STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES V. KEENE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-2125
	)	
ESCAMBIA COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for final hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on August 31, 2007, in Pensacola, Florida.

APPEARANCES

For Petitioner: Michael J. Stebbins, Esquire
Michael J. Stebbins, P.L.
504 North Baylen Street
Pensacola, Florida 32501

For Respondent: Joseph L. Hammons, Esquire
Hammons, Longoria & Whittaker, P.A.
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to damages and back salary for the period of April 22, 2004, through May 31, 2006, pursuant to Subsection 1012.33(3)(g), Florida Statutes (2007), as well as interest and attorney's fees.

PRELIMINARY STATEMENT

On September 18, 2006, Petitioner filed a lawsuit in the Circuit Court of Escambia County, Florida, for back salary pursuant to his contract with Respondent and Section 1012.33(g), Florida Statutes. After filing an answer to this lawsuit, Respondent later filed a motion to dismiss based upon the Petitioner's failure to exhaust his administrative remedies. On April 20, 2007, Judge Terrell issued an order staying the proceedings and directed Petitioner to file a petition with Respondent within 21 days of the order. Petitioner filed his petition on May 4, 2007, to which Respondent filed its answer on May 14, 2007, contesting the allegations and relief sought by Petitioner.

Petitioner filed a Motion to Dismiss the administrative proceeding on July 6, 2007, for lack of jurisdiction, and to relinquish jurisdiction to the Circuit Court of Escambia County, Florida. That Motion was denied by Order dated July 13, 2007. The final hearing was originally scheduled for Wednesday, July 18, 2007, but upon Motion for Continuance filed by Petitioner, the final hearing was held on Friday, August 31, 2007.

At the hearing, Petitioner testified and offered Exhibits numbered 1-14, 20-22, and 26-40, which were admitted into evidence. Respondent presented the testimony of Keith Leonard,

Director of Human Resources for the Escambia County School District and offered four exhibits, which were admitted into evidence. The parties jointly filed a Pre-hearing Stipulation.

A Transcript was filed on September 26, 2007. Thereafter, by agreement, Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on October 31, 2007, by agreement.

References to statutes are to Florida Statutes (2007) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Charles V. Keene, has been employed by Respondent, the School Board of Escambia County, as a full-time Florida-certified public school teacher since April 22, 2004, under a series of annual contracts.

2. Prior to his employment with Respondent, Petitioner was a full-time public school teacher in Alabama for 20 years and received satisfactory performance evaluations throughout the 20 years.

3. At the time he was hired by Respondent, commencing April 22, 2004, Petitioner received credit for salary schedule placement for the one year he had previously taught in Florida, and for the two years he had taught in Georgia. He requested, but did not receive, credit for the 20 years of instructional

service in the state of Alabama that he utilized to obtain his retirement in Alabama.

4. Respondent operates under a collective bargaining agreement known as the "Master Contract." The Master Contract includes, among other things, a salary schedule that is the result of negotiations with the Escambia Educational Association ("EEA"), the collective bargaining agent that represents teachers. The negotiated salary schedule is then recommended by the Superintendent of Escambia County Schools pursuant to Subsection 1012.27(2), Florida Statutes, to Respondent for approval and adoption.

5. The salary schedule adopted by Respondent governs the compensation payable to instructional personnel. The salary schedule includes "steps" with corresponding "salary." Placement on the salary schedule step depends, in part upon prior teaching experience. Generally, more prior teaching experience credited for placement on the schedule results in a higher level of compensation.

6. At the time of Petitioner's hire on April 22, 2004, the Master Contract in place was the contract for the period of 1999-2002, extended by agreement of Respondent and the EEA until July 21, 2004.

7. According to the Master Contract in effect on Petitioner's date of hire, limitations were placed on the amount

of prior teaching experience that could be used for determining placement on the salary schedule. For example, credit for prior teaching, military, governmental, or employment service, not including Florida public school teaching experience, was limited to a maximum of fifteen years. The Master Contract also contained a specific provision for placement of retired educators. The contract provided as follows:

> II.5(C) Placement for Retired Educators
>
> 1. Educators who retired from Escambia District Schools and who return to full time employment in Escambia District Schools shall be placed on Step 5 of Appendix A-Instructional Salary Schedule.
> 2. Educators who retired from any other school district shall be placed on Step 0 of Appendix A-Instructional Salary Schedule.

The effect of this provision was that Petitioner received no credit for the 20 years of Alabama teaching when placed on the salary schedule.

