

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL DELONG, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 10-2233  
 )  
 WEST PALM BEACH POLICE PENSION )  
 FUND, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 14, 2010, by video teleconference, with the parties appearing in West Palm Beach, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Frank J. McKeown, Jr., Esquire  
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For Respondent: Bonni S. Jensen, Esquire  
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STATEMENT OF THE ISSUE

Whether the Petitioner is eligible for vested deferred retirement pension benefits payable by the West Palm Beach Police Pension Fund ("Fund").

PRELIMINARY STATEMENT

In a letter dated March 18, 2010, the Board of Trustees ("Board") of the Fund notified Michael DeLong that it intended to deny his request for an early or normal retirement benefit payable by the Fund. The Board advised Mr. DeLong that it had determined that he was not "eligible for any further benefits from the plan because you did not have 10 years of credited service." The Board attached to the letter a Proposed Order, and it notified Mr. DeLong that he had the right to appeal the Board's preliminary decision. Mr. DeLong timely filed his appeal. The Board transmitted the matter to the Division of Administrative Hearings for the assignment of an administrative law judge, pursuant to the contract between the Fund and the Division of Administrative Hearings.

The final hearing was held on July 14, 2010. At the hearing, Mr. DeLong testified in his own behalf. The Fund presented the testimony of David M. Williams, Jeffrey Amrose, and Robert Klausner. Joint Exhibits 1, 2.1 through 2.11, 2.13 through 2.33, and 3 through 11 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on July 22, 2010. The parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, on the stipulation of the parties, and on the entire record of this proceeding, the following findings of fact are made:

1. The Fund is a vested defined benefit pension plan created by Special Act of the Florida Legislature pursuant to Chapter 185, Florida Statutes. See Ch. 24981, Laws of Fla. (1947), as amended by Ch. 88-105, Laws of Fla. ("Fund documents").<sup>1</sup> It is funded by contributions from its members; the City of West Palm Beach, Florida; and the State of Florida.

2. Mr. DeLong was employed by the Police Department of the City of West Palm Beach ("Police Department") on November 26, 1979.

3. Mr. DeLong was injured in the line of duty in or about 1987. He submitted an Application for Retirement dated May 26, 1988, under the category of "Duty Disability."

4. Mr. DeLong retired from the Police Department effective November 17, 1988, after the Board approved his application for

disability retirement benefits. At the time of his disability retirement, Mr. DeLong had service credit under the Fund of eight years, 11 months, and 21 days.

5. Mr. DeLong received a monthly disability retirement benefit of \$1,725.59.

6. In a letter dated April 19, 1989, Mr. DeLong applied for a specialized assignment with the Police Department. He enclosed with the letter an Application for Specialized Assignment, indicating that his "requested assignment" was "helicopter flight officer," and he stated that he believed he could "perform flight operations."<sup>2</sup>

7. The opening for specialized assignment for helicopter patrol was advertised in the April 7, 1989, Police Department Bulletin, and the assignment was described in pertinent part as follows: "The position will be considered a Part-time Position that will utilize selected officers both during their On-Duty and Off-Duty hours. Overtime will be afforded those who work while Off-Duty."

8. At its meeting on June 14, 1989, the Board was advised of Mr. DeLong's application for specialized assignment as a helicopter pilot. Questions arose as to whether Mr. DeLong continued to be disabled, as defined in the Fund documents, and entitled to continue receiving disability retirement benefits. In order to determine if Mr. DeLong was still disabled, the

Board directed that Mr. DeLong be examined by a physician chosen by the Board "for the purpose of securing a medical opinion as to whether Mr. DeLong is physically able to perform the duties of the position being sought."<sup>3</sup>

9. In a letter dated June 20, 1989, Michael F. McClure, the Assistant Chief of the Police Department's Uniform Services Division, advised Mr. DeLong that he could not be considered for the helicopter patrol assignment because he was "not a full-time employee with the police department."<sup>4</sup> Chief McClure further stated that "[i]f, at some later date, you are determined by a physician to be capable of returning to full duty, you [sic] application will be considered."<sup>5</sup>

10. As reflected in the minutes of the Board's meetings on August 22, 1989; November 8, 1989; and December 7, 1989; the Board was unable to conclude, on the basis of the information provided to it, that Mr. DeLong was physically capable of performing the duties of a police officer.

