

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGE TAMALAVICH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-2759
	)	
DEPARTMENT OF MANAGEMENT	)	
SERVICES, DIVISION OF	)	
RETIREMENT,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

A hearing in this case was held on January 16, 2008, by video teleconference between Tallahassee and Fort Lauderdale, Florida, before Eleanor M. Hunter, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jane Letwin, Esquire  
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For Respondent: Larry D. Scott, Esquire  
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### STATEMENT OF THE ISSUE

Whether Petitioner is eligible to participate in the Florida Retirement System based on his employment from January 29, 2001, through June 30, 2004.

### PRELIMINARY STATEMENT

Petitioner, George Tamalavich, requested the Division of Retirement ("Division") to determine his eligibility for Florida Retirement System ("FRS") service credit from January 29, 2001, through June 30, 2005. In a letter dated May 1, 2007, the Division notified Petitioner that he was not eligible to participate in the FRS from January 29, 2001, through June 30, 2005, because he was employed in a temporary position as an adult vocational education instructor with the Broward County School Board from January 2001 through March 2004, not in a regularly established position.

In a letter dated May 21, 2007, the Petitioner requested a hearing. The case was referred to the Division of Administrative Hearings on June 14, 2007. A hearing, scheduled for August 27, 2007, was re-scheduled for November 5, 2007, based on the filing of Petitioner's Amended Emergency Motion for Continuance. On consideration of Petitioner's and Respondent's Joint Motion to Continue Hearing, filed on October 31, 2007, the hearing was re-scheduled for January 16, 2008. The court reporter filed the transcript on February 5, 2008. Following

the granting of Motions for Extension of Time to File Proposed Recommended Orders by both Petitioner and Respondent, Proposed Recommended Orders were received on February 25, 2008.

Petitioner also filed, on March 4, 2008, Petitioner's Motion to Supplement the Record with two documents asserted to have been found subsequent to the hearing and requested that the Division be required to revise its determination of FRS eligibility based on the documents, a Personnel Action Form dated 9/29/93, and a Statement of Earnings dated 9/30/93. Respondent filed an objection to supplementing the record. The Petitioner did not asked for jurisdiction to be relinquished to the Division to consider recalculating years of service based on the new documents and, without review and an explanation by Division personnel or any other witness, the undersigned is unable to determine how, if at all, the documents affect this case. Petitioner can presumably submit the additional information to the Division for determination, as he did when the earlier denial gave rise to this case.

On March 14, 2008, Petitioner's Motion to the Court to Take Notice of a Document Filed in the Record Prior to the Hearing was filed, and was followed by Respondent's Objection to Petitioner's Motion to the Court to Take Notice of a Document Filed in the Record Prior to the Hearing. Petitioner noted that the docket indicates that he filed the additional exhibit at

3:56 pm on January 15, 2008, the afternoon before the hearing. That was untimely under the requirements of the pre-hearing order. In addition, when an objection to the introduction of the exhibit was raised at the hearing, the record reflects, on page 47, line 20 of the transcript, that the tender was withdrawn. As the record is closed, the renewed post-hearing tender of the exhibit is denied. On March 21, 2008, Petitioner's Second Motion to Supplement the Record was filed, to introduce into evidence a document that was an exhibit in Johnson-Rollins vs. Department of Management Services, Division of Retirement, DOAH Case No. 03-4024 (R.O. 12/22/2003).

Respondent's Objection to Petitioner's Second Motion to Supplement the Record and request for attorney's fees and costs, as authorized by Sections 57.105 and 120.569(2)(e), Florida Statutes, was filed on March 24, 2008. The Second Motion to Supplement and the request for fees and cost are addressed in the Conclusions of Law to this Recommended Order.

At the hearing, Petitioner presented his own testimony, and the testimony of: Joyce Morgan, Benefits Administrator, Enrollment Section, Division of Retirement; Sara Elizabeth Snuggs, Director, Division of Retirement; Alex Macri, coordinator for the professional development unit of the Broward County School Board.

Respondent presented the testimony of: Charlene Fansler, benefits administrator for educational members of the Florida Retirement System; Ronald Weintraub, Director of Benefits for Broward County School Board; and Robert Crawford, Principal of Atlantic Technical Center and High School.

