STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

CITY OF WILTON MANORS, FLORIDA, FOR THE BENEFIT OF THE CITY OF WILTON MANORS PENSION PLAN FOR GENERAL EMPLOYEES AND POLICE,

Petitioner,

vs.

Final Order No. DMS – 09-0080

DOAH Case Nos. 08-4766
09-0933
09-0934
09-0935
09-0936
09-0937
09-0938

DMS DOR No.: 08-15602

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent.
_____/

FINAL ORDER

PRELIMINARY STATEMENT

After being formally notified of the Division of Retirement's intent to deny Petitioner's request for release of premium tax money for the tax years 1999, 2000, 2001, 2002, 2003, 2004, and 2005, the Petitioner timely filed petitions for hearing and the cases were referred to the Division of Administrative Hearings. The cases were consolidated for hearing.

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, John G. Van Laningham, held a formal hearing in the above-styled case on April 16, 2009, by video teleconference in Tallahassee, Florida, and Lauderdale Lakes, Florida.

At the formal proceeding, Petitioner presented the testimony of Theora Braccialarghe, Actuary, Brenda Clanton, Chairman of the Pension Board, and Patricia Shoemaker. Petitioner offered 12 exhibits, which were admitted. Respondent offered the

testimony of Patricia Shoemaker, Benefits Administrator for Local Retirement Systems, Division of Retirement, and Joseph Gallegos, City Manager, City of Wilton Manors, Florida. Respondent offered 28 exhibits which were admitted.

The Parties filed proposed Recommended Orders and a Recommended Order was issued June 15, 2009, 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-).

STATEMENT OF THE ISSUES

The issue in this case is to determine whether Petitioner is entitled to receive premium tax distributions for the tax years 1999, 2000, 2001, 2002, 2003, 2004, and 2005.

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 finding of fact 6 of the Recommended Order as it is contrary to the evidence. The term "forfeiture" is used nowhere in the statute. The term forfeiture implies a punitive action. In the instant case, the requirement for removing general employees from Chapter 185 plans is to be eligible to participate. The premium tax program, as set forth elsewhere in the Recommended Order is purely voluntary on the

part of municipalities, and they are in no way vested in the right to receive the money unless they voluntarily agree to meet the requirements enacted by the Legislature.

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 conclusions 12, 18, 24, 25, 30, 31, 32, 34, 37, 44, 45, 46, 47, and 48, (and any footnotes connected to them) which are hereby rejected as incorrect, incomplete, or irrelevant. The conclusions offered by the Administrative Law Judge lead to the absurd result that no plan sponsor may be precluded from receiving premium tax revenues regardless of any restrictions the Legislature may have placed on receipt of those funds. Therefore, based on the record evidence, the following conclusions of law are substituted and adopted:

12. In administrative proceedings the burden is on the party seeking the affirmative of an issue. See Sections 120.57(1)(j) and (k), Florida Statutes (2008); Florida Department of Transportation v. J.W.C. Co., 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).

In his Recommended Order, the Administrative Law Judge repeatedly uses the term "forfeiture" to describe the events of this case. This term implies a punitive action by the Division. This is not supported by any record evidence. The City is in no way "vested" in the right to receive premium tax money. Chapter 185 places many restrictions on the receipt of premium tax money, and it is a purely voluntary program, meaning that no municipality may be forced to participate.

Further, the Administrative Law Judge provides the reason why, in the instant case, the burden rests with Petitioner. Conclusion of Law 18 emphasizes the following portion of Section 185.10, Florida Statutes: "In order for a municipality and its retirement fund to participate in the distribution of premium tax monies under this chapter, all the provisions shall be complied with annually, including state acceptance pursuant to part VII of Chapter 112." In other words, a municipality must demonstrate, each year, continuing eligibility. Thus in this proceeding, it is incumbent on the City to prove entitlement to the funds at issue.

18. Section 185.10, Florida Statutes (1999), provides, in relevant part: "For any municipality having a chapter plan or local law plan under this chapter....In order for a municipality and its retirement fund to participate in the distribution of premium tax moneys under this chapter, all the provisions shall be complied with annually. "(emphasis added). The City, as of October 1, 1999, the operative date of Chapter 99-1, Laws of Florida, no longer has a plan that meets the definition of either a chapter plan or a local law plan. Subsections 185.02(3) and 185.02(10), define these plans, and both require that they provide benefits solely "for police officers, or police officers and firefighters, where included." No plan failing to meet the definition of "chapter plan" or "local law plan" may participate, because they cannot comply with "all the provisions" as explicitly required for participation.