11. The minutes of the December 7, 1989, meeting reflect that Mr. DeLong's attorney at the time, Scott Richardson, represented to the Board that "Dr. Stone [the physician chosen by the Board to examine Mr. DeLong] stated that while Mr. DeLong is not totally disabled that he would be limited in terms of being prevented from performing the normal duties of a Police Officer."<sup>6</sup> The minutes also reflect that Mr. Richardson stated

that "the Police Department states that due to these limitations that Mr. DeLong would not be rehired."<sup>7</sup>

12. The Board's attorney framed the question before the Board at the December 7, 1989, meeting as follows: "[T]he question is whether Dr. Stone's re-evaluation would warrant the Trustees determining that Mr. DeLong was no longer eligible to receive Disability Benefits." At the conclusion of its discussion of Mr. DeLong's situation, the Board voted unanimously "to accept Dr. Stone's report and to recognize that Mr. DeLong is still eligible to receive Disability Benefits."

13. Mr. DeLong continued receiving disability retirement benefits until the Board decided to discontinue the benefits at its meeting on October 30, 1990.

14. In or about early October 1990, the Board learned that that Mr. DeLong was employed as "a sworn Law Enforcement Officer" with the Palm Beach County Sheriff's Office.<sup>8</sup> Mr. DeLong was advised in a letter from the Board's attorney dated October 12, 1990, that "disability retirement is payable only as long as you are totally incapacitated from performing the functions of a police officer." Mr. DeLong was asked to appear at the Board's October 30, 1990, meeting to "show cause why your disability pension should not be terminated."<sup>9</sup>

15. In a letter dated October 23, 1990, Mr. DeLong's attorney advised the Board's attorney as follows: "Please be

advised that Mr. DeLong, effective immediately, resigns his position with the West Palm Beach Police Department and relinquishes any right that he presently has to the disability pension previously granted. This letter will obviate the need for us to appear at the [Board's] October 30, 1990, meeting."<sup>10</sup>

16. In a letter dated October 29, 1990, Mr. DeLong returned his disability retirement benefit check to the Fund and confirmed that he "resigned his job as a police officer and terminated my duty disability pension."<sup>11</sup>

17. Because Mr. DeLong began his employment with the Palm Beach County Sheriff's Office effective May 1, 1990, the Board requested that he refund the amount of \$10,553.54, which represented the total amount of disability retirement benefits he received between May 1, 1990, and October 1990.<sup>12</sup> Mr. DeLong repaid the Fund in full.

18. Mr. DeLong was not entitled to a return of his contributions to the Fund because the amount of disability retirement benefits he received exceeded his contribution. He did, however, receive payment of \$5,497.90, which was the balance in his share account as of October 1, 1989.<sup>13</sup>

19. Mr. DeLong submitted to the Florida Retirement System Pension Plan a form dated June 24, 2005, requesting that it verify his retirement system service credit. He noted on the

form that he had been employed by the West Palm Beach Police Department from November 1979 to April 1990.

20. Mr. DeLong sent a letter to the Fund administrator, which was received on September 29, 2008, inquiring about his eligibility for a pension, the years of service that were credited to him, and any refunds due to him.

21. Although the record is incomplete, it appears that, between July 2009 and February 2010, the Fund's representatives were trying to determine if Mr. DeLong was entitled to vested deferred retirement benefits either upon early retirement or upon normal retirement at age 55 years.

22. Mr. DeLong was notified that his request for vested deferred retirement benefits would be discussed at the March 12, 2010, meeting of the Fund's Board.

23. The minutes of the Board's March 12, 2010, meeting reflect that Mr. DeLong was not present. The issue of Mr. DeLong's eligibility to receive vested deferred retirement benefits was presented to the Board, and the minutes indicate that the Board decided not to "apply any credited service to Mr. DeLong during his time of disability."<sup>14</sup>

#### CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to the contract between the Fund



and the Division of Administrative Hearings and Sections 120.565 and 120.57(1), Florida Statutes (2010).

25. Mr. DeLong is seeking to establish his eligibility for vested deferred retirement benefits from the Fund and, therefore, has the burden of proof by a preponderance of the evidence. See Haines v. Department of Children & Families, 983 So. 2d 602, 605 (Fla. 5th DCA 2008) (citing Department of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)) (general rule is that party asserting affirmative of issue has burden of presenting evidence as to issue, as well as ultimate burden of persuasion); Florida Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

26. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

27. At the times pertinent to this proceeding, the Fund documents defined the terms under which the Fund operated. Section (2) of the Fund documents included the following definitions, pertinent to this proceeding:

(i) "Member" or "participant" means any person who is included in the membership of the fund.