8. Employees' rights for placement on the salary schedule are determined by the date of hire.

9. With credit being given for prior teaching experience in Florida and Georgia, but without credit for 20 years of teaching experience in Alabama, Petitioner was placed on the salary schedule in accordance with the provisions of the Master Contract in effect at the time of his hire.

10. Petitioner received annual instruction contracts under the authority of Section 231.36(2), Florida Statutes (later renumbered Section 1012.33(3), Florida Statutes).

11. Petitioner's annual instructional contracts set forth the contract salary on an annual basis payable through twelve monthly installments. The contract specified the number of days to be worked and the daily rate of compensation.

12. Respondent's standard form contract provides that "[t]his annual contract shall be deemed amended to comply with all laws, all lawful rules of the State Board of Education, all lawful rules and actions of the School Board and all terms of an applicable ratified collective-bargaining agreement."

13. Respondent, as a matter of practice, provides newly hired teachers with information on how they are placed on the salary schedule. Additionally, Respondent's website has information available with a link to the Master Contract language which demonstrates how instructors are placed on the salary schedule.

14. Human Resources staff members are instructed that the Master Plan governs placement of newly hired instructors on the salary schedule, and they advise the newly hired instructors of placement on the salary schedule.

15. At the time of his hire, Petitioner was told he would not be credited on the salary schedule for his Alabama teaching

experience which led to his retirement in that state after 20 years.

16. Petitioner acknowledged that he received a copy of the Master Contract in August of 2004, when the school year started.

17. Petitioner knew, at the time of hire, that his rate of pay was based on his placement on the salary schedule. Petitioner had agreed at that time to perform the services required by his contract based upon the compensation set forth in the contract.

18. Petitioner inquired about receiving credit for his 20 years of teaching experience in Alabama at the time he was hired by Respondent. At that time, Petitioner was told by Judy Fung, an employee with Respondent's human resources office, that Petitioner would not be granted credit for his 20 years of teaching experience in Alabama.

19. Petitioner provided Respondent, shortly after he was hired, all the necessary paperwork to document his 20 years of satisfactory service as a teacher in Alabama.

20. Petitioner performed the agreed-upon instructional services and was paid the agreed-upon contractual amount.

21. Petitioner's annual instructional contract specifies the salary paid through twelve monthly installments with a daily rate of compensation identified. The amount of compensation can be further broken down into an hourly rate based upon 7.5 hours

per day, and provides for annual leave and sick leave. As is customary, if the employee takes leave and has no accrued leave balance, his pay will be reduced to compensate for the hours of leave without pay taken. Respondent maintains ledgers with all the compensation information for its employees, including Petitioner.

22. The statutory provision governing credit for prior teaching experience at issue in this hearing is former Subsection 231.36(3)(g), renumbered through amended versions to Subsection 1012.33(3)(g), Florida Statutes. Although the statute has been amended several times since 2001, the language that applies to all instructional employees (which includes public school classroom teachers pursuant to Subsection 1012.01(2)(a), Florida Statutes) hired after June 30, 2001, remains the same: "[F]or purposes of pay, a school board must recognize and accept each year of full-time public school teaching service earned in the state of Florida or outside the state." The original version of the statute effective July 1, 2001, included language that this statutory provision "is not intended to interfere with the operation of a collective bargaining agreement except to the extent it requires the agreement to treat years of teaching experience outside the district the same as years of teaching experience within the district." § 231.35(3)(g), Fla. Stat. (2001). The statute was

amended effective January 7, 2003, removing the reference to collective bargaining and clarifying that the statutory provision applied only to public school teachers. § 1012.33(3)(g), Fla. Stat. (2003).

23. The Master Contract was amended effective July 22, 2004, to include language referencing Subsection 1012.33(3)(g), Florida Statutes. The changes to the Master Contract, however, applied only to those instructors hired after July 22, 2004.

24. Petitioner, and certain other teachers hired after June 30, 2001, but before July 22, 2004, have requested their placement on the salary schedule be revised to include credit for previous years of teaching experience. Those requesting a revised placement on the salary schedule based upon uncredited experience include teachers who had previously retired utilizing that credit and some who had not retired. Respondent, uncertain as to the proper application of the statute, has addressed claims for placement on the salary schedule and/or past compensation on a case-by-case basis.

25. In February 2006, Petitioner became aware that Respondent's position concerning his requested credit for 20 years of teaching experience in Alabama may have been incorrect.

26. Petitioner made a request for retroactive credit and for back salary for his 20 years of teaching experience in

Alabama in June 2006, and again provided Respondent with documentation of his Alabama satisfactory teaching experience.

