected because the applicants either did not possess a valid Florida driver's license or did not pass the criminal background screening. Rejection of an applicant required approval of two supervisors.

12. On October 1, 1999, the County recognized past service with HCVAS by new employees such as Petitioner. The County credited each new employee with seniority, annual leave, and sick leave based on a contractual formula negotiated with the labor union equal to 80 percent of seniority, annual leave, and sick leave earned while employed by HCVAS.

13. On October 1, 1999, former HCVAS employees employed by the County, including Petitioner, became entitled to participate in the FRS system through the "assumption of functions or activities" by the County from HCVAS "which was not an employer

under the system" within the meaning of Subsection 121.021(1)(f), Florida Statutes (2005). On the same date, Petitioner became a member of the special risk class of FRS and is "entitled to receive past-service credit . . . for the time" Petitioner "was an employee of [HCVAS] . . . the "other employing entity."

14. On November 6, 2003, Petitioner applied to purchase credit in the FRS for his past service with HCVAS. On December 23, 2003, Respondent denied Petitioner's request on the ground that a "merger, transfer or consolidation" of functions between units of government did not occur.

15. On January 8, 2004, Petitioner provided Respondent with a written reply. The reply explained that the application to purchase credit for past service was based on the County's assumption of functions or services by an employing entity that was not an employer under the FRS and not on a merger, transfer, or consolidation of functions between units of government.

16. By letters dated April 16 and May 25, 2004, Respondent issued written statements of proposed Final Agency Action. On April 16, 2004, Respondent based its proposed agency action on the express ground that a "merger, transfer or consolidation" had not occurred when the County undertook emergency ambulance service in the service area. On May 25, 2004, Respondent added the additional ground that an assumption of functions did not

occur between governmental units because HCVAS was a "not-for-profit corporation" and not a "unit of government."

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the parties and the subject matter in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005). DOAH provided the parties with adequate notice of the formal hearing.

18. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that he became entitled to and did participate in the FRS "through the assumption of functions or activities" by the County from HCVAS and that HCVAS was "an employing entity which was not an employer" under the FRS. §§ 121.081(1)(f), 120.57(1)(j), and 120.57(1)(k), Fla. Stat. (2005); Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993); Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

19. Subsection 121.081(1)(f), Florida Statutes (2005), in relevant part, provides:

> (f) When any person, either prior to this act or hereafter, becomes entitled to and does participate in one of the retirement systems consolidated within or created by this chapter through the consolidation or merger of governments or the transfer of functions between units of government,

> either at the state or local level or between state and local units, or through the assumption of functions or activities by a state or local unit from an employing entity which was not an employer under the system, and such person becomes a member of the Florida Retirement System, such person shall be entitled to receive past-service credit as defined in s. 121.021(18) for the time such person performed services for, and was an employee of, such state or local unit or other employing entity prior to the transfer, merger, consolidation, or assumption of functions and activities. (emphasis added)

Petitioner showed by a preponderance of evidence that he satisfies the relevant statutory requirements to purchase credit in the FRS for past service with HCVAS.

20. Respondent invokes the judicial doctrine of "great deference" for Respondent's interpretation that the statutory phrase "an employing entity which was not employer under the system" is limited to a public employer such as a city or other local government unit that was not an employer under the FRS. Respondent interprets the term "employing entity" to exclude private employers such as HCVAS.

21. The quoted statutory terms are not defined by statute or Respondent's rules. The record evidence does not set forth a reasonable basis to support a finding that an interpretation of the quoted terms requires special agency insight or expertise. Petitioner did not articulate any underlying technical reasons for deference to agency expertise. Johnston, M.D. v. Department

of Professional Regulation, Board of Medical Examiners, 456 So. 2d 939, 943-944 (Fla. 1st DCA 1984).

22. Respondent argues that its interpretation of the term "employing entity" is the interpretation that Respondent has always adopted in applying the statute and that a contrary interpretation would be expensive for the FRS. Neither argument articulates agency expertise or an underlying technical reason for deference to agency expertise.

23. The statutory interpretation adopted by Respondent is not entitled to deference for the additional reason that the proposed statutory interpretation is clearly erroneous. Respondent has previously interpreted the term "employing entity" to include a private company.

24. Respondent previously issued final orders adopting in toto findings in two Recommended Orders that, in relevant part, concluded that an assumption of functions occurred when a county government assumed functions previously performed by a private company. Futch v. State of Florida, Department of Administration, Division of Retirement, Case No. 83-2239 (DOAH March 12, 1984)(adopted in toto in Final Order dated March 14, 1984); Strine v. Department of Administration, Division of Retirement, Case No. 80-1378 (DOAH December 17, 1980)(adopted in toto in Final Order dated January 23, 1981).

