

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD L. DULEY,)
)
 Petitioner,)
)
 vs.) Case No. 10-8475
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, a final hearing in this matter was conducted before Administrative Law Judge Diane Cleavinger, Division of Administrative Hearings, on October 26, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard L. Duley, pro se
5432 Pinderton Way
Tallahassee, Florida 32317

For Respondent: Kristin M. Klein, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner is entitled to retirement service credit for the time period in which he was not employed with the State of Florida.

PRELIMINARY STATEMENT

In 2009, Petitioner Richard L. Duley, requested a determination by the Division of Retirement (Division) on whether he was entitled to membership and credit in the Florida Retirement System (FRS) for the period of June 30, 2005 to May 30, 2008. The Division issued a Final Agency Action letter on December 18, 2009, denying Petitioner's request for membership and service credit. Petitioner disagreed with Respondent's determination and requested a formal hearing before the Division of Administrative Hearings.

At the hearing, Petitioner testified on his own behalf and offered 30 exhibits into evidence. Petitioner's Exhibits 1-4 were admitted into evidence except for the sections containing Petitioner's typed comments on the exhibits. Petitioner's Exhibits 5-30 were not admitted into evidence. Respondent presented the testimony of one witness. Additionally, official recognition was granted to the Public Employee Relations Commission (PERC) Hearing Officer's Recommended Order, Richard L. Duley, Petitioner, v. Department of Transportation, Respondent, Case No. VP-2007-001, filed February 15, 2008; and the PERC Final Order of Richard L. Duley, Petitioner v. Department of Transportation, Respondent, Case No. VP-2007-001, issued April 8, 2008.

After the hearing, Petitioner filed a Proposed Recommended Order on November 6, 2010. Likewise, Respondent filed a Proposed Recommended Order on November 5, 2010.

FINDINGS OF FACT

1. The Department of Management Services (DMS) is responsible for the administration of the Florida Retirement System (FRS) under Chapter 121, Florida Statutes.

2. The Department of Transportation (DOT) is an agency of the State of Florida whose employees qualify for membership in FRS.

3. Petitioner Richard L. Duley is an honorably discharged veteran. He began employment with DOT in 1991. At the same time, he became a member of FRS.

4. Prior to 2001, then-Governor Jeb Bush directed state agencies to reduce their workforce by 25 percent over a five-year period beginning in 2001. The directive was known as the "Service First Initiative." In response to the Governor's directive, DOT developed an Agency Organizational Efficiency Plan.

5. On January 18, 2005, Petitioner was notified that his position was designated to be deleted under the Agency's Organizational Efficiency Plan; his position was abolished on June 30, 2005.

6. As a result, Petitioner was dismissed from state employment and was no longer receiving retirement service credit for FRS. However, Petitioner did not receive a clear point of entry to challenge either his termination or whether he was entitled to a veteran's preference by DOT.

7. After his dismissal, Petitioner was hired by a private firm who had contracted with the State to perform the functions that Mr. Duley had previously provided as an employee of the state. The contract terminated in June or July of 2007, and was not renewed. As such, Mr. Duley became unemployed.

8. On July 30, 2007, Petitioner filed a complaint with the Department of Veterans' Affairs (DVA) alleging that DOT had denied him veteran's preference in retention during the 2005 layoff. The DVA found that Petitioner's complaint had merit. On November 19, 2007, Petitioner filed a complaint with the Public Employees Relations Commission (PERC), which held an evidentiary hearing on the complaint. PERC is the administrative body that has jurisdiction to determine issues and remedies under the veteran's preference statute.

9. In its Final Order issued April 8, 2007, PERC found that Petitioner was an honorably discharged veteran and was entitled to preferential treatment in employment. PERC also found that DOT violated the veteran's preference law by not affording Petitioner special consideration in finding

alternative employment after the layoff. As a remedy for its violation of the veteran's preference law, PERC ordered DOT to make Petitioner an offer of employment to an existing position comparable to that which he held prior to his layoff. PERC also awarded Petitioner attorneys' fees and costs. However, and most importantly, PERC did not reinstate Petitioner to his former position because it had been abolished. Similarly, PERC did not rescind Petitioner's termination. Finally, PERC did not award back pay or benefits to Petitioner.

10. As a consequence of the Final Order, neither Petitioner nor DOT paid contributions towards the Retirement Systems Trust Fund for the period that Petitioner was not employed with the State. Additionally, Petitioner was offered and hired into a new position by DOT and again began to accrue retirement service credit in FRS when he was hired by DOT in May of 2008. The PERC Final Order was not appealed and became res judicata on the issues litigated therein. Therefore, since Petitioner's termination was not rescinded and Petitioner was not reinstated by PERC and did not pay contributions into FRS, he is not entitled to receive credit for the time he was not employed by the State and this action should be dismissed.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

12. Section 121.011(g), Florida Statutes (2006), governs credit that can be given to FRS members who have not retired and have been dismissed from employment. Section 121.011(g)1. and 2., Florida Statutes, states:

1. If such dismissal is rescinded by proper authority or through legal proceedings, the member is eligible to receive retirement service credit . . . provided:

a. The dismissal action taken against the member is determined to be incorrect and is negated, the employee is made whole for the period of the dismissal or any portion thereof, and employment is reinstated; and

b. The employer pays into the Retirement System Trust Fund the total required employer contributions for the period for which the employee is made whole, plus interest at 6.5 percent compounded annually until full payment is made. The employee shall pay the total employee contributions, plus interest, if applicable.

2. If the dismissal action is subsequently changed to a suspension . . . provided the members employment is reinstated, restoring the employee-employer relationship, and the employee pays the total required employer and employee contributions and complies with all the requirements in paragraph (e).
(Emphasis added.)

13. Section 121.011(g), Florida Statutes, only allows members who have been dismissed to receive retirement service credit if their dismissal was rescinded. Alternatively, the employee can receive retirement credit if the dismissal is changed to a suspension and the required contributions are paid into the retirement System Trust Fund.

14. In this case, Petitioner's dismissal was not rescinded and he was not reinstated because his former position no longer existed. Further, his dismissal was not changed to a suspension by PERC. Additionally, Petitioner was not "made whole" by his new position because he was not awarded back pay or benefits.

15. Based on these facts, the conditions have not been met which would allow Petitioner to receive retirement service credit for the period in which he was not employed by the state.

16. Further, Section 121.021(17) (a), Florida Statutes, defines "credible service" as follows:

. . . the sum of his or her past service, prior service, military service, out-of-state or non-FRS in-state service, workers' compensation credit, leave-of-absence credit, and future service allowed within the provisions of this chapter if all required contributions have been paid and all other requirements of this chapter have been met. (Emphasis added.)

17. Because no contributions were made on behalf of Petitioner for the period for which he was not employed with the

State, that time period does not qualify as "credible service."
Therefore, this action should be dismissed.

RECOMMENDATION

Based upon the foregoing, Finding of Fact and Conclusions
of Law set forth herein, it is

RECOMMENDED:

That the Department of Management Services, Division of
Retirement, enter a Final Order dismissing this action.

DONE AND ENTERED this 23rd day of December, 2010, in
Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of December, 2010.

COPIES FURNISHED:

Richard L. Duley
5432 Pinderton Way
Tallahassee, Florida 32317

Larry D. Scott, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399

Kristin M. Klein, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399

Sarabeth Snuggs, Director
Division of Retirement
Department of Management Services
Post Office Box 9000
Tallahassee, Florida 32315-9000

John Brenneis, General Counsel
Department of Management Services
4050 Esplanade Way
Tallahassee, Florida 32399-0950

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.