\* \* \*

(k) "Police officer" means any person who is elected, appointed, or employed full-time by the city . . . .

\* \* \*

(n) "Retirant" means any member who retires with a pension from the fund.

(o) "Retirement" means a member's withdrawal from city employment with a pension payable from the fund.

\* \* \*

(q) "Service," "credited service," or "service credit" means the total number of years, and fractional parts of years, of service of any police officer omitting intervening years and fractional parts of years, when such police officer was not employed by the city. . . .

28. Section (8) of the Fund documents described the age and service requirements for retirement and provided for normal retirement, vested deferred retirement, and early retirement. Pertinent to this proceeding, "vested deferred retirement" applied to members of the Fund "with 10 or more years of

credited service" who "leave the employment of the department for any reason except retirement or death." § (8)(b) of the Fund documents. If a police officer is eligible for vested deferred retirement, the police officer shall be entitled to a pension on early retirement or at the normal retirement age.

Id.

29. Mr. DeLong claims that he is entitled to a vested deferred retirement benefit because his years of active employment as a police officer with the Police Department, plus the one year, five months, and 13 days during which he received disability retirement benefits, total slightly more than 10 years.

30. Duty disability retirement pensions are governed by the provisions of Section (11) of the Fund documents, which provided in pertinent part:

(a) Retirement.--Any member who becomes physically or mentally, totally and permanently disabled to perform the duties of a police officer, by reason of a personal injury or disease arising out of and in the course of the performance of his or her duties as a police officer, in the employ of the city, shall be retired with a pension provided for in this subsection; provided, that after a medical examination of the member made by or under the direction of the medical committee, the medical committee reports to the board, in writing whether:

1. The member is wholly prevented from rendering useful and efficient service as a police officer; and

2. The member is likely to remain so disabled continuously and permanently. . .

\* \* \*

(c) Duty disability pension benefits; disability occurs before age and service eligibility.--A member whose retirement on account of disability, as provided in paragraph (a) of this subsection, occurs prior to the date he or she would become eligible to retire under paragraph (8) hereof [normal, vested deferred, or early retirement], shall receive a disability pension . . . . The disability pension . . . shall be subject to subsection (12) hereof.

31. Subsection (12) of the Fund documents sets forth "[c]onditions applicable to all disability retirants," and provided in pertinent part:

(c) Payment of disability pensions.-- Monthly disability retirement benefits shall be payable as of the date the board determines that the member was entitled to a disability pension; . . . The last payment shall be, if the police officer recovers from the disability prior to his or her normal retirement date, the payment due next preceding the date of recovery, . . . .

\* \* \*

(e) Reexaminations of disability retirants.--At least once each year during the first 5 years following a member's retirement on account of disability, and at least once in each 3-year period thereafter, the board shall require any disability retirant who has not attained age 50 to undergo a medical examination to be made by a physician designated by the board. . . . If, upon such medical examination of such

retirant, the said physician reports to the board that the retirant is physically able and capable of performing the duties of a police officer in the rank held by him or her at the time of his or her retirement, the member shall be returned to employment in the department at a salary not less than the rank held by him or her and his or her disability pension shall terminate.

(f) Credited service for disability retirant.-- In the event a disability retirant is returned to employment in the department, as provided in paragraph (e), he or she shall again become a member of the fund and the credited service in force at the time of the member's retirement shall be restored to his or her credit. If he or she retired under a duty disability as provided in paragraph (11)(a) hereof, he or she shall be given service credit for the period he or she was in receipt of a disability pension. . . .

32. Pursuant to Section (12)(e) and (f) of the Fund documents, Mr. DeLong would have been eligible to receive service credit for the period during which he received disability retirement benefits only if it was determined that he was physically capable of performing the duties of a police officer and if he returned to employment with the Police Department.

33. Based on the minutes of the relevant Board meetings, there was no determination by the Board that Mr. DeLong was physically capable of returning to duty as a police officer prior to its learning, in October 1990, that Mr. DeLong had been employed by the Palm Beach County Sheriff's Department since

May 1, 1990. In fact, Mr. DeLong's attorney conceded at the Board's December 7, 1989, meeting that Mr. DeLong continued to have limitations on his ability to perform the normal duties of a police officer. The Board voted at that time to continue Mr. DeLong's disability retirement benefits, an implicit finding by the Board that Mr. DeLong remained totally and permanently disabled as defined in Section (11)(a) of the Fund documents.

