STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

JOHN NELSON,

Petitioner,

Final Order No. DMS – 12-0025

vs.

DOAH Case No. 11-4343
OGC Case No. 11-21448

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

FINAL ORDER

PRELIMINARY STATEMENT

After being formally notified of the Division of Retirement's ("Division") intent to seek repayment of Petitioner's distribution from his Deferred Retirement Option Program account and subsequent monthly retirement benefits, Petitioner timely filed a petition for hearing and the case was referred to the Division of Administrative Hearings ("DOAH"). Pursuant to notice, DOAH, by its duly designated administrative law judge, Barbara J. Staros, held a formal hearing in the above-styled case on January 11, 2012, in Tallahassee, Florida.

At the formal proceeding, Petitioner testified on his own behalf and presented the testimony of Tyler McNeill, the Chief Deputy Clerk of Jefferson County. He also offered seven exhibits which were admitted into evidence. Respondent offered the testimony of Ira Gaines, a Division Benefits Administrator, and offered four exhibits which were admitted into evidence.

The parties filed proposed recommended orders and a recommended order was issued March 8, 2012, which is incorporated by reference into this final order. No exceptions to the recommended order were filed by either party. A transcript of the hearing and all exhibits have been reviewed in the preparation of this final order.

STATEMENT OF THE ISSUE

Whether the Division's decision to deem Petitioner in violation of the termination requirements set forth in Chapter 121 of the Florida Statutes, and seek repayment of Petitioner's distribution from his Deferred Retirement Option Program account and subsequent monthly retirement benefits received, was consistent with Florida law.

STANDARD OF REVIEW

Subsection 120.57(1)(l), Florida Statutes, 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 on 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 statutes or rules over which the Legislature has provided the agency administrative authority. Hoffman v. State, Dep't of Mgmt. Servs., Div. of Ret., 964 So. 2d 163, 165 (Fla. 1st DCA 2007); Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-1142 (Fla. 2d DCA 2001); Barfield v. Dep't 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 Bd. of Optometry v. Fla. Soc'y of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1998).

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the findings of fact set forth in the recommended order.

CONCLUSIONS OF LAW

The Department accepts the conclusions of law set forth in the recommended order, which are incorporated herein by reference, with the exception of conclusions 25, 29, 32 and 38 which are hereby modified in part as provided below. The conclusions offered in the recommended order lead to an incongruous result which neither applies the text of the entire relevant statutes nor follows the statutory framework set forth in Chapter 121 of the Florida Statutes.

Since these conclusions of law interpret statutes implemented and enforced by the Department and address matters within this agency's substantive jurisdiction, the conclusions can be substituted by a conclusion that is "as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. The Department finds that the following modifications are more reasonable than those set forth in the recommended order:

Paragraph 25 – This paragraph, with the exception of the footnote, is rejected as an incorrect statement of law and is substituted with the following:

> At the time Petitioner and Mr. McNeill initiated the telephone call to Mr. Gaines, Petitioner was already an officer or employee as defined in section 121.021(10) and rule 60S-6.001(4), Florida Administrative Code. Although personnel papers awaited completion and Petitioner had not received cash in hand, under Florida law, his paid term as a county commissioner had already commenced. See § 100.041(2)(a), Fla. Stat. (2010). Therefore, at the time Petitioner spoke with Mr. Gaines, Petitioner already had earned the prospective receipt of payment for his employment as a commissioner.
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> To hold otherwise would fail to account for the statutory scheme in which the term "employee" is used. If the definition of "employee" was construed to exclude individuals who have been hired by a FRS employing agency in a paid

position and began working, but have not completed all necessary paperwork, it would deprive new employees who have been coming to work and doing their job from receiving FRS benefits. [1] A FRS member cannot be denied these benefits after they have agreed to paid employment and began serving in their position simply because all the necessary paperwork had not been completed. Entitlement to payment is sufficient. See City of Crystal River v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 03-0324 (DOAH 11/25/03) (finding that failure to complete a mandatory employment form did not impact a person's "employee" status).

Paragraph 29 - The last sentence of this paragraph is rejected as an incorrect statement of law. This sentence reads, "It [121.091(13)(c)5.d., Florida Statutes] does not describe, nor mandate, forfeiture of DROP monies by the DROP participant who becomes reemployed by a FRS employer." Although this statute does not use the exact term "forfeiture," this is incorrect for two reasons: (i) the statute mandates the return of retirement benefits received if, by their own actions, a member voids their DROP; and (ii) the requirement to repay benefits received when a member fails to terminate is not a "forfeiture" under the law, but rather a function of the "voiding" of their DROP.

