

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS L. BRIGHT,)
)
 Petitioner,)
)
 vs.) Case No. 08-1011
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal administrative hearing in this case on June 3, 2008, in Kissimmee, Florida.

APPEARANCE

For Petitioner: Brian D. Solomon, Esquire
Brian D. Solomon, P.L.
101 East 13th Street
St. Cloud, Florida 34769

For Respondent: Geoffrey M. Christian, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue in this case is whether or not the position
Petitioner held with Brevard County, Florida, from December 5,

2005, to October 31, 2006, entitled him to service credit in the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

By letter dated November 7, 2007, Respondent, Department of Management Services, Division of Retirement, notified Petitioner, Thomas L. Bright, that a position he filled with the Parks Department, Brevard County, Florida, was ineligible for participation in the FRS. The FRS "denial" letter characterized the position Petitioner held as a "temporary 'on-call'" position. Petitioner timely requested a hearing, and this case was forwarded to the Division of Administrative Hearings on February 25, 2008, for formal hearing.

On February 26, 2008, an Initial Order was sent to both parties. Based on the parties' responses to the Initial Order, on March 21, 2008, the case was scheduled for final hearing in Kissimmee, Florida, on April 15, 2008. On April 7, 2008, Petitioner requested a continuance that was granted; the case was rescheduled for June 3, 2008.

The final hearing took place as rescheduled. Petitioner presented three witnesses: Jeffrey Whitehead, Frank Abate, Carol Sheffield, and testified in his own behalf. Respondent presented the testimony of Joyce Morgan. The parties jointly presented 20 exhibits that were received into evidence and marked accordingly.

In addition, Respondent requested official recognition of Chapter 121, Florida Statutes, and Florida Administrative Code Rule Chapter 60S.

The parties agreed to submit proposed recommended orders before July 18, 2008. Both parties requested extensions to the time for filing proposed recommended orders. These requests were granted. Both parties filed Proposed Recommended Orders on September 2, 2008, that were considered by the undersigned. The Transcript of proceedings was filed with Division of Administrative Hearings on September 8, 2008.

All references are to Florida Statutes (2006), unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. Petitioner is a member of the FRS. He first worked for the Florida Department of Transportation in October 1976 and remained with the Department of Transportation until January 1980, when he began working for Osceola County, Florida. He worked for Osceola County until May 1990, when he began working for Brevard County, Florida. He worked for Brevard County until 2004.

2. At the time he was laid off by Brevard County, Petitioner had 25.5 years of credible service in the FRS.

3. Petitioner's expressed desire was to complete 30 years of credible service in the FRS. To that end, he met with Brevard County officials seeking re-employment in a position that would qualify him for additional credible service.

4. In October 2005, Petitioner met with several Brevard County employees, including the county manager and Human Resource director, seeking a job that would enable him to get 4.5 more years of credible FRS service.

5. As a result of his meetings and efforts, on October 28, 2005, Petitioner was offered a part-time position as a park ranger with duties that included "monitoring any scheduled activities at Rodes [sic] Park on Friday and Saturday evenings from approximately 9:00 p.m. to 1:00 a.m., to ensure orderly behavior of park patrons."

6. Accepting the offered position, Petitioner was employed as a Park Ranger I, with the stated job description. The following information appears on a Brevard County document titled "Authorization to Place Special Services Employee on Payroll" which memorialized his employment:

Working Title: Park Ranger I, Part Time (less than
40 hrs per week);

Hire Date: 12/03/05; and

How many pay periods do you anticipate this job will
last? 19 (PP) 38wks.

Also noted on this document, "Enroll in FRS 95HA."

7. An inter-office memorandum dated November 17, 2005, from Jeff Whitehead, south area parks operations manager to Peggy Busacca, county manager, regarding Petitioner's hiring, states in part: "This position will require an individual that has an extremely flexible schedule and that can be asked, at times, to report with very little notice. Furthermore, the majority of shifts will be on Friday and Saturday evenings, generally from 8:00 p.m. to 1:00 a.m. . . . In addition, providing Mr. Bright with this opportunity will render him eligible to collect his retirement benefits."

8. Frank Abbate, Brevard County Human Resource director, emailed Petitioner on December 19, 2005, stating, in part: "I'm glad to see that . . . you were able to get a position with Parks and Recreation that meets both[,] one of their Department's needs[,] as well as your interest in continuing to earn FRS service credits. I wish you the best and look forward to your achieving your goal of thirty years service under FRS!"

9. Brevard County knew that Petitioner's employment was conditioned on his inclusion as a participant in the FRS, and, in fact, enrolled him in the FRS by making appropriate contributions on his behalf to FRS. At no time did Brevard County advise Petitioner that he was not participating in the FRS. Petitioner relied on Brevard County's assertion that he was an enrolled member of the FRS.

