FILED
2009 SEP 23 A 11:05
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

FREDERICK M. RHINES,

Petitioner,

Final Order No. DMS – 08-0099

vs.

DOAH Case No. 07-5050
DMS Case No. 07-12197

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT

Respondent.
_______________________________________/

## FINAL ORDER

## PRELIMINARY STATEMENT

After being formally notified of the Division of Retirement's determination that he failed to terminate employment under Chapter 121, Florida Statutes, rendering his retirement null, the Petitioner timely filed a petition for hearing and the case was referred to the Division of Administrative Hearings.

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Daniel Manry, held a formal hearing in the above-styled case on February 25, 2008, in Tallahassee, Florida.

At the formal proceeding, Petitioner testified on his own behalf and offered the testimony of Daniel Hoffman, former Human Resource Officer, City of Venice, Florida. Petitioner also offered one exhibit, which was admitted. Respondent offered the testimony of Ira Gaines, Benefits Administrator, Division of Retirement. The parties submitted 7 joint exhibits, which were admitted.

The Parties filed proposed Recommended Orders and a Recommended Order was issued June 3, 2008, which is incorporated by reference into this Final Order. No exceptions to the Recommended Order have been filed. A transcript of the hearing has been reviewed in the preparation of this Final Order, and references to it will be (T- ). References to joint exhibits will be (J-).

STATEMENT OF THE ISSUES

The issue in this case is to determine whether Petitioner terminated covered employment as defined in Chapter 121, Florida Statutes, and therefore, the validity of his retirement.

STANDARD OF REVIEW

Subsection 120.57(1)(l), Florida Statutes (2002), provides that an agency reviewing a Division of Administrative Hearings (DOAH) recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1975). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of fact. See Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347, 1348 (Fla. 1st DCA 1987).

Subsection 120.57(1)(l), Florida Statutes (2002), provides that an agency may reject or modify an Administrative Law Judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretations are "as or more reasonable" than the interpretation made by the Administrative Law Judge. Florida courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the Administrative Law Judge's application of legal concepts

such as collateral estoppel and hearsay; but not from reviewing conclusions of law containing the Administrative Law Judge's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001); Barfield v. Department of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). Further, an agency's interpretation of the statutes and rules that it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. See State Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA 1998.).

FINDINGS OF FACT

The Department of Management Services accepts the Findings of Fact set forth in the Recommended Order with the following exceptions:

1. The Department rejects paragraph 6 of the Recommended Order as contrary to the evidence and contradicted by finding of fact 12. It was stipulated by the Parties that employees who elected to remain in the FRS were still participating employees. (J-6). It was also stipulated by the parties that Petitioner was "re-employed" by the City on January 31, 2007, the same month he elected to terminate his DROP participation. (J-6). The second sentence of paragraph 6 of the Recommended Order is rejected as an incorrect conclusion of law.

2. The Department rejects the first sentence of paragraph 7 of the Recommended Order as contrary to all of the evidence. No evidence was presented that Petitioner ceased to be an FRS member. In fact, the Petitioner specifically asked that his FRS benefit continue, which would not be possible if he were not a participating member

of the FRS. The thrust of the argument by Petitioner was that he wanted to continue his participation in the FRS and participate in the City's plan as well. (T-14). The second sentence of paragraph 7 of the Recommended Order is also rejected as contradicted by paragraph 12 of the Recommended Order.

3. The Department rejects finding of fact 8 of the Recommended Order as three incorrect conclusions of law, as well as contradicted by paragraph 12 of the Recommended Order.

4. The Department rejects paragraph 9 of the Recommended Order as contrary to the evidence and paragraph 12 of the Recommended Order, and as an incorrect conclusion of law. The agreement between the City and the Division provides that the city would "comply with all provisions of Chapter 70-112, Laws of Florida, and with all rules and regulations adopted and promulgated by the Administrator of the Florida Retirement System necessary to carry out the purposes of Chapter 70-112, Laws of Florida." (J-7). Chapter 70-112, Laws of Florida, was codified as Chapter 121, Florida Statutes, upon which, this case rests. The City could not, without violating the provisions of that contract, operate contrary to the clear language of the statute.

5. The Department rejects paragraph 10 of the Recommended Order as an incorrect conclusion of law, and as contrary to paragraph 12 of the Recommended Order. Further, it is contrary to the evidence. All of the evidence presented indicated that Petitioner worked for the City under the FRS during the month of January, 2007, before "terminating" his DROP participation. All service credit under the FRS is awarded on a monthly basis, and any day of employment during any calendar month is counted as a full month of retirement credit or employment, pursuant to Section 121.021(17)(b)4., Florida

Statutes. Therefore, the City could not have been anything but an FRS employer for the benefit of Petitioner during the month of January, 2007.