First, section 121.091(13)(c)5.d. provides for the repayment of retirement benefits received back to the FRS trust fund when a member fails to terminate as required by statute. This section does this by directing that "[a] DROP participant who fails to terminate all employment relationships as provided in s. 121.021(39) shall be deemed not retired, and the DROP election is null and void." [Emphases added.] In other words, if you fail to terminate as provided by statute, you are treated as if you never retired and never participated in the DROP. Instead, the person is an active member of the FRS, earning service credit for their entire period of employment which will lead to a higher future monthly retirement benefit.

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[1] Individuals who are "employees" of FRS participating agencies are entitled to certain benefits, including: the receipt of disability retirement benefits if they are injured in a work-related accident and receipt of service credit for a month in which they are paid. §§ 121.011(3), 121.021(17), Fla. Stat. (2010). The FRS also allows member's beneficiaries to receive death benefits in the event the person dies before retiring. § 121.091(7), Fla. Stat. (2010).

It is already established that Petitioner failed to terminate as provided in section 121.021(39). Therefore, Petitioner becomes a continuously active FRS member based on his failure to terminate. Since Petitioner is deemed by statute to have never retired, it is only logical that the statute requires Petitioner to repay any retirement benefits received, including DROP benefits. Holding otherwise would render the statutory language which plainly deems the Petitioner's DROP election void meaningless. Thus, this result cannot be adopted by the Department. See State ex rel. School Bd. of Martin County v. Dep't of Educ., 317 So. 2d 68 (Fla. 1975).

Holding as the recommended order suggests would also allow members whose DROP is "null and void" to keep their DROP money and retirement benefits and continue to work and earn retirement service credit. In effect, there would be two payments for the voided DROP time frame - one to the DROP account and one to fund the member's months of earned service credit. Potentially, the member could even participate in the DROP a second time. This is clearly not what the Legislature intended.

Second, the recommended order characterizes the repayment of retirement benefits as a "forfeiture" of retirement benefits. This is incorrect. The Florida Constitution describes a "forfeiture" as it relates to retirement benefits as the loss of rights and privileges under a public retirement system that occurs when an employee is convicted of a felony involving a breach of the public trust. Fla. Const. art II, § 8(d). This constitutional provision was codified in both chapters 112 and 121 of the Florida Statutes, and refers to a member's loss of all rights to participate in the system.[2] §§ 112.3173, 121.091(5)(f), Fla. Stat. Petitioner has not been

[2] There are some instances where these chapters address a member "forfeiting" a benefit that does not directly relate to a criminal conviction. However, in these instances, the member has still lost his or her entire right to participate in the plan.

convicted of a felony, and he has not lost his right to participate in the FRS. Rather, Petitioner will continue to participate in the FRS earning additional service credit and increasing his monthly retirement benefit. §§ 121.021(17), (24); 121.091(1), Fla. Stat. Therefore, he has not "forfeited" his retirement - he has simply not retired and is not eligible to receive a retirement benefit until he does.

Paragraph 32 - This paragraph is modified to clarify that Petitioner has not "forfeited" his retirement benefits. The following language is added to the end of the existing paragraph:

> However, Petitioner has not forfeited his retirement benefit within the meaning of the relevant statutes. Instead, Petitioner will continue participation in the FRS. Because of his continued participation, he will earn additional service credit and increase his monthly retirement benefit for the entire period he was employed with both DFS and Jefferson County. §§ 121.021(17), (24); 121.091(1), Fla. Stat. When Petitioner ultimately retires, his monthly retirement benefit will be substantially higher than it would have been had he retired in 2005 (as originally intended). Furthermore, section 121.091(13)(c)5.d. clearly requires repayment – a person who has not retired cannot receive a retirement benefit.

Paragraph 38 - The first sentence of this paragraph is accepted. Since section 121.091(13)(c)5.d. does not require Petitioner to lose the ability to participate in the FRS, this section does not contain a "forfeiture" provision. Therefore, the second sentence is inapplicable and rejected.

Respondent also rejects the last sentence of this paragraph as an incorrect statement of law. This sentence states that "because Petitioner was reemployed after July 1, 2010, he is not eligible to reenroll in FRS in the Elected Officer's Class of FRS." This sentence attempts to apply the law set forth in sections 121.053(3) and 121.122(2) regarding renewed membership in the FRS to this case. However, these statutes do not apply to someone who has voided their own DROP election by reemployment with an FRS employer.

ORDER

Based on the foregoing, it is hereby ORDERED AND DIRECTED that:

1. Petitioner repay retirement benefits in the amount of $192,921.85 to the Division of Retirement;
2. Petitioner remain an active member of the Florida Retirement System, with past accruals of all relevant benefits associated with active membership.

DONE AND ORDERED this 14th day of June, 2012, in Tallahassee, Leon County, Florida.

Scott Stewart
Interim Secretary
Department of Management Services
4050 Esplanade Way
Tallahassee, Fl. 32399-0950
(850) 488-2786

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 6th day of June, 2012.

Debbie Shoup
Clerk
Department of Management Services

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