10. Petitioner was hired with the mutual expectation that he would be available to work at Rhodes Park on any Friday and Saturday nights from 8:00 p.m. to 1:00 a.m. and that the employment would continue for 4.5 years so Petitioner would be able to obtain 30 years of credible FRS service. There was nothing "temporary" in the expectation of Petitioner and his employer regarding the duration of employment. During the period in question, December 2005 through October 2006, Petitioner worked at least one day per month.

11. Petitioner's employment was continuing, not temporary, on-call, in that he was scheduled to be available to work at his assigned responsibility every Friday and Saturday. While Petitioner did not work every Friday and Saturday night, Petitioner did, in fact, work every Friday and Saturday night during the period in question, as requested by his employer, Brevard County. That is, he never failed to perform his assigned duties when requested.

12. Petitioner was finally notified on November 7, 2007, that he was ineligible for participation in FRS. During this nearly two-year period of employment, Petitioner satisfactorily performed his employment responsibilities.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of these proceedings and of

the parties hereto pursuant to Sections 120.569 and Subsection 120.57(1), Florida Statutes (2007).

14. Chapter 121, Florida Statutes, contains the Florida Retirement System Act. Respondent is charged with managing, governing and administering the FRS. § 121.1905, Fla. Stat.

15. Petitioner has the burden of proving by a preponderance of the evidence that he was an eligible participant in the FRS during the period in question, December 5, 2005 through October 31, 2006. Wilson v. Department of Administration, Division of Retirement, 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

16. Brevard County is a local agency employer. § 121.021(42)(a), Fla. Stat. All employees of a local agency are compulsory participants in the FRS. § 121.051(1)(a), Fla. Stat. "Employee" is defined as "any person receiving salary payments for work performed in a regularly established position . . ." § 121.021(11), Fla. Stat.

17. Subsection 121.021(52), Florida Statutes, defines a "regularly established position" for a local agency as: "a regularly established position which will be in existence for a period beyond 6 consecutive months, except as provided by rule."

18. Subsection 121.021(53), Florida Statutes, defines a "temporary position" for a local agency as "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."

19. Florida Administrative Code Rule 60S-1.004(5) reads, in pertinent part, as follows:

An employee who is filling a temporary position shall not be eligible for membership in the Florida Retirement System. Records documenting the intended length of a temporary position and the dates of employment of an employee in such position must be maintained by the agency. An employer employing a person in a temporary position shall advise the employee at the time of his employment that he is filling a temporary position and cannot participate in the Florida Retirement System or claim this temporary employment later for retirement purposes. A position shall not be considered temporary due to the uncertainty of the employee's intention to continue employment. A position meeting the definition below shall be a temporary position.

* * *

(b) A temporary position in a local agency is:

1. An employment position which will not exist beyond 6 consecutive calendar months; or

2. An employment position which is listed below in paragraph (d) regardless of whether it will exist beyond 6 consecutive months.

* * *

(c) When an employment position in a local agency is extended beyond 6 consecutive calendar months, with the exception of those listed in paragraph (d) below, it shall become a regularly established position for retirement purposes and the employer shall enroll the current employee and all subsequent employees filling the position into the retirement system and shall begin to make the necessary contributions on the first day of the seventh calendar month, or on the first day of the month following the month in which the decision is made to extend the position beyond 6 months, if earlier. When a temporary position extends beyond 6 months and there is no documentation substantiating that the position was originally established as a temporary position to last for 6 months or less, the employee filling such position will be enrolled from the initial date of employment and retirement contributions shall be due retroactively to that date.

(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.).

* * *

5. On Call Positions (positions filled by employees who are called to work unexpectedly for brief periods and whose employment ceases when the purpose for being called is satisfied). [Emphasis added]

20. "Unexpected" is defined by The American Heritage Dictionary of the American Language, Fourth Edition, 2003, as: "coming without warning; unforeseen." The Farlex Thesaurus,

2008, published by Princeton University, lists the following synonyms, "accidentally, by chance, circumstantially," and further advises that "unexpectedly" means "in a way that was not expected; without advanced planning."

21. A preponderance of the evidence demonstrates that Petitioner was employed for a period greater than six consecutive months. He was not "called to work unexpectedly for brief periods" as is typical of non-qualifying "on call positions." His period of employment was planned and established to be from 8:00 p.m. to 1:00 a.m., Friday and Saturday, when required by his employer. Nor did his "employment cease when the purpose for being called [was] satisfied." He is expected to be available the following Friday and Saturday and each Friday and Saturday thereafter. He is considered an "employee," as contemplated by Subsection 121.021(11), Florida Statutes, and, as a practical matter, has been filling a "regularly established position" with Brevard County from December 3, 2005, through the date of the hearing.

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Management Services, Division of Retirement, enter a final order finding that Petitioner, Thomas L. Bright, is eligible for participation

in the Florida Retirement System, while employed by Brevard County from December 3, 2005, through October 31, 2006.

DONE AND ENTERED this 10th day of October, 2008, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of October, 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.