6. The Department rejects paragraph 11 of the Recommended Order as not supported by any evidence in the record, as well as irrelevant to the proceeding.

7. The Department rejects paragraph 12 of the Recommended Order, with the exception of the final clause of the last sentence, which is supported by the record and is a succinct statement of the situation in this case, that is, that the City is both a covered and a non-covered employer. During the time in issue, they were a covered employer for the benefit of Petitioner. It is further supported by the Petitioner's own testimony, that he "started back" on January 31, 2007, to keep his employer provided insurance from lapsing. (T-33). The Department did in fact propose a literal interpretation of the statutory terms. What the Administrative Law Judge failed to assert was a reason why this was not proper. Nowhere does the Recommended Order provide a reason to resort to legislative history in aid of interpretation. If a statute is clear on its face, there is no need to resort to the rules of statutory construction. See M.W. v. Davis, 756 So.2d 90 at 101, (Fla. 2000)("when language of statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation construction as statute must be given its plain and obvious meaning")

## CONCLUSIONS OF LAW

The Division of Retirement accepts the Conclusions of Law set forth in the Recommended Order, which are incorporated herein by reference, with the exception of paragraphs 15 through 23, which are hereby rejected as either incorrect or irrelevant. Therefore, based on the record evidence, the following conclusions of law are substituted and adopted:

8. The Division of Retirement is charged with administering the Florida Retirement System (FRS) pursuant to Chapter 121, Florida Statutes (2006).

9. Section 121.091(13)(c)5.a., Florida Statutes (2006), provides that prior to a distribution of DROP benefits:

> The division shall receive verification by the participant's employer or employers that such participant has terminated employment as provided in s. 121.021(39)(b).

10. Section 121.021(39)(b), Florida Statutes (2006), 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.

11. Section 121.021(10), Florida Statutes (2006), provides:

> "Employer" means any agency, branch, department, institution, university, institution of higher education, or board of the state, or any county agency, branch, department, board, district school board, or special district of the state, or <u>any city of the state which participates in the system for the benefit of certain of its employees</u>, or a charter school or charter technical career center that participates as provided in s. 121.051(2)(d). (emphasis added).

12. The facts are undisputed that in January 2007, the City was an FRS participating employer for the benefit of employees hired prior to 1996. In fact, for the month of January 2007, the City was required to make contributions on behalf of

Petitioner by virtue of his salary payments through January 12, 2007, as required by Section 121.091(13)(i), Florida Statutes (2006).

13. This case raises a simple issue of contract. The State and the Petitioner entered into a contract. That contract contained a condition precedent to the payment of benefits, to wit: Petitioner's termination from his FRS employer. See Childers v. Dept. of Management Services, Division of Retirement, 4D07-4230 (Fla. 4th DCA 2008)("the State entered into a contract with the employee, promising to pay him benefits upon his retirement. That contract included a condition precedent: the employee must refrain from committing specified offenses prior to retirement").

14. While the Petitioner's circumstance certainly evokes sympathy, any mis-representations regarding his situation were made by the City, not the Department, and the City is not an agent of the Department. See Bright v. Dept. of Management Services, Division of Retirement, DOAH Case No. 03-2142 (2004).

ORDER

Based on the foregoing, it is hereby ORDERED AND DIRECTED that the Petitioner's retirement of January 2007, from the City of Venice is NULL AND VOID, as is his participation in the Deferred Retirement Option Program, and all previously paid benefits are to be refunded to the FRS. It is further ORDERED AND ADJUDGED, that Petitioner's creditable service shall be recalculated to reflect continuous service from the time of his application and acceptance into the DROP, throughout his employment with the City of Venice.

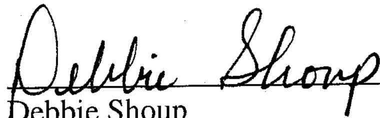
DONE AND ORDERED this 19 day of Sept 2008, in Tallahassee, Leon County, Florida.

Linda H. South
Secretary
Department of Management Services
4050 Esplanade Way
Tallahassee, Fl. 32399-0950
(850) 488-2786

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF MANAGEMENT SERVICES, 4050 ESPLANADE WAY, SUITE 160, TALLAHASSEE, FLORIDA 32399-0950, AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

I HEREBY CERTIFY that this Final Order was filed in the official records of the Department of Management Services, and copies distributed by U.S. Mail to the parties below, on the 19 day of September, 2008.



Debbie Shoup
Clerk
Department of Management Services

Copies furnished to:

James W. Linn, Esq.
Glenn E. Thomas, Esq.
Lewis, Longman & Walker, P.A.
2600 Centennial Place, Suite 100
Tallahassee, Florida 32308-0572

Judge Daniel Manry
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Thomas E. Wright
Senior Attorney
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, FL 32399-0950