24. Section 185.05(1)(b)3., Florida Statutes (1999), provides in relevant part: "Based on the election results, a new board shall be established as provided in subparagraph 1. or subparagraph 2., as appropriate." (emphasis added).

25. Regarding the collection and distribution of revenue obtained via the premium tax, Section 185.10, Florida Statutes, provides, in relevant part:

> In order for a municipality and its retirement fund to participate in the distribution of premium tax moneys under this chapter, all the provisions shall be complied with annually, including state acceptance pursuant to part VII of chapter 112. (emphasis added).

30. As the unrebutted testimony showed, the membership was free to reject the separation. (T-239). It is entirely possible, although speculative, that the police membership may have felt they could obtain better than the minimum benefits provisions from the local government through collective bargaining than those provided for in Chapter 185. In such a case, the city may be required to forego participation in the Premium Tax program.

31. It is a well settled principle in statutory construction that the inclusion of one thing implies the exclusion of others. See Thayer v. State, 335 So.2d 815 (Fla. 1976). In the instant case, the statute is clear that general employees may no longer be included in a plan for police officers, or police officers and firefighters, if the plan sponsor wishes to continue participation in the Premium Tax program. There is no third option included in the express language to allow a plan to otherwise continue participation. This is consistent with Finding of Fact 3, where the Administrative Law Judge correctly notes that Premium Tax money is to be used "exclusively to fund retirements for police officers."

32. Section 185.05(b)3., Florida Statutes, provides:

> Any board of trustees operating a local law plan on July 1, 1999, which is combined with a plan for general employees shall hold an election of the police officers, or police officers and firefighters if included, to determine whether a

plan is to be established for police officers only, or for police officers and firefighters where included.

34. As the evidence indicated, the City also maintains a Chapter 175 plan for firefighters. An election would be necessary of the membership of that plan in order to merge the plans to remain in compliance with Chapters 175 and 185, Florida Statutes.

37. Participation in the revenue sharing program of chapter 185 is purely voluntary on the part of a municipality. However, if a municipality wishes to participate, they must do so within the framework set forth by the legislature. As provided in Article VII, Section 1, Constitution of Florida (1968 Rev.), "[n]o tax shall be levied except in pursuance of law....All other forms of taxation shall be preempted to the state except as provided by general law.

44. The interpretations of an administrative agency are entitled to great weight and should not be disturbed unless clearly erroneous. See Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla. 1997); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA, 1998).

45. It is interesting to note that the only City representative called by Petitioner had no knowledge at all of any discussions or deliberations of the City Commission. Rather, the City Manager, Joseph Gallegos, was called by Respondent. Mr. Gallegos recommended to the City Commission (T-161-163; Respondent's Exhibits 22 and 24) that the plans not be separated due to the increased cost, which was apparently as much or more than the expected Premium Tax distributions. Because a plan sponsor, in this case the City of Wilton Manors, is responsible for funding a local pension plan regardless of the source of funds, this was a legitimate concern, and one which was apparently taken to heart by the Commissioners.

46. Another concern which may have weighed on City Commissioners' minds is, as indicated by Petitioner's Exhibit 5 (the ordinance creating the Plan, or the Plan Document), is that in 1999, the legislature also required participating municipalities to provide set minimum benefits. A review of the Plan Document indicates that the City's plan does not include a minimum of 300 hours of overtime as creditable compensation, early retirement at age 50 with 10 years of service, a 10 year certain normal retirement option, normal retirement at age 55 with 10 years of service, or full vesting after ten years of service. All of these required minimum benefits have additional costs to the plan sponsor, the City.

Paragraphs 47 through 48 are hereby rejected as incorrect or unnecessary.

ORDER

Based on the foregoing, it is hereby ORDERED AND DIRECTED that the Petitioner's request for distribution of Chapter 185 Premium Tax revenue for the tax years 1999 through 2005 is hereby DENIED.

DONE AND ORDERED this 15 day of Oct 2009, in Tallahassee, Leon County, Florida.

Linda H. South
Secretary
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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 Division of Retirement, and copies distributed by U.S. Mail to the parties below, on the 15th day of October, 2009.

Debbie Shoup
Clerk
Department of Management Services

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