27. Petitioner's request for credit and back salary was refused. The only reason given to him at the time was that he failed to make his request within two years of his hire date.

28. At the direction of its General Counsel and after approval by the School Board, Respondent's placement on the salary schedule was amended effective June 1, 2006, to allow credit for his 20 years of teaching experience in Alabama.

29. Respondent's human resources department does not know why the retroactive credit and salary increase were allowed for Petitioner, nor why the date of June 1, 2006, was chosen, especially when the collective bargaining agreement, according to Respondent, does not allow such credit.

30. Petitioner seeks from Respondent 20 years of service credit and back salary for his satisfactory Alabama teaching experience for the period of April 22, 2004, through May 31, 2006, in the amount of $39,209.50.

31. Petitioner also seeks reimbursement of reasonable attorney's fees, costs, and interest, both pre- and post-judgment.

CONCLUSIONS OF LAW

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

33. Subsection 1012.33(3)(g), Florida Statutes, provides:

> Beginning July 1, 2001, for each employee who enters into a written contract, pursuant to this section, in a school district in which the employee was not employed as of June 30, 2001, but has since broken employment with that district for 1 school year or more, for purposes of pay, a district school board must recognize and accept each year of full-time public school teaching service earned in the state of Florida or outside the state and for which the employee received a satisfactory performance evaluation. Instructional personnel employed pursuant to s. 121.091(9)(b)3. are exempt from the provisions of this paragraph.

34. Subsection 121.091(9)(b)3. does not apply in this case because it is limited to re-employment of retired instructional personnel who take employment as substitute or hourly teachers, education paraprofessionals, transportation assistants, bus drivers, or food service workers on a non-contractual basis. Petitioner is not employed in any of these enumerated positions and is a contract instructional employee.

35. The proper application of Subsection 1012.33(3)(g), Florida Statutes, is the primary issue for resolution here. Petitioner's assertion that he is entitled to rely upon

Respondent's past practice concerning other educators similarly situated regarding the implementation of this statutory provision is irrelevant to the issues in this proceeding. Absent other legal restrictions, this provision either requires payment of the requested compensation or it does not. Further, to the extent Petitioner claims that Respondent is estopped to deny the claimed compensation because his salary schedule placement was changed or because others may have been paid under similar circumstances, his reliance upon the doctrine of administrative estoppel is misplaced.

36. Subsection 1012.33(3)(g), Florida Statutes, does not apply to retired educators. From the initial version of the statutory provision at Subsection 231.36(3)(g), Florida Statutes (2001), through the subsequent amended versions of the statute, one clause has remained constant: "Instructional personnel employed pursuant to s.121.091(9)(b)3. are exempt from the provisions of this paragraph." As stated above, Petitioner does not fall within this exempt class.

37. Subsection 121.091(9), Florida Statutes, entitled "Employment After Retirement; Limitation" generally controls the circumstances through which public employees of the State of Florida who have retired and receive benefits under the Florida Retirement System ("FRS") can return to employment with the same employer or another FRS covered employer. It sets time

constraints on when those employees may return to work and additional constraints on their receipt of previously earned FRS benefits. Subsection (9)(b)3 specifically addresses "school board" employees who have retired. School board employees who have retired may return to employment with a district school board only in accordance with the terms of this subsection, and in the limited enumerated positions.

38. While Subsection 121.091(9), Florida Statutes, speaks to the circumstances under which all retired members of the FRS may return to employment, Subsection (9)(b)3. addresses only the circumstances under which school board retired employees may return to work. Significant to this analysis, Subsection 1012.33(3)(g), Florida Statutes, does not concern retirement at all except to exclude certain retired school board personnel from its coverage. The plain language of the statute demonstrates the intent to require school boards to treat years of experience outside the school district the same as years of experience within the school district. The same plain language excludes retired educators from coverage under the statute.

39. Subsection 1012.33(3)(g), Florida Statutes, requires only the recognition, for pay purposes, of years of experience of teachers seeking employment within the school districts of Florida. The explicit purpose appears to be, in all versions of the statute, that credit for teaching service be recognized at

time of hire in some manner and in equal fashion for those with teaching service earned in the State of Florida and those with service earned outside the state.