The following Exhibits were submitted without objection as Joint Exhibits:

Book 1

1. Memorandum No. 81-60, dated December 23, 1981.
2. Annual Professional Service Contract for Mr. George Tamalavich, for school year 1998 to 1999.
3. Copies of Atlantic Technical Center agreements for Mr. George Tamalavich for the years effective August 28, 2001, January 27, 2003 and August 25, 2003.
4. Personnel Action Form of January 29, 2001.
5. Copy of Broward County School Board Policy 4107 entitled "Part-time Temporary Instructional Personnel in Vocational Adult and Community Education Programs," with approval documents.
6. Employee Payroll Timesheets for Mr. George Tamalavich for the years 2000 to 2004.
7. Notice dated May 7, 2003 from Dan G. Cochran, Associate Superintendent to Identified Employee, Subject Retirement System Contributions.
8. Letter dated June 7, 2004, from Sarabeth Snuggs to Frank Till, Superintendent.
9. Letter dated June 23, 2004, to Sarabeth Snuggs from Ronald Weintraub.
10. Notice dated August 25, 2004, to "Identified Employee" from Dan G. Cochran, Associate Superintendent.

11. Copy of pages of FRS Handbook, I - XVII, pages 1 - 7 to 1 - 10.
12. Composite Exhibit George Tamalavich's Request for a Leave of Absence from The School Board of Broward County, Florida, for school year 1999 - 2000; Letter dated September 21, 1999, from Gracie M. Diaz, Instructional Staffing Director, to George Tamalavich; Letter dated April 3, 2000, from Gracie M. Diaz, Instructional Staffing Director, to George Tamalavich; Instructional Suspensions/Terminations for 1999 2000; Termination Document dated June 30, 2005.
13. Statement of Account, dated October 10, 2006, addressed to Mr. George Tamalavich.
14. Review Member History for Mr. George Tamalavich.
15. Composite Exhibit Distribution Request Form FICA Alternative Plan dated January 22, 2007; Form Remuneration Statements; Bancore FICA Alternative Plan information and enrollment form.
16. Division of Retirement History Summary Report for Mr. George Tamalavich dated November 19, 2007.
17. Letter dated April 13, 2007, from Joyce Morgan, Division of Retirement Benefits Administration to George Tamalavich.
18. Deposition of Robert B. Crawford dated August 13, 2007.
19. Deposition of Alex Macri dated August 13, 2007.
20. Deposition of Marta LaCasse dated October 5, 2007.
21. Deposition of George J. Tamalavich dated October 5, 2007.

Book 2

22. Depositions of Joyce W. Morgan dated August 6, 2007 and November 19, 2007.
23. Deposition of Charlene Fansler dated December 3, 2007.

24. Deposition of Sara Elizabeth Snuggs dated December 18, 2007 and continued on January 4, 2008.
25. Deposition of Ronald J. Weintraub dated August 13, 2007.
26. Audit letter to Superintendent Franklin Till from Joyce Morgan, Department of Management Services, Management Review Specialist, dated July 3, 2002.

Official recognition was taken of Chapter 121, Florida Statutes (2007), and Florida Administrative Code Rules 60S-1.002(2), 60S-1.004(4), 60S-1.004(4)(b), and 60S-1.004(5)(d)3.

#### FINDINGS OF FACT

1. The Secretary of the Department of Management Services through the Division is the administrator for the FRS.

2. FRS was established by the State of Florida to provide pension benefits to eligible employees of the State of Florida and county agencies, including county school boards.

3. Petitioner, George Tamalavich ("Petitioner" or "Mr. Tamalavich"), attended Fitchburg State College in Massachusetts, where he received a certificate for teaching in the trade industry.

4. Prior to coming to Florida, Petitioner taught at the Worchester County Trade School for eight years, and participated in the Massachusetts State Pension Plan.

5. In 1990, Petitioner relocated to Florida and obtained a part-time position, first for two days a week, then increasing

to four days a week, teaching a computer-aided manufacturing and design course at McFatter Vocational Technical School ("McFatter") in the Broward County School District (BCSD).

6. In his initial position at McFatter, Petitioner testified that he knew he did not qualify for annual leave or other fringe benefits, including FRS membership, although he claimed not to remember that anyone specifically told him he was not receiving pension credit.

7. From October 1993 until June 1999, Petitioner was employed by the BCSD in a full-time position under the terms of an annual contract. He testified that, with the annual contract, he had a salary, received fringe benefits and did not have to submit time sheets.

8. Because he was employed in a regularly established position, Mr. Tamalavich was eligible for membership in the FRS and received service credit for 5 years and 9 months, through the end of his contract in September 1999.

9. In September 1999, Petitioner requested and received a leave of absence for the 1999-2000 school year. The letter advising Mr. Tamalavich of the approval of his leave included a requirement that he notify the BCSB of his plans for the following year by March 1, 2000. In a letter dated February 14, 2000, the BCSB sent a reminder of the March 1, 2000, deadline. On April 3, 2000, the BCSB sent notice to Mr. Tamalavich by



certified mail, with a receipt returned to the BCSB, that his termination would be recommended for failure to respond to the February 14, 2000, letter. Mr. Tamalavich testified that he received notice of his termination after the fact but not the letters setting the March 1 deadline. The notice of termination did not include information on appealing that decision.

10. Mr. Tamalavich was hired at a different school in 2001. When he returned to work he signed agreements dated August 28, 2001, for the 2001-2002 school year; January 27, 2003, for the 2002-2003 school year; and August 25, 2003, for the 2003-2004 school year. Petitioner was employed as a part-time adult vocational education instructor at Atlantic Technical Center ("Atlantic") in the BCSD during these school years. During his employment at Atlantic, Petitioner submitted time sheets and was compensated on an hourly basis. He acknowledged in his testimony that he was in a temporary position when he returned to work in August 2001.

11. The agreements for part time employment at Atlantic provided that:

THE ADMINISTRATOR MAY INITIATE OR TERMINATE THIS AGREEMENT UPON NOTICE. This appointment is contingent upon sufficient enrollment and attendance in the program/course "assigned" or the class will be canceled and this agreement shall be null and void.  
The employee's signature below indicates acceptance of the appointment subject to all

terms and conditions of Board Policy 6Gx6-4107.

12. BCSD policy 6Gx6-4107 provides, in pertinent part,  
that:

2. The conditions of employment listed herein apply only to those personnel employed on a part-time, temporary basis to teach courses on a course-by-course basis or to provide part-time instructional support to programs in post-secondary adult vocational education, adult general education, Community Instructional Services, and education for personal improvement.

. . . . .

4. Part-time temporary teachers shall have no guarantee or expectation of continued employment and may be terminated upon written notice by the location administrator.

. . . . .

7. Part-time temporary teachers shall be paid an hourly salary based upon the Salary Schedule adopted for part-time, temporary employees.

. . . . .

9. Part-time, temporary teachers shall not be eligible for a continuing contract or for a Professional Service Contract and are not entitled to fringe benefits regardless of the time of service as a part-time employee.

13. Mr. Tamalavich testified that he saw BCSD policy 6Gx6-4107 for the first time at the hearing in this case, although he worked at Atlantic from August 2001, until he was forced to leave due to a serious illness on March 12, 2004. The principal

of Atlantic, who hired Petitioner, testified that he would determine every nine or eighteen weeks whether enrollment was sufficient and then give Mr. Tamalavich his schedule.

14. Because Petitioner did not have six years in the FRS prior to July 1, 2001, and was not employed in a regularly established position on July 1, 2001, when vesting requirements were reduced from ten to six years, the Division determined that he is not vested in the FRS and therefore he is not eligible to receive retirement benefits from the FRS.

15. Mr. Tamalavich claims entitlement to more FRS service credit because of errors made by the BCSD, which reflected that he was enrolled in the FRS from July 1, 2003, until August 25, 2004, although initially his counsel asserted that the contested period of time extended to June 30, 2005.

16. As a result of a computer programming error, the BCSB incorrectly grouped together all personnel who had worked for more than six months and notified them, including temporary adult vocational education instructors, that they were eligible for FRS service credit.

17. The notice dated May 7, 2003, was sent to "Identified Employees" in temporary positions existing beyond six months advising the employees that they would be enrolled in FRS effective July 1, 2003. Mr. Tamalavich testified that he received the notice.

18. After the notice of May 7, 2003, several temporary adult vocational education instructors began to request the Division to review their entire employment history to determine their FRS service credit.

19. After receiving an inordinate number of these requests and reviewing on a case-by-case basis personnel documents provided by the BCSB, the Division determined that temporary adult vocational education instructors were being reported in error by the BCSD for FRS service credit.

20. In a letter dated June 7, 2004, the Interim State Retirement Director wrote to the Superintendent of the BCSD, citing Florida Administrative Code Rule 60S-1.004(5)(d)(3), which excludes positions established with no expectation of continuation beyond one semester or one trimester. The letter also included other factors related to ineligibility for FRS credit, including compensation at an hourly rate, and employment based on enrollment and funding contingencies.

21. The Superintendent was advised specifically that "[a]dult vocational education instructors are essentially temporary in nature, where there is no promise, claim or right of employment beyond the quarter, semester or trimester to which they are appointed to teach."

22. On June 23, 2004, the Director of the Benefits Department responded for the BCSD conceding that part-time adult

vocational education instructors, including those filling temporary positions, were inadvertently enrolled in the FRS beginning on July 1, 2003, and that the FRS contributions would be retroactively reversed.

23. On August 25, 2004, a notice was sent by the BCSB to "identified employees" advising them that adult vocational education teachers were erroneously enrolled in the FRS, and that they would be removed retroactively to July 1, 2003. Mr. Tamalavich received the notice that did not include any information on appealing the decision.

24. There was no claim of erroneous deductions from Mr. Tamalavich's pay, despite his testimony that FRS contributions were taken out of his paycheck. Employee funds are not withheld for payments into the FRS plan. It is and has been, since 1975, solely employer-funded.

25. For temporary employees who are not eligible for enrollment in the FRS, the BCSB provides a FICA Alternative Retirement Plan administered by Bencor.

26. Contributions to the Bencor-administered plan were made on behalf of Mr. Tamalavich, who requested and received a distribution from that fund in January 2007.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of these

proceedings, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

28. Petitioner has the burden of proof by a preponderance of the evidence. Florida Department of Transportation v. J.W.C. Company, 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).

29. Respondent administers the FRS as authorized in Chapter 121, Florida Statutes, and the rules promulgated in Florida Administrative Code Chapter 60S.

30. Florida Administrative Code Rule 60S-1.002(2) provides:

The Division shall deny membership to any officer or employee who does not meet the requirements for membership in the Florida Retirement System as set forth in Chapter 121, F.S. and these rules.

31. Section 121.051, Florida Statutes (2007), provides for compulsory participation in the FRS for all employees hired after December 1, 1970. Section 121.021(11), Florida Statutes (2007), defines "employee" as:

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

32. In Section 121.021(52)(b), Florida Statutes (2007), a "regularly established position" is defined as follows:

(b) In a local agency (district school board, county agency, community college, city, metropolitan planning organization, or special district), the term means a regularly established position which will be in existence for a period beyond 6 consecutive months, except as provided by rule.

33. Section 121.021(53) (b), Florida Statutes (2007), defines a "temporary position" as follows:

(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.

34. As authorized by Section 121.021(52)(b) and (53)(b), Florida Statutes (2007), the Division has defined "temporary position" in Florida Administrative Code Rule 60S-1.004(5)(d)3., which provides, in relevant part,:

(d) The following types of positions in a local agency are considered temporary positions for retirement purposes. Documents to support such temporary positions listed below must be maintained in the agency's records (see subsection 60S-5.007(2), F.A.C.).

3. Temporary Instructional Positions (positions which are established with no expectation of continuation beyond one semester or one trimester at a time, to teach in a community college, public school, or vocational institution; effective July 1, 1991, such positions may include paper

graders, tutors, notetakers, and lab tutors at community colleges).

35. Competent substantial evidence supports the conclusion that Petitioner was employed as a temporary adult vocational education instructor on a class-by-class, semester-by-semester basis for the period January 29, 2001, through June 30, 2004.

36. Petitioner contends that this case is governed by Hoffman v. Dep't of Mgmt Servs, Division of Retirement, 964 So. 2d 163 (Fla. 1st DCA 2007). The Court, in Hoffman, described the facts as follows:

In the case we have before us, Appellant failed to timely respond to three letters from the Department of Management Services, Division of Retirement (Division), notifying her of an entitlement to a monthly retirement benefit following her husband's death in 1996. Nine years later Appellant requested retroactive benefits, which the administrative law judge (ALJ) granted. The Department of Management Services (Department) issued a final order reversing the ALJ's decision. While we are not unsympathetic to the human misfortune involved in this case, judicial restraint and the constitutional requirement of the separation of powers precludes this court from directing the executive branch to grant relief here. See Fla. Const., Art. II, § 3.

37. The Hoffman court disagreed with the ALJ's factual finding that the Division's letters to appellant were deficient because they were unclear and failed to provide adequate notice, and agreed with the Division that the finding was not supported by competent, substantial evidence. There is no plausible claim



that the BCSD's notices terminating Petitioner and retroactively removing him from the FRS were not clear, but they were deficient in failing to provide a clear point-of-entry to appeal those decisions.

38. The court, in Hoffman, also held that the appellant is presumed to have notice of all applicable rules and statutes. This conclusion does not support Petitioner's contention he should have been given a copy of BCSB policy 6Gx6-4107.

39. Petitioner cited the case of Wise v. Dep't of Mgmt Servs, Division of Retirement, 930 So. 2d 867 (Fla 2nd DCA 2006), for the proposition that, during the contested period of time, Mr. Tamalavich was misled. Ms. Wise, a full-time school teacher who worked part-time on a special project, was asked to reverse the arrangement and work as a part-time teacher and full time on the special project as an "adjunct." Ms. Wise was never told that the "adjunct" position was "temporary" or a "temporary position." In this case, Petitioner's agreements and his testimony support the conclusion that he knew he was in a temporary position.

40. Petitioner relies on Urrechaga v. Dep't of Management Services, Division of Retirement, DOAH Case No. 06-3265 (R.O. 12/11/06), a case that is arguably comparable because Ms. Urrechaga was included and then excluded from the FRS without any intervening change in her position. Two factors,

however, distinguish that case from this one. First, the intervening factors here are Petitioner's leave of absence, failure to indicate his intent to return under his annual contract, and termination, and the explicit agreements he signed when he was employed at Atlantic. Second, and perhaps more compelling, the contested period of service in Urrechaga was prior to July 1979. Until July 1, 1979, local agencies had the discretion to determine whether or not an employee would be included the FRS, and the school board agreed with Ms. Urrechaga that it had mistakenly stopped paying FRS contributions for her.

41. The notion that an error in enrollment in the FRS cannot be corrected is contrary to the provisions of Section 121.193, Florida Statutes (2007), which authorizes the Department of Management Services to conduct external compliance audits and require corrective action, as follows:

(1) The department shall conduct audits of the payroll and personnel records of participating agencies. These audits shall be made to determine the accuracy of reports submitted to the department and to assess the degree of compliance with applicable statutes, rules, and coverage agreements. Audits shall be scheduled on a regular basis, as the result of concerns known to exist at an agency, or as a follow up to ensure agency action was taken to correct deficiencies found in an earlier audit.

(2) Upon request, participating agencies shall furnish the department with information and documents that the department requires to conduct the audit.

The department may prescribe by rule the documents that may be requested.

(3) The department shall review the agency's operations concerning retirement and social security coverage. Preliminary findings shall be discussed with agency personnel at the close of the audit. An audit report of findings and recommendations shall be submitted to department management and an audit summary letter shall be submitted to the agency noting any concerns and necessary corrective action.

42. The BCSD's mistake of law in the notice that Petitioner was included in the FRS was apparently a decision that it was not authorized to make. Its misrepresentations and failure to give notice of any appeals processes for those misrepresentations and Petitioner's termination arguably affected Petitioner's substantial interests, but were not actions taken by the Division. Austin v. Austin, 350 So. 2d 102 (Fla. 1st DCA 1977); and Infantino v. Dept. of Administration, (DOAH Case No. 88-4905 (R.O. 4/5/89)).

43. Although Petitioner's Second Motion to Supplement the Record is deemed inappropriate, the legal issue raised is, nevertheless, discussed. In Johnson-Rollins v. Dep't. of Mgmt. Services, Division of Retirement, Ms. Johnson-Rollins was not vested during the contested period because she signed a document entitled "Acknowledgment of FRS Status and Alternative Plan" that clearly advised her that she was not covered by the FRS. It is the claim that the absence of a similar document in this

case requires a different result. As noted, the agreements signed by Mr. Tamalavich throughout his employment at Atlantic are clear. They referenced the contingencies of his employment and the BCSD policy that part-time temporary teachers received no fringe benefits.

44. Finally, Petitioner raises the issue of estoppel based on notice he received on May 7, 2003. Estoppel was also considered in Hoffman, which cited Wise as an example of a situation where a person received tacit representations that caused her to change her position to her detriment. There is no evidence that Mr. Tamalavich changed his position as a result of the erroneous notice he received in May 2003.

45. Considering the applicable cases, statutes and rules, Petitioner is not eligible for FRS benefits for the period from January 29, 2001, through June 30, 2004.

46. Jurisdiction is retained, pursuant to Sections 57.105 and 120.569(2)(e), Florida Statutes (2007), to consider Respondent's claim of entitlement to fees and costs.

#### RECOMMENDATION

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

RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order denying Petitioner's

request to participate in FRS from January 29, 2001, through June 30, 2004.

DONE AND ENTERED this 8th day of April, 2008, in Tallahassee, Leon County, Florida.



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ELEANOR M. HUNTER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of April, 2008.

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.