STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FREDERICK M. RHINES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-5050
	)	
DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case on behalf of the Division of Administrative Hearings (DOAH), on February 25, 2008, in Tallahassee, Florida.

APPEARANCES

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

For Respondent: Robert B. Button, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
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STATEMENT OF THE ISSUES

The issues are whether Petitioner became an employee of an FRS employer within a calendar month after completing his

participation in the Deferred Retirement Option Program (DROP) in violation of Subsection 121.091(13)(c)5.d., Florida Statutes (2006)[1]; whether Respondent's interpretation of relevant statutes is an unadopted rule; and whether Respondent's interpretation of relevant statutes is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

Respondent proposes, by letter dated October 2, 2007, to terminate any subsequent retirement benefits to Petitioner and for Petitioner to reimburse the Florida Retirement System (FRS) for retirement benefits received, including a lump-sum payment Petitioner received at the conclusion of his participation in DROP. Petitioner timely requested an administrative hearing.

At the hearing, Petitioner testified, presented the telephonic testimony of one additional witness, and submitted one exhibit for admission into evidence. Respondent called one witness and identified one exhibit but did not submit the exhibit. The parties submitted seven joint exhibits for admission into evidence. The unopposed Request for Official Recognition of Legislative History is granted.

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 March 10, 2008. The undersigned granted Petitioner's unopposed request for an extension of time

to file proposed recommended orders (PROs). Petitioner and Respondent timely filed their respective PROs on April 30 and 29, 2008.

FINDINGS OF FACT

1. The parties stipulated to several facts in this proceeding. Respondent is the state agency responsible for administering the FRS. Petitioner was employed as an equipment operator (street sweeper) by the City of Venice, Florida (the City), for more than 35 years until he completed his participation in DROP on January 11, 2007. At that time Petitioner was earning approximately $38,000.00 annually.

2. The City revoked its participation in the FRS effective January 1, 1996, and established a new City retirement plan. The new City retirement plan applies to all employees hired after January 1, 1996. However, the City continued its participation in the FRS for all employees who were members of the FRS prior to January 1, 1996.

3. Petitioner elected to participate in DROP on March 31, 2002. At the conclusion of DROP, Petitioner received a lump-sum payment of approximately $84,279.00 and received monthly benefits until Respondent ceased paying benefits in accordance with the proposed agency action.

4. Petitioner's efforts at reemployment were unsuccessful. On January 31, 2007, the City employed Petitioner to perform the

same work he previously performed at a base salary as a "new hire."[2] The City assured Petitioner that reemployment would not adversely affect Petitioner's FRS retirement benefits because the City does not consider itself an FRS employer.

5. A member of the City's human resources department contacted a representative for Respondent to verify the City's statutory interpretation. The conversation eventually led to this proceeding.

6. Petitioner was not employed by an employer under the FRS during the next calendar month after completing his participation in DROP on January 11, 2007. Judicial decisions discussed in the Conclusions of Law hold that the issue of whether Petitioner is an employee of an FRS employer is a factual finding.

7. When Petitioner began employment with the City on January 31, 2007, Petitioner was not a member of the FRS within the meaning of Subsection 121.021(12). He was not an employee covered under the FRS because he was hired after January 1, 1996, when the City revoked its participation in FRS.

8. On January 31, 2007, Petitioner was not an employee within the meaning of Subsection 121.021(11). Petitioner was not employed in a covered group within the meaning of Subsection 121.021(34). Petitioner did not become a member under Chapter 121, and the City was not a "city for which

coverage under this chapter" was applied for and approved for Petitioner.

9. On January 11, 2007, Petitioner ceased all employment relationships with "employers under this system" within the meaning of Subsection 121.021(39). When Petitioner resumed employment on January 31, 2007, Petitioner did not fail to terminate employment with an employer under the FRS system. Petitioner's new employer was not an employer under the FRS system and had not been such an employer after January 1, 1996.

10. After January 1, 1996, the City was not a covered employer for any employees employed after that date, including Petitioner. On January 31, 2007, Petitioner was not an employee of an employer within the meaning of Subsection 121.021(10). The City did not participate in the FRS system for the benefit of Petitioner.

11. The employment of Petitioner by the City on January 31, 2007, had no financial impact on the FRS, and Petitioner did not begin to accrue new benefits with the FRS. Respondent did not demonstrate in the record why the agency's proposed statutory interpretation requires special agency insight or expertise and did not articulate in the record any underlying technical reasons for deference to agency expertise. Nor did the agency explain in the record or its PRO why the issue of whether Petitioner is an employee of an FRS employer is

not an issue of fact that is within the exclusive province of the fact-finder.

12. Respondent proposes a literal interpretation of selected statutory terms without explaining legislative intent for the prohibition against reemployment within the next calendar month.[3] Respondent's proposed statutory interpretation also fails to distinguish the economic impact in situations involving what may be fairly characterized as a dual-purpose employer; that is one like the City which is part covered employer and part non-covered employer.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties and the subject matter in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007). DOAH provided the parties with adequate notice of the formal hearing.