40. The limited exclusion from the provision of Subsection 1012.33(3)(g) for retired educators is explicit: "Instructional personnel employed pursuant to s.121.091(9)(b)3. are exempt from the provisions of this paragraph." The stated purpose of Subsection 1012.33(3)(g) is to ensure equal credit for newly hired instructors for their prior teaching service, whether that service was earned within the State of Florida or outside the state. No legislative intent is provided to enlighten as to whether that body intended to give preferential treatment to out-of-state retired educators that is not available for Florida retired educators. The statute cannot be reasonably construed as intending to provide a special benefit for retired teachers from other states while denying Florida teachers who retire the right to use the same years of experience for pay purposes in the event of a return to teaching. The statute is designed to ensure that teachers having prior service outside Florida are treated equally with teachers having prior service in Florida. The statute cannot be used, with respect to the exclusion under Subsection 121.091(9)(b)3, to confer a benefit on teachers who retire outside of Florida while denying that same benefit to

teachers who retire in Florida by using years of service earned in Florida.

41. Next, the doctrine of equitable estoppel does not apply in this instance. "Although equitable estoppel can apply against the state . . ., such claims can be pursued only in rare instances where there are exceptional circumstances." McNamara v. Kissimmee River Valley Sportsmen's Association, 648 So. 2d 155, 162-63 (Fla. 2d DCA 1994). "Among the elements that must be proven is a positive act by an authorized official, upon which reliance is based." Id.; see also Bishop v. State, Division of Retirement, 413 So. 2d 776, 779 (Fla. 1st DCA 1982) ("There is no evidence that the state or its agents have committed an affirmative act by which an equitable estoppel could be declared against the State."); Department of Administration, Division of Retirement v. Flowers, 356 So. 2d 14, 15 (Fla. 1st DCA 1978) ("The authorities are clear that estoppel cannot be raised against the State unless there are exceptional circumstances and some positive act on the part of a state officer."); and Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So. 2d 517, 524 (Fla. 1st DCA 1971) ("The casual and offhand manner in which the bureau chief indicated that he thought it would be satisfactory for Knott to submit a bid cannot be said to constitute such an affirmative and positive representation of fact as to justify reliance thereon

by Knott in determining whether it should submit a bid for construction of the project.").

42. The mere failure to act does not constitute a "positive act" upon which an estoppel against a state agency can be based. See Monroe County v. Hemisphere Equity Realty, Inc., 634 So. 2d 745, 747-48 (Fla. 3d DCA 1994) ("Here, the trial court misconstrued the legal doctrine of equitable estoppel when it ruled that Texas Largo was entitled to proceed with its development based upon the County's failure to act against third parties. The trial court further erred when it found that the Planning Director's 1987 letter to Tamarind, the original developer, was an additional basis for estopping the County from enforcing its regulation against Texas Largo. . . . [T]he letter does not, under any conceivable standard, rise to the level of a 'positive act' sufficient to create estoppel. Simply put, the letter says nothing, and suggests nothing by omission, regarding the two-year limitation."); State v. Hadden, 370 So. 2d 849, 852 (Fla. 3d DCA 1979) ("[E]stoppel will not be applied against the State for an omission to act . . . ."); and U. S. Immigration and Naturalization Service v. Hibi, 94 S. Ct. 19, 21-22 (1973) ("Here the petitioner has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in respondent's class and established a cutoff date for the claiming of such benefits. Petitioner, in

enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, is enforcing the public policy established by Congress. While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in Montana v. Kennedy, 366 U.S. 308, 314, 315, 81 S. Ct. 1336, 6 L. Ed. 2d 313 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.").

43. In the present case, Petitioner presents no evidence that, in reliance on Respondent's representation that he was properly placed on the salary schedule, he changed his position to his detriment. On the contrary, the evidence of record demonstrates that Petitioner knew of his placement on the salary schedule; knew the salary he was to receive for his employment; and agreed to perform services in exchange for the compensation he was promised. Moreover, he performed the services expected of him and received the promised compensation.

44. Further, if Respondent had known at the time of the hiring of Petitioner that the salary schedule would have

required it to pay Petitioner at a significantly higher rate, it might have chosen not to offer Petitioner employment. While there was no proof offered at hearing that Petitioner altered his position to his detriment (i.e., his plans to teach in Escambia County at the time he accepted employment) when Subsection 1012.33(3)(g), Florida Statutes, was not applied to give him credit for 20 years of teaching service in Alabama, Respondent may have detrimentally altered its position by hiring an instructor at a rate of compensation agreed upon by the parties where, were it known at the time of hiring that a higher rate of compensation would later be claimed, the offer of employment may not have been extended. Under these facts, it is Petitioner who is estopped, after completing the contractual periods of employment, from claiming that he must be paid a higher rate of compensation, for the period already served, than that to which he agreed when the offer of employment was extended.

