STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IRENE LEONARD, Petitioner, vs. DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT, Respondent.	)	Case No. 11-1529

RECOMMENDED ORDER

Pursuant to notice, on August 16, 2011, a formal hearing in this cause was held by video teleconference in Lakeland and Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: Irene Leonard, pro se
127 Paul Revere Road
Bartow, Florida 33830

For Respondent: Thomas E. Wright, Esquire
Division of Retirement
Department of Management Services
4050 Esplanade Way, Suite 160
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STATEMENT OF THE ISSUE

Whether Petitioner's request for retirement credit should be approved.

PRELIMINARY STATEMENT

In October 2006, Petitioner, Irene Leonard, injured her back while working for the DeSoto County Sheriff's Office (Sheriff's Office). From October 2006 through September 2007, Petitioner received temporary total workers' compensation disability benefits as a result of her injuries. The exact dates during this period when she received temporary total disability benefits are not at issue in the present case. Petitioner returned to work for the DeSoto County Sheriff's Office in September 2007 and, subsequently, sought retirement credit from Respondent, Department of Management Services, Division of Retirement (Division), for the period that she received temporary total disability benefits. By letter dated January 7, 2011, the Division informed Petitioner that pursuant to section 121.125, Florida Statutes (2007),[1/] she would not be granted retirement credit for the period in question, because following her return to work in September 2007, she worked intermittently and did not have a full month of active employment before being terminated by her employer. Petitioner, thereafter, submitted to the Division a Petition for Administrative Hearing. On March 16, 2011, the Division referred the matter to the Division of Administrative Hearings for a disputed fact hearing.

A Notice of Hearing by Video Teleconference was issued setting the case for formal hearing on June 24, 2011. At Petitioner's request, the case was continued and reset for hearing on August 16, 2011.

At the hearing held on August 16, 2011, two witnesses testified: Petitioner; and Andy Snuggs, who works as a benefits administrator with the Division. Additionally, five exhibits (Respondent's 1 through 4 and 6) were offered and received into evidence without objection. Petitioner did not offer any documents into evidence.

Neither party elected to order the transcript of the proceeding. On August 26, 2011, Petitioner submitted a Proposed Recommended Order. In reviewing Petitioner's Proposed Recommended Order, there was no indication that a copy of the same was provided to counsel for Respondent. By way of Notice of Ex-Parte Communication, the undersigned, on August 26, 2011, forwarded a copy of Petitioner's Proposed Recommended Order to counsel for Respondent. On August 29, 2011, Respondent submitted a Proposed Recommended Order. The Proposed Recommended Orders submitted by the parties have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner previously worked for the Sheriff's Office for DeSoto County, Florida. It is undisputed that the Sheriff's

Office is a qualified Florida Retirement System ("FRS") employer and that Petitioner was, during all times relevant hereto, an FRS eligible employee.

2. In the instant case, it is undisputed that in October 2006, Petitioner sustained a work-related injury while in the course and scope of her employment with the Sheriff's Office. Petitioner, from the time of her injury through approximately September 11, 2007, received temporary total disability workers' compensation benefits for her employment-related injuries. The precise dates when these benefits were received by Petitioner are not at issue in the instant dispute.

3. On September 12, 2007, Petitioner returned to work at the Sheriff's Office with light-duty work limitations. Also on this date, Petitioner resumed receiving payroll wages from the Sheriff's Office. Petitioner continued to receive temporary partial disability wage payments through December 2008 and received workers' compensation medical benefits through October 2010.

4. When Petitioner returned to work on September 12, 2007, she was still receiving medical treatment from the workers' compensation physician and attended regular sessions with the physician throughout the duration of her employment with the Sheriff's Office. The visits to the workers' compensation physician often occurred during times when the Sheriff's Office

scheduled Petitioner to work, thus, resulting in her absence from work on these days.

5. The Sheriff's Office terminated Petitioner's employment on December 12, 2007. Between the dates of September 12, 2007, and December 12, 2007, Petitioner was on the Sheriff's Office payroll and received wages as follows:

a) For the period September 23, 2007, through October 6, 2007, she received payroll wages for 14 days;

b) For the period October 7, 2007, through October 20, 2007, she received payroll wages for five days; and

c) For the period October 21, 2007, through December 12, 2007, she received payroll wages for 14 days.

6. No evidence was presented at the hearing explaining Petitioner's work schedule for the period September 13, 2007, through October 5, 2007. Between the dates of September 12, 2007, and December 12, 2007, Petitioner worked and received payroll wages from the Sheriff's Office for a total of 34 days.

7. Although the 34 days that Petitioner worked were dispersed throughout the months of September, October, November, and December, Petitioner, nevertheless, received a paycheck from

the Sheriff's Office for wages for each pay period following her return to work.

8. There was no testimony offered at the hearing as to the total number of days that Petitioner was scheduled to work between September 12, 2007, and December 12, 2007. However, Petitioner testified that any scheduled work days that she missed during this period occurred as a result of her having to attend medical appointments with the workers' compensation physician. Respondent offered no evidence to the contrary as to this point.

9. Given the severity of Petitioner's work-related injury, which apparently resulted in her being away from work for nearly a year, coupled with the fact that she continued to receive workers' compensation medical benefits through October 2010 (some four years after the date of her injury), the undersigned accepts as credible Petitioner's testimony that any scheduled work days that she missed between September 12, 2007, and December 12, 2007, resulted from her having to attend medical appointments with the workers' compensation physician.

10. On April 4, 2008, Petitioner submitted correspondence to the Division and stated therein the following:

> Sir,
>
> I am writing this email in regards to my retirement. Under the florida [sic] retirement system, a member is entitled to

> retirement credit for periods of eligible workman [sic] comp[ensation]. The member must return to FRS covered employment for one month. Creditable workman [sic] comp[ensation] includes all periods that workman [sic] comp[ensation] are made. FRS employers are required by Section 121.125, Florida Statutes, and Section 60S-2012, Florida Administrative Code, to report the period covered by workman [sic] comp[ensation] on the monthly retirement report. D.C.S.O. stated I worked intermittently but where is it written in the Florida State Statutes or Administrative Code, how many days during the month you are allowed to miss and it would not be credible service or considered a break in service. [sic] Sir, I was still active [sic] employed with D.C.S.O. upon returning to work on Sept[ember] 12, 2007. The days I missed was [sic] due to medical appointmentts [sic] for my workman's [sic] comp[ensation] injury I sustained at D.C.S.O. I always provided documentation from the physician. I was not terminated until December 13, 2007 when Capt. McClure of D.C.S.O. called me at 8:21 A.M. [sic] on my scheduled day off. The three months I was allowed to work and the period on workman [sic] comp[ensation] should be credible service towards retirement. Sir, my question is when the other employees at D.C.S.O. take off more than a couple of days, during the month, for various reasons, without medical documentation[,] do[es] it count for credible service towards retirement or is it a break in service. [sic]

11. On April 7, 2008, Doug Cherry, on behalf of the Division, responded to Petitioner's inquiry of April 4, 2008, and stated the following:

> Ms. Leonard, as I explained in our phone conversation, for periods of workers'

compensation (temporary partial or temporary total) to be eligible for retirement credit there must be a return to active employment for one complete calendar month. The attached letter from the Sheriff of DeSoto County shows that from your scheduled date of return in September 2007, your employment was not active for the required month.

This letter states you worked intermittently until your termination of employment in December 2007. To satisfy the one calendar month of active work, you needed to be consistently working through October 31, 2007.

You indicated in our conversation that the information from the Sheriff was incorrect. If so, you would need to contact that office to resolve any discrepancy.

I [have] also attached the appropriate Florida Statute (121.125) and the Florida Administrative Code (60S-2.012) which states [sic] this requirement. The law does not provide for exceptions or a combination of active and non-active employment during the one calendar month.

Regarding your question about active members taking off days during the month, the requirements for earning service credit are different than the eligibility requirement for periods of workers' [sic] compensation. In your own account, you did earn credit for the months of September, October, November and December 2007 for the time you did work and earn salary.

However, as stated above, for the period of workers' compensation to be creditable for retirement, the requirement is active employment for the full calendar month, not to earn service credit after such period.

You also indicated that you were going to provide your attorney with this information.

If your attorney would like to give me a call (850-488-9623), I will be glad to discuss this issue with him or her.

I hope this information will help clarify this issue for you.

12. On January 7, 2011, Respondent wrote Petitioner and informed her of the following:

Dear Ms. Leonard:

This will respond to your request for retirement credit for the period of time you received Workers' Compensation (WC), that was submitted to the State Board of Administration (SBA). Because this is an issue of creditable service, the SBA forwarded the request to the Division of Retirement since the Division is the proper agency to address such an issue.

Information you and your agency provided indicates that you were out on WC October 2006 through September 2007 at which time your employer, the DeSoto County Sheriff's Office, sent you a letter dated September 6, 2007 requiring you to return to work within two weeks or be terminated from employment.

The Division has not received any documentation from the Workers' Compensation carrier to substantiate the actual periods of WC or the date maximum medical improvement was reached. Therefore, this letter cannot address periods of possible eligibility for retirement credit but will address whether your employment from September 2007 met the return to work requirement for such eligibility.

The Sherriff's [sic] office provided us with documentation of your time worked in September, October, November, and December 2007. During these months, you worked intermittently and did not have a full

> calendar month of active employment before your employment was terminated by your employer on December 12, 2007.
>
> * * *
>
> You did not consistently work during any of those calendar months until your employment was terminated by your employer on December 12, 2007. Therefore, starting in September 2007, you did not meet the return to actively performing service requirement of the above provision to establish eligibility for possible retirement credit.

13. Petitioner's failure to return to active employment status was the only reason given by the agency when denying Petitioner's claim.

14. Andy Snuggs has worked as a benefits administrator for the Division for approximately the last 20 years. The Division offered, and the undersigned accepted, Mr. Snuggs as an expert in matters related to the Act.

15. Mr. Snuggs testified that in the exercise of the agency's discretion, the agency defines the phrase "active employment," as it relates to section 121.125, to mean that an employee must work each scheduled work day in a regularly established position for at least one calendar month following the employee's return to work and that no allowances are made for any absences, excused or otherwise. Mr. Snuggs did not offer any testimony explaining why the Division selected the particular definition that it did for the term "active."

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2011).

17. Petitioner bears the burden of establishing by a preponderance of the evidence her entitlement to retirement benefits. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Espinoza v. Dep't of Bus. & Prof'l Reg., 739 So. 2d 1250, 1250 (Fla. 3d DCA 1999); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); and § 120.57(1)(j)("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. . . .").

18. "A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' or evidence that 'more likely than not' tends to prove a certain proposition." Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

19. Chapter 121, Florida Statutes, contains the "Florida Retirement System Act (Act)." § 121.011(1).

20. Section 121.1905 "create[s] the Division of Retirement within the Department of Management Services," and it further provides that "the mission of the Division of Retirement is to provide quality and cost-effective retirement services as

measured by member satisfaction and by comparison with administrative costs of comparable retirement systems."

21. The issue that the Division must resolve in the instant case is whether under section 121.125, Petitioner was actively employed with the Sheriff's Office for at least one calendar month between September 12, 2007, and December 12, 2007.

22. The Division argues that because Petitioner did not attain perfect attendance during either of the months following her return to employment on September 12, 2007, she failed to return to active employment status for the requisite one calendar month as required by section 121.125.[2/]

23. Section 121.125 provides, in part, as follows:

> A member of the retirement system created by this chapter who has been eligible or becomes eligible to receive workers' compensation payments for an injury or illness occurring during his or her employment while a member of any state retirement system shall, upon return to active employment with a covered employer for 1 calendar month . . ., receive full retirement credit for the period prior to such return to active employment or disability retirement for which the workers' compensation payments were received. (emphasis added).

24. Florida Administrative Code Rule 60S-2.012 provides as follows:

> A member who has been eligible or becomes eligible to receive temporary total or

> temporary partial Workers' Compensation payments for an injury or illness occurring during his employment as a member of any state-administered retirement system shall receive retirement credit for such period, not to extend beyond the earlier of the date the member reaches maximum medical improvement as defined in Section 440.02(8), F.S., or terminates employment as provided in Rule 60S-6.001, F.A.C., in accordance with the following provisions:
>
> (1) A member must return to active employment immediately upon recovery, for at least one calendar month, performing service in a regularly established position with any participating employer, or, effective July 1, 1990, be approved for disability retirement as provided in Rule 60S-4.007, F.A.C. The Division may require evidence of the member's bona fide return to work and medical evidence of his ability to return to work.
>
> * * *
>
> (3) Effective July 1, 1990, a member shall receive full retirement credit for the period during which he received Workers' Compensation payments. (emphasis added).

25. Neither the Act, nor the Division's promulgated rules, provide a definition of the term "active." Rule 60S-2.012, which is the Division's interpretation of section 121.125, is simply a near verbatim recitation of the Legislature's statutory mandate.

26. It is well established that an agency interpretation of a statute that places upon the statute an interpretation that is not readily apparent from its literal reading, or in and of

itself purports to create rights or require compliance or otherwise has the direct and consistent effect of law, is an unadopted rule. St. Francis Hospital, Inc. v. Dept. of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

27. Mr. Snuggs, the Division's expert, testified that the Division, with respect to section 121.125, interprets the term "active" as being synonymous with perfect attendance. This is an interpretation of the term active that is not readily apparent from a literal reading of section 121.125.

28. As stated by the First District Court of Appeal,

> [w]hen an agency seeks to validate agency action based upon a policy that is not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action.

St. Francis Hospital at 1354 (citing E.M. Watkins & Co. v. Bd. of Regents, 414 So. 2d 583, 588 (Fla. 1st DCA 1982)), (citing Fla. Cities Water Co. v. Fla. Pub. Serv. Comm'n, 384 So. 2d 1280 (Fla. 1980)); Annheiser-Busch, Inc. v. Dep't of Bus. & Prof'l Reg. 393 So. 2d 1177 (Fla. 1st DCA 1981); and McDonald v. Dep't of Banking & Fin., 346 So. 2d 569 (Fla. 1st DCA 1977). Compare Meridian, Inc. v. Dep't of HRS, 548 So. 2d 1169 (Fla. 1st DCA 1989)(policy recorded in discoverable precedents).

29. Although Mr. Snuggs testified that the Division adopted the one-month perfect attendance requirement pursuant to the exercise of its discretion, he failed to expose and elucidate any rationale explaining why the Division embraced this particular definition of the term "active," as it relates to section 121.125.

30. Section 121.021(38) provides, in relevant part, as follows:

> "Continuous service" means creditable service as a member, beginning with the first day of employment with an employer covered under a state-administered retirement system consolidated herein and continuing for as long as the member remains in an employer-employee relationship with an employer covered under this chapter. An absence of 1 calendar month or more from an employer's payroll shall be considered a break in continuous service, except for periods of absence during which an employer-employee relationship continues to exist and such period of absence is creditable under this chapter or under one of the existing systems consolidated herein. (emphasis added).

The Act does not define what constitutes a break in continuous service.

31. Rule 60S-6.001 sets forth the Division's interpretation of what constitutes a break in service under the Act. Subsection (11) of the rule provides as follows:

> BREAK IN SERVICE-–Means an interruption in the continuous service of a member where any of the following occurs:

> (a) The member terminates his employment in a position covered by the Florida Retirement System or any existing retirement system and receives a refund of the accumulated contributions he has made, even though the member later claims prior service and repays the refunded contributions.
>
> (b) The member has an absence of one calendar month or more from an employer's payroll except for periods of absence where an employer-employee relationship continues to exist and such absence is creditable under the Florida Retirement System or one of the existing systems. (emphasis added).