14. Respondent has the burden of proof in this proceeding. Respondent must show by a preponderance of the evidence that Petitioner became an employee of a covered employer within the next calendar month after Petitioner concluded his participation in DROP and that Petitioner must repay any FRS benefits he has received. 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).[4]

15. Regardless of which party has the burden of proof, a preponderance of the evidence shows that on and after January 31, 2007, Petitioner was not an employee of an FRS employer. The determination is an issue of fact that is within the exclusive province of the fact-finder. Johnson v. Department of Management Services, Division of Retirement, 962 So. 2d 1038 (Fla. 1st DCA 2007).

16. Subsection 121.091(13)(c)5.d., in relevant part, requires a DROP participant who fails to terminate employment defined in Subsection 121.021(39)(b) to repay any benefits received. Subsection 121.021(39)(b) defines termination, in relevant part, to occur when a DROP participant "ceases all employment relationships with employers under this system. . . ." The City ceased being an employer under the FRS on January 1, 1996. When Petitioner resumed employment with the City on January 31, 2007, Petitioner did not have an employment relationship with an "employer under this system."

17. Respondent invokes the judicial doctrine of "great deference" to Respondent's statutory interpretation. The record evidence does not support a finding that an interpretation of relevant statutory 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).

18. In Petitioner's unopposed Amended Petition for Formal Administrative Hearing and in Petitioner's PRO, Petitioner argues, oxymoronically, that Respondent's proposed statutory interpretation is "non-rule policy" that is an "unadopted rule." Nonrule policy is agency policy that does not satisfy the statutory definition of a rule and is not required to be promulgated as a rule. An unadopted rule is agency policy that satisfies the definition of a rule but has not been promulgated in accordance with statutory rulemaking requirements.

19. Agency policy cannot be both nonrule policy and an unadopted rule. Regardless of the moniker, neither may exceed delegated legislative authority without violating the separation of powers doctrine. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-266 (Fla. 1991). See also Carver v. Division of Retirement, 848 So. 2d 1203, 1206 (Fla. 1st DCA 2003)(an agency may interpret, but never alter a statute).

20. Petitioner is not required to file a duplicative 120.56 proceeding if his rule challenge is adequately addressed in this proceeding conducted pursuant to Subsection 120.57(1)(a 120.57 proceeding). Department of General Services v. Willis, 344 So. 2d 580, 591-592 (Fla. 1st DCA 1977). The remedies

available in a 120.56 and 120.57 proceeding are intended to enhance the remedies available to Petitioner, not limit them.

21. Petitioner's rule challenge is moot. The doctrine of mootness requires a live case or controversy throughout the administrative proceeding. Montgomery v. Department of Health and Rehabilitative Services, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985). A rule challenge is rendered moot when evidence shows the rule no longer applies to the party initiating the rule challenge. Id. See also A.G. v. Department of Children and Family Services, 932 So. 2d 311, 313 (Fla. 2d DCA 2006) (termination of parental rights case is moot when issues raised by mother cease to exist); Merkle v. Guardianship of Robert J. Jacoby, 912 So. 2d 595, 599-600 (Fla. 2d DCA 2005)(a stipulation agreement reached after filing suit renders action moot). The challenged rule no longer applies to Petitioner because Petitioner prevailed on other grounds in this 120.57 proceeding.

22. Petitioner's rule challenge is moot on other grounds. If this Recommended Order were to determine that the challenged agency policy is an unadopted rule and an invalid exercise of delegated legislative authority, the remedy available under Subsection 120.57(1)(e) is to preclude the agency from relying on the rule; a remedy Petitioner has obtained whether the agency policy is nonrule policy or an unadopted rule.

23. Unlike a determination of invalidity in a 120.56 proceeding, a similar determination in this proceeding would not be a final order and would not be infused with statutory authority to require the agency to publish notice of the invalidity of the rule. A determination of invalidity in this proceeding would be limited to the parties and facts of record and would not preclude the agency from relying on the rule in other cases except to the extent the doctrine of stare decisis may preclude reliance on the rule in other cases involving similar facts and law. Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993).

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order reinstating Petitioner's monthly retirement benefits, paying all past due amounts to Petitioner, with interest, and dismissing its request for reimbursement of past FRS benefits from Petitioner.

DONE AND ENTERED this 3rd day of June, 2008, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2008.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2006), unless otherwise stated.

[2/] On January 31, 2007, the City employed Petitioner in a part-time position and provided full-time employment on February 12, 2007. The new hourly rate was $12.72 compared to a previous hourly rate of $18.63.

[3/] At the request of the undersigned at the hearing, the parties filed 95 unnumbered pages of legislative history in this proceeding. Respondent's PRO does not mention the legislative history. Petitioner's PRO quotes some legislative language, which is little more than circular with statutory terms, but fails to cite to that part of the 95 pages of legislative history to enable to fact-finder to go to that part of the history for independent research.

[4/] The parties dispute the burden of proof in an apparent anomaly. Petitioner's PRO asserts that he has the burden of proof, and Respondent's PRO asserts that it has the burden of proof.

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.