45. Neither would estoppel lie against Respondent if it had engaged in the "positive act" of misinforming Petitioner about the provisions of Subsection 1012.33(3)(g), Florida Statutes, inasmuch as agencies of "the state cannot be estopped through mistaken statements of the law." State Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981); SourceTrack, LLC v. Ariba, Inc., 958 So. 2d 523 (Fla. 2d DCA

2007); and Austin v. Austin, 350 So. 2d 102, 105 (Fla. 1st DCA 1977) ("Administrative officers of the state cannot estop the state through mistaken statements of the law.").

46. Additionally, Petitioner's attempt to place the blame on Respondent for what he claims was its erroneous interpretation of the law at the time he was hired (and currently) simply misses the mark. First, "[n]o less than [the school board], [Petitioner] is charged with knowledge of the law," including both statutory and rule provisions, and therefore he should have known, without Respondent having to personally interpret for him, whether he was entitled to credit for his pre-retirement years of teaching in Alabama. State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991) ("[P]ublication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions."); see also Buscher v. Mangan, 59 So. 2d 745, 748 (Fla. 1952) ("[E]veryone is charged with knowledge of the law."); Nelson v. State, 761 So. 2d 452, 453 (Fla. 2d DCA 2000) ("Additionally, the due process clause did not require the State to give Mr. Nelson notice of the Act's application at the time he was released from prison. Mr. Nelson is charged with constructive knowledge of the law.").

47. When Petitioner was hired by Respondent on April 22, 2004, he received credit for three years of prior service in

Florida and two years of prior service in Georgia because none of these cumulative five years had been previously credited toward any retirement. Additionally, Petitioner had 20 years of service in Alabama that were credited for purposes of his retirement under the laws of the State of Alabama. The Escambia County School Board correctly denied placement on the salary schedule including those 20 years of service in Alabama. Not only does Subsection 1012.33(3)(g), Florida Statutes, not require Respondent to award such credit for placement on the salary schedule, but it specifically denies authorization for such credit to retired educators.

48. Petitioner claims that Respondent must pay him additional compensation for the period he provided instructional services from April 22, 2004, through May 31, 2006. The additional compensation is to represent the salary Petitioner would have received for this time period had he been given credit for 20 years of teaching in Alabama and been placed on a higher step on the salary schedule as a result. This is despite the fact that Petitioner agreed at the time of his hiring to the compensation offered, performed the services required of him, and was paid as promised. The fact that Petitioner believes that Respondent "illegally" withheld the additional compensation from him due to its misinterpretation of the Florida Statutes is not persuasive.

49. Petitioner, as noted above, is deemed to know the law and will be bound by that law despite his reliance on, as he puts it, on the school board's erroneous interpretation of 1012.33(3)(g). Petitioner has failed to prove that he is entitled to credit for the 20 years of teaching service leading to his retirement in Alabama.

50. Further, he has failed to prove that Respondent's interpretation of Subsection 1012.33(3)(g), Florida Statutes, is unreasonable. To the contrary, Respondent has reasonably and logically interpreted this statute, which is clear and unambiguous on its face. Petitioner and similarly situated retired educators who have used years of teaching experience to qualify for retirement, whether in Florida or outside, may not rely on Subsection 1012.33(3)(g) to use those same years again, upon obtaining instructional employment with a school board in Florida, for placement on the salary schedule. The purpose of Subsection 1012.33(3)(g) is to require school districts to credit all teaching experience equally for pay purposes, regardless of where that experience was gained. It was not intended to allow out-of-state retired educators who have used their previous years of experience for purposes of retirement to gain advantageous placement on the salary schedule. This statutory provision may not serve as a means for those who agree to a specified salary, based upon non-retirement service, to

later claim entitlement to a higher salary using credit for retirement service in another state that is not available to teachers who have retired from service in Florida.

51. There being no legal basis to support the applicability of either a two-year or a five-year statute of limitations under Chapter 95, Florida Statutes, to an administrative action, both Respondent's claim that a two-year statute of limitations applies to Petitioner bringing an action for back pay, and Petitioner's claim that a five-year statute of limitations applies to his claim for back pay are moot.

52. There being no legal or equitable basis to credit Petitioner for the 20 years of service in Alabama, which entitled him to retire in that state, Petitioner's additional claims for attorney's fees and costs, and pre- and post-judgment interest are moot.

RECOMMENDATION

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

RECOMMENDED that the Escambia County School Board enter a final order denying Petitioner's claim for back salary in the amount of $39,209.50, as well as pre- and post-judgment interest on this amount, and attorney's fees and costs.

DONE AND ENTERED this 21st day of December, 2007, in Tallahassee, Leon County, Florida.

S

ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
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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.