

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN R. NELSON, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 11-4343  
 )  
 DEPARTMENT OF MANAGEMENT )  
 SERVICES, DIVISION )  
 OF RETIREMENT, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held pursuant to notice, on January 11, 2012, in Tallahassee, Florida, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Amy W. Schrader, Esquire  
Gray Robinson, P.A.  
Post Office Box 11189  
Tallahassee, Florida 32302

For Respondent: Elizabeth Regina Stevens, Esquire  
Courtney Strickland Brogan, Esquire  
Department of Management Services  
Office of the General Counsel  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether Petitioner must forfeit and repay distributions he received from the Deferred Retirement Option Program and subsequent monthly retirement benefits received as a consequence of his election to the position of County Commissioner of Jefferson County within six months of terminating state employment.

PRELIMINARY STATEMENT

By letter dated February 1, 2011, Respondent, the Division of Retirement (Division) advised Petitioner John R. Nelson that the Division intended to void his participation in the Deferred Retirement Option Program. The letter further instructed Petitioner that he must repay all retirement benefits received, including the DROP accumulation, in the amount of \$192,921.85. The letter relied upon sections 121.021(39)(b)2. and 121.091(13)(c)5.d, Florida Statutes, as authority. The letter afforded Petitioner a point of entry to challenge Respondent's decision.

Petitioner disputed Respondent's decision and timely requested an administrative hearing. The request for hearing was forwarded to the Division of Administrative Hearings on or about August 24, 2011. A formal hearing was scheduled for October 26, 2011. The Division filed an unopposed Motion for Continuance, which was granted. The hearing was rescheduled for

January 11, 2012. Petitioner filed a Motion for Leave to File Amended Petition for Formal Administrative Hearing, which was granted. The parties filed unilateral pre-hearing statements.

At hearing, Petitioner testified on his own behalf and offered the testimony of Tyler McNeill, John Nelson and Ira Gaines. Petitioner's Exhibits numbered 1 through 7 were admitted into evidence. Respondent presented the testimony of one witness, Ira Gaines. Respondent's Exhibits numbered 1 through 4 were admitted into evidence.

The hearing was not transcribed. The parties timely filed Proposed Recommended Orders, which have been duly considered in the preparation of this Recommended Order.

References to the Florida Statutes will be to the 2010 version unless otherwise noted.

#### FINDINGS OF FACT

1. The Division of Retirement (Division) is, and was at the times material to this case, the state agency charged with the responsibility of administering the Florida Retirement System (FRS).

2. Petitioner, John Nelson, was employed by the Department of Financial Services (DFS) from October 1977 through July 31, 2010. For the last five years of his employment with DFS, Petitioner participated in the Deferred Retirement Option Program (DROP).

3. Prior to ending his DROP participation, Petitioner completed a DROP Termination Notification Form (DP-TERM Rev. 06/06) on April 23, 2010, confirming he would terminate employment on July 31, 2010. The DROP Termination Notification was also signed by a representative from FRS confirming Petitioner's employment termination date and reads in pertinent part:

I understand that I cannot work for any Florida Retirement System (FRS) covered employer during the calendar month following my DROP termination date or my DROP participation will be null and void. If I fail to meet this requirement, I will forfeit my accumulated DROP benefit including interest. I also understand that I may not be reemployed by any FRS employer in any capacity including part-time, temporary, other personal services (OPS) or non-Division approved contractual services during the calendar month immediately following my DROP termination date. If I fail to meet this requirement, I will forfeit my accumulated DROP benefit, including interest retroactive to me enrollment date in the DROP.

4. The above-referenced version of the DP-TERM (Revised 6/06) has been incorporated by reference into Florida Administrative Code Rule 60S-9.001(ee).

5. Due to significant statutory changes made by the Legislature, the Division sent to Petitioner a second DROP Termination Notification, (Form DP-TERM revised 04/10) which he signed on June 9, 2010. The wording in the revised form

reflected statutory changes which would take effect July 1, 2010. The revised form states in pertinent part:

If your DROP termination date is on or after July 1, 2010: Your termination requirement means you cannot remain employed or become re-employed with any Florida Retirement System (FRS) covered employer during the FIRST SIX calendar months following your DROP termination date. This includes but is not limited to: Part-time work, temporary work, other personal services (OPS), substitute teaching or non-Division approved contractual services. During the 7th-12th calendar months following your DROP termination date, you may return to work for a participating FRS employer but must suspend your retirement benefit for any of these months your[sic] are employed. There are no reemployment exceptions during the reemployment limitation period. After the 12th calendar month following your DROP termination date, there are no employment restrictions.

If you fail to meet the termination requirements noted above, you will void (cancel) your retirement and DROP participation, you must repay all retirement benefits received including your DROP accumulation, and you must apply to establish a future retirement date. If you void your retirement your employer will be responsible for making retroactive retirement contributions and you will be awarded service credit for the period during which you were in DROP through your new termination date. Your eligibility for DROP participation will be determined by your future retirement date and you may lose your eligibility to participate in DROP. (emphasis added).

6. The revised form DP-TERM (Revised 04/10) has not yet been adopted as a rule. At the time of hearing, rulemaking had been initiated.

7. Petitioner terminated his employment with DFS on the agreed termination date of July 31, 2010, and was no longer an employee of DFS after that date.

8. Sometime between July 31, 2010, and November 2010, Petitioner was paid his accumulated DROP monies in the amount of \$181,635.09, in the form of a direct rollover into an eligible retirement account. Petitioner was also paid monthly retirement benefits for the months of August through November 2010, in the total amount of \$11,286.76. The Division deactivated Petitioner's monthly retirement benefits in December 2011.

9. The total amount of retirement benefits paid to Petitioner after terminating employment with DFS is \$191,921.85, which the Division seeks to recover.

10. In April of 2010, at the urging of community members, Petitioner registered to run for public office in Jefferson County, Florida. He won the election and was sworn into office as a Jefferson County Commissioner on November 16, 2010.

11. Tyler McNeill is the Chief Deputy Clerk and Human Resources Officer for Jefferson County. Following Petitioner's election as a County Commissioner, Mr. McNeill began to process a small packet of employment-related documents which he provides

to elected officials. Mr. McNeill went to Petitioner's home on a Sunday evening to get the necessary papers signed.

12. Prior to this meeting, Petitioner was unaware that Jefferson County participates in the FRS. Petitioner described his reaction to learning this as "shocking." When Mr. McNeill and Petitioner got to the FRS form, Petitioner did not want to sign it and informed Mr. McNeill of that. Mr. McNeill described Petitioner as appearing physically ill, shocked, and "so upset" upon learning that the County was an FRS participating employer.

13. On November 22, 2010, Petitioner and Mr. McNeill called Ira Gaines, FRS Benefits Administrator, using a speakerphone. At the time they placed this call, Petitioner had not yet signed the employment documents supplied to him by Mr. McNeill, and Petitioner informed Mr. Gaