STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

THOMAS L. BRIGHT,

Petitioner,

Final Order No. DMS – 08-0117

vs.

DOAH Case No. 08-1011
OGC Case No. 08-13651

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

FINAL ORDER

This cause came before the undersigned for the purpose of issuing a final agency order.

APPEARANCES

For Petitioner: Brian D. Solomon, Esq.
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For Respondent: Geoffrey M. Christian, Esq.
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STATEMENT OF THE ISSUE

Whether Petitioner's employment as a part-time temporary park ranger from December 3, 2005 to October 31, 2006 was in a regularly established position for purposes of entitlement to service credit in the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

Pursuant to notice, Respondent advised Petitioner that he "filled a temporary 'on-call' position as a Park Ranger I ... and

[was] ineligible for participation in the Florida Retirement System from December 3, 2005 through October 31, 2006, as provided by Section 60S-1.004(5)(d)5. of the Florida Administrative Code ..." The notice afforded Petitioner a point of entry to challenge Respondent's proposed action and to request an administrative review of the issues. Petitioner timely filed a request for an administrative hearing. Thereafter, the matter was transferred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing.

The matter was ultimately heard on June 3, 2008. Petitioner testified on his own behalf and presented the testimony of fellow Brevard County employees Jeff Whitehead, Frank Abate, and Carol Sheffield. Respondent presented the testimony of Joyce Morgan, a benefits administrator in its Bureau of Enrollment and Contributions. Official recognition was requested and taken of Chapter 121, Florida Statutes, and Chapter 60S, Florida Administrative Code. The parties stipulated to the admissibility into evidence of twenty joint exhibits. The parties further stipulated that at all times material to the case identical statutory and rule language applied.

A transcript of the proceedings was ordered and filed with the Division of Administrative Hearings. Following several extensions of time, the parties' proposed recommended orders were timely filed. The administrative law judge submitted his recommended order and all exhibits offered into evidence to the

Department. A copy of the recommended order is attached hereto and made a part hereof. No exceptions to the recommended order were filed.

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes (2008), provides that an agency reviewing a Division of Administrative Hearings recommended order may reject or modify the findings of fact of an administrative law judge if "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." De Groot v. Sheffield, 95 So.2d 912, 916 (Fla.1975). However, an agency may not create or add to findings of fact because it is not the trier of fact. See Friends of Children v. Dep't of Health & Rehabilitative Servs., 504 So.2d 1345, 1347-48 (Fla. 1st DCA 1987).

Section 120.57(1)(l), Florida Statutes (2008), 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 conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the

administrative law judge. Florida courts have consistently applied this section'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. 2nd DCA 2001); Barfield v. Dep't 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 Bd. of Optometry v. Fla. Soc'y of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA 1998).

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the findings of fact set forth in the recommended order, with the exception of the following:

1. The Department rejects findings of fact 2, 3 and 4 to the extent they incorrectly state the applicable law. All instances of the use of the word "credible" should read "creditable". See § 121.021(17), Fla. Stat.; see generally Ch. 121, Fla. Stat.

2. The Department rejects finding of fact 5 to the extent it misstates the competent substantial evidence. The competent substantial evidence of record shows that Petitioner was offered a "part-time *temporary* position". (Joint Exhibit 4).

3. The Department rejects, as irrelevant, (a) the final sentence of the quoted language in finding of fact 7; (b) the entirety of finding of fact 8; (c) the first and third sentences of finding of fact 9; and (d) the first sentence of finding of fact 10. These findings are based on alleged understandings, assertions and expectations that may have existed between Petitioner and his employer, the Brevard County Board of County Commissioners, and can only be relevant to the legal and equitable theories of "agency" and "estoppel." These findings erroneously imply that Brevard County, as an FRS-participating employer, is an agent of Respondent and that Respondent can be estopped by the actions of Brevard County and of other FRS-participating employers.

4. In addressing the issue of apparent authority, the Florida Supreme Court, in Almerico v. RLI Ins. Co., 716 So.2d 774 (Fla.1998), applied a three-prong test to determine the existence of apparent agency: first, whether there was a representation by the principal; second, whether a third party relied on that representation; and, finally, whether the third party changed position in reliance upon the representation and suffered detriment. Id. at 777; see also Warren v. Dep't of Admin., 554

So.2d 568 (Fla. 5th DCA 1989); Smith v. Am. Auto Ins. Co., 498 So.2d 448, 449 (Fla. 3rd DCA 1986).

5. In this case, there is no evidence that Respondent ever made representations to Brevard County that it had actual or apparent authority to act as agent for Respondent. In fact, Chapter 121, Florida Statutes, clearly grants Respondent sole authority to administer the FRS. Although FRS-participating employers are liaisons between Respondent and FRS members, these entities are not considered Respondent's agents. To suddenly create an agency relationship where none has previously existed would open a Pandora's Box of claims and overwhelm both Respondent and tribunals charged with appeals of agency decisions. Petitioner having failed to prove the first of the three elements required to establish the existence of apparent authority, a further analysis regarding the remaining elements is unnecessary. Thus, any representations made by Brevard County to Petitioner cannot be attributed to Respondent and an equitable estoppel analysis of Brevard County's actions is unnecessary. See Bright v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 03-2142, 2004 WL 193006, at *9-10 (DOAH January 30, 2004).

6. Furthermore, the Division of Administrative Hearings does not have jurisdiction over equitable remedies. See § 26.012, Fla. Stat.; Strickland v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 03-4031, 2004 WL 715161, at *4 (DOAH March 29, 2004). Even if estoppel could lie in this action, the evidence does not support its application against Respondent. The

elements of equitable estoppel against the State are (a) a representation as to a material fact that is contrary to a later-asserted position; (b) reliance on that representation; and (c) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. Kuge v. State, Dep't of Admin., Div. of Ret., 449 So.2d 389, 391 (Fla. 3rd DCA 1984); see also Hodge v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 98-3066, 1999 WL 1483767, at *3 (DOAH April 28, 1999). Against a state agency, equitable estoppel will be applied only under exceptional circumstances. N. Am. Co. v. Green, 120 So.2d 603 (Fla.1959).

7. In this case, the evidence does not support a finding that Respondent made representations to Petitioner. Having failed to prove the first of the three elements required to establish equitable estoppel against the State, further analysis regarding the remaining elements is unnecessary. Moreover, even if Respondent had made a mistake of law, which the evidence in this case does not support, the State may not be estopped for conduct resulting from mistakes of law. Salz v. Dep't of Mgmt. Servs., Div. of Ret., 432 So.2d 1376, 1378 (Fla. 3rd DCA 1983); Austin v. Austin, 350 So.2d 102, 105 (Fla. 1st DCA 1977); see also Scott v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 96-3761, 1997 WL 1052601, at *7 (DOAH July 30, 1997); Infantino v. Dep't of Admin., Case No. 88-4905, 1989 WL 645023, at *4 (DOAH April 5, 1989).

8. The Department further rejects the second clause of the first sentence of finding of fact 9. The fact that Brevard County *enrolled* Petitioner in the FRS did not and does not mean that he was *eligible* to participate in the FRS. Prior to July 1, 1979, the employing agency determined which of its employees were eligible for FRS membership. On that date a new rule promulgated by Respondent became effective. Thereafter, Respondent determined which employees were eligible. See Fla. Admin. Code R. 60S-1.002(2); see also Urrechaga v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 06-3265, 2006 WL 3668481, at *4 (DOAH January 29, 2007); Morrina v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 06-2473 2006 WL 3101930, at *1 (DOAH October 27, 2006). Furthermore, the notion that an error in enrollment in the FRS cannot be corrected is contrary to the provisions of Section 121.193, Florida Statutes, which authorizes the Department to conduct external compliance audits and require corrective action of FRS-participating agencies. See § 121.193, Fla. Stat.; see also Tamalavich v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 07-2759, 2008 WL 960393, at *9 (DOAH May 14, 2008).

9. Finally, the Department rejects that portion of finding of fact 12 which states Petitioner "satisfactorily" performed his employment responsibilities during the "nearly two-year period of employment" from December 3, 2005, through November 7, 2007. Even if true, whether Petitioner satisfactorily performed his employment responsibilities is irrelevant. Furthermore, the only

relevant period of time in this case is December 3, 2005, through October 31, 2006.

CONCLUSIONS OF LAW

The Department hereby adopts and incorporates by reference the conclusions of law set forth in the recommended order, with the exception that the Department rejects that portion of conclusion of law 21 which states Petitioner has been filling a regularly established position with Brevard County from December 3, 2005, "through the date of the hearing." Even if true, whether Petitioner filled a regularly established position after October 31, 2006, is irrelevant. The only relevant period of time in this case is December 3, 2005, through October 31, 2006.

Based upon the foregoing it is,

ORDERED and DIRECTED that, from December 3, 2005 to October 31, 2006, Petitioner was employed in a regularly established position and is entitled to service credit in the Florida Retirement System for such period of time.

DONE and ORDERED on this 17 day of December, 2008.

LINDA H. SOUTH, Secretary
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NOTICE OF RIGHT TO APPEAL

UNLESS EXPRESSLY WAIVED BY A PARTY SUCH AS IN A STIPULATION OR IN OTHER SIMILAR FORMS OF SETTLEMENT, ANY PARTY SUBSTANTIALLY AFFECTED BY THIS FINAL ORDER MAY SEEK JUDICIAL REVIEW BY FILING AN ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF MANAGEMENT SERVICES, AND A COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE CLERK OF THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER, IN ACCORDANCE WITH RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, AND SECTION 120.68, FLORIDA STATUTES.

Certificate of Clerk:

Filed in the Office of the Agency Clerk of the Department of Management Services on this 24th day of December 2008.

Debbie Shoup
Agency Clerk