32. It is undisputed that Petitioner returned to work for the Sheriff's Office on September 12, 2007, and received salary wages, though non-continuously, from that time through December 12, 2007, the date of her termination. In accordance with section 121.021(17)(b) and as confirmed by Mr. Cherry in his correspondence to Petitioner of April 7, 2008, Petitioner earned retirement credit for the months of September, October, November, and December 2007, because she was on the Sheriff's Office payroll for each of these months. Clearly, in order to have received retirement credit for the months of September, October, November, and December 2007, Petitioner had to have been an employee that was in continuous service status. As such, Petitioner's date of return to continuous service status coincides with the date that she resumed being an "active" employee. Accordingly, Petitioner, as contemplated by section

121.125, returned to "active" employment with the Sheriff's Office on September 12, 2007.

33. Given that Petitioner returned to active employment on September 12, 2007, the remaining issue is whether Petitioner's intermittent visits to her authorized workers' compensation physician, resulting in absences from work, constitute a break in service.

34. In his correspondence of April 7, 2008, to Petitioner, Mr. Cherry, as to section 121.125, advised that "[t]he law does not provide for . . . a combination of active and non-active employment during the one calendar month." As applied to the instant case, this statement by Mr. Cherry is correct in theory, but incorrect in application.

35. Section 121.021(38) and rule 60S-6.001(11), in relevant part, make it clear that an employee, like Petitioner, who is on continuous service status, suffers a break in service if, and only if, the employee either terminates employment or is absent for one calendar month or more from an employer's payroll. It is undisputed that Petitioner was not absent from her employer's payroll during the entirety of any month between September 12, 2007, and December 12, 2007; and she certainly was not terminated during this time-frame. Accordingly, Petitioner did not experience a break in service between September 12,

2007, and December 12, 2007, and, therefore, remained an active employee until the date of her termination.

36. As applied to the instant case, neither the plain language of the Act, nor the plain language of rule 60S-6.001(11), can reasonably be interpreted in such a way so as to expand the definition of "break in service" to include intermittent absences from work to attend appointments with an authorized workers' compensation physician.

37. The Division's indirect attempt to expand the definition of "break in service" to include absences from work that are shorter in duration than what is set forth in the Act and in rule 60S-6.001(11), constitutes an unadopted rule. Section 120.52(20) defines an unadopted rule as "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of section 120.54." Statutorily "an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule." § 120.57(1)(e).

38. The Division has not demonstrated entitlement to any of the provisions listed in section 120.57(1)(e) that would authorize it to rely upon the unadopted rule as a basis for denying Petitioner's claim.

39. Petitioner has met her burden and has proved that she was actively employed by the Sheriff's Office for at least one

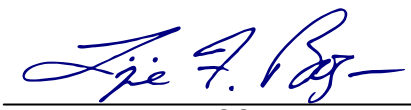
calendar month following her return to work on September 12, 2007. Therefore, the Division should proceed with securing from the workers' compensation carrier appropriate documentation to substantiate Petitioner's absence from work for the period October 2006 through August 2007.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that Respondent, Department of Management Services, Division of Retirement, enter a final order determining that Petitioner, Irene Leonard, met the return-to-work requirements necessary to receive retirement credit for workers' compensation payment periods.

DONE AND ENTERED this 8th day of September, 2011, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of September, 2011.

ENDNOTES

[1/] All future references to Florida Statutes will be to 2007, unless otherwise indicated.

[2/] In Mitchell v. Department of Management Services, Division of Retirement, Case No. 03-0417 (Fla. DOAH March 31, 2003; Fla. DMS May 22, 2003), the Division defined "active" employment as meaning "physically working and earning salary." This definition differs substantially from the definition offered by the Division in the instant case.

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.