25. In Futch, the sole shareholder and president of the Brevard Ambulance Service (BAS) contracted with Brevard County, Florida to provide services as the Emergency Medical Services (EMS) coordinator from October 1, 1969, through September 30, 1977. On November 3, 1977, Mr. Futch resigned his position from BAS and sold its assets. On November 4, 1977, Mr. Futch became a full-time employee of Brevard County in the newly created County position of EMS director. The hearing officer concluded there "was an 'assumption of functions' by the County when it created the EMS Director position in November, 1977." Futch, at paragraph 11 (3d unnumbered page).

26. In Strine, Metro Dade County, Florida, did not renew a contract with National City Management Company (National City), a private company that employed Mr. Strine and had provided day-to-day management and operation of the county bus service for approximately 10 years. On October 15, 1974, Metro Dade County authorized the city manager to assume the functions previously performed by National City. Mr. Strine then became a full-time employee of Metro Dade County. The hearing officer concluded that National City, a private company, was an "employing entity" and that Metro Dade County assumed the functions of an employing entity that was not an employer under the FRS. Strine, at paragraph 11 (4th unnumbered page).

27. The judicial doctrine of stare decisis applies to administrative proceedings, including this one. An agency, including Respondent, is bound by its previous final orders unless the facts or law in this proceeding are distinguishable from those in the agency's previous final orders. Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 503 (Fla. 4th DCA 1993) reh. denied December 21, 1993; modified temporally, but not substantively in Caserta v. Department of Business and Professional Regulation, 686 So. 2d 651, 653 (Fla. 5th DCA 1996).

28. The previously discussed conclusions in Futch and Strine are not distinguishable from Respondent's proposed interpretation in this proceeding of the terms "assumption of functions" and "employing entity." In each proceeding, the terms "assumption of functions" and "employing entity" were interpreted to include a county government's assumption of functions from a private company that had not been an employer under the FRS.

29. In addition to being bound by Respondent's previous final orders, Respondent is also bound by relevant appellate judicial decisions. In Wilson v. State of Florida, Department of Administration, Division of Retirement, 472 So. 2d 525 (Fla. 3d DCA 1985), the court concluded that an assumption of functions occurred under former Subsection 121.081(1)(g),

Florida Statutes (1984), when a private company became "county-owned." Wilson, 472 So. 2d at 530. The court held that employees of the private company were entitled to purchase retirement credit for their past service with the private company "pursuant to section 121.081(1)(g)." Id. The substantive statutory provisions at issue in Wilson are now contained in Subsection 121.081(1)(f), Florida Statutes (2005). See also Schoettle v. Department of Administration, Division of Retirement, 513 So. 2d 1299, 1302 (Fla. 1st DCA 1987)(overruling Respondent's denial of out-of-state service credit toward retirement for a teacher at a private school and rejecting Respondent's conclusion that Respondent always denied credit when the "employing entity" was private rather than public).

30. In Futch, Respondent denied an application to purchase credit for past service based on facts not evidenced in this proceeding. In Futch, "there was no carry-over in benefits such as . . . accumulated leave" from the applicant's prior employment with BAS. The County did not take over ambulance operations from BAS at the time that Mr. Futch became a County employee. Rather, the County initiated its own service at a later time. Mr. Futch did not perform duties for the County that were identical to those he performed for BAS. The responsibilities of the EMS coordinator comprised only five percent of the duties Mr. Futch performed at BAS. Finally, the

employment of Mr. Futch by the County arose through competitive selection rather than the assumption of functions by the County.

31. In this proceeding, the County recognized Petitioner's past service with HCVAS through a carry-over in benefits such as accumulated leave and seniority. The County assumed the functions of emergency ambulance service from HCVAS at the time that Petitioner became a County employee. Petitioner performed identical duties for the County and HCVAS.

32. The employment of Petitioner by the County arose through the assumption of functions by the County rather than competitive selection. Petitioner was eligible for continued employment if he applied no later than May 29, 1999, possessed a valid Florida driver's license, and passed a criminal background check. The County directed its Public Safety Department (Department) to give special consideration to Petitioner and to hire Petitioner if at all possible. Petitioner's application for employment did not compete against those from the general public. The Department employed approximately 95 percent of the HCVAS employees who applied for employment.

33. The Motion to Dismiss Petitioner's request for attorney's fees and costs asserts that the authority of the State Retirement Commission to award attorney's fees and costs is limited to disability appeals. Petitioner did not reply to

the Motion to Dismiss. The Motion to Dismiss is granted for the reasons stated in the Motion.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order granting Petitioner's application to purchase credit in the FRS for past service with HCVAS.

DONE AND ENTERED this 31st day of January, 2006, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of January, 2006.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.