34. Based on the findings of fact herein, even had the Board concluded that Mr. DeLong was no longer permanently and totally disabled, the Police Department did not refuse to return him to employment. The only application for employment submitted to the Police Department by Mr. DeLong was an Application for Specialized Assignment as a helicopter pilot, which he submitted in April 1989. Mr. DeLong could not be given this "specialized assignment" because he was no longer employed as a full-time police officer by the Police Department, which employment was a prerequisite for consideration for a specialized assignment. Consequently, the Police Department could not hire Mr. DeLong for this position.

35. Mr. DeLong contends in his proposed findings of fact and conclusions of law that his employment with the Police Department actually ended when the Police Department terminated his employment effective May 1, 1990, the day he began his employment with the Palm Beach County Sheriff's Department. To

the contrary, in accordance with the definition of "retirement" in Section (2) (o) of the Fund documents, Mr. DeLong withdrew from his employment with the Police Department on November 17, 1988, the effective date of his retirement and his entitlement to disability benefits from the Fund. His purported "resignation" of his position with the Police Department on October 23, 1990, was ineffective and did not alter his termination date under the Fund documents.

36. Based on the pertinent provisions of the Fund documents, as applied to the facts found herein, Mr. DeLong is not entitled to service credit for the period of time he received disability retirement benefits from the Fund. His service credit at the time of his retirement and withdrawal from employment with the Police Department was, pursuant to Section (2) (q) of the Fund documents, eight years, 11 months, and 21 days. Mr. DeLong has fewer than 10 years of service credit with the Police Department, and he has, therefore, failed to meet his burden of proving by a preponderance of the evidence that he is eligible for vested deferred retirement benefits from the Fund.<sup>15</sup>

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Trustees of the West Palm Beach Police Pension Fund enter a final order finding that

Michael L. DeLong did not accrue service credit during the time he received disability retirement benefits and is, therefore, not eligible for vested deferred retirement benefits.

DONE AND ENTERED this 12th day of October, 2010, in Tallahassee, Leon County, Florida.



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PATRICIA M. HART  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of October, 2010.

ENDNOTES

<sup>1/</sup> In the Pre-Hearing Stipulation filed by the parties, it was noted that one question of law to be determined was whether the 1987 or 1988 version of the special act governing the Fund was applicable in this proceeding. At the final hearing, counsel for the Fund stated that the parties had agreed that the 1988 version of the special act should be applied.

<sup>2/</sup> Joint Exhibit 2.5.

<sup>3/</sup> Joint Exhibit 2.6.

<sup>4/</sup> Joint Exhibit 2.7.

<sup>5/</sup> Id.

<sup>6/</sup> Joint Exhibit 2.11.



<sup>7</sup>/ Id.

<sup>8</sup>/ Joint Exhibit 2.13

<sup>9</sup>/ Id.

<sup>10</sup>/ Joint Exhibit 2.14.

<sup>11</sup>/ Joint Exhibit 2.15.

<sup>12</sup>/ Joint Exhibit 2.18.

<sup>13</sup>/ At the times pertinent to this proceeding, the share account was not part of a member's contributions to the Fund but was a separate fund established by Section 185.35(2), Florida Statutes.

<sup>14</sup>/ Joint Exhibit 2.33.

<sup>15</sup>/ Mr. DeLong included in his proposed findings of fact and conclusions of law a request for attorney's fees and costs "upon a finding on the appeal the Agency's actions were gross abuse of the Agency's discretion. Florida Statute Section 120.596(5)." Section 120.595(5), Florida Statutes (2010), provides in pertinent part that "[w]hen there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion."

Mr. DeLong is not entitled to the requested award of attorney's fees and costs for two reasons. First, this administrative proceeding is not an appeal of the Board's action, in the sense that the term "appeal" is used in Section 120.595(5), Florida Statutes (2010), because there has not yet been final agency action. This proceeding is a part of the administrative process in which the Board's final agency action is formulated. See Haines v. Department of Children & Families, 983 so2d 602, 605 (Fla. 5th DCA 2008); Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So. 2d 19 (Fla. 1st DCA 1990) (citing Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981)) ("A request for formal administrative hearing commences a de novo proceeding intended to formulate agency action, and not to review action taken

earlier or preliminarily."). Second, the Division of Administrative Hearings is not a court but is an administrative entity conducting evidentiary hearings under contract with the Board, which retains the authority to enter a find order in this matter. See Florida State University v. Hatton, 672 So. 2d 576, 579 (Fla. 1st DCA 1996) ("[N]either the Division of Administrative Hearings nor its hearing officers are '[a] court of competent jurisdiction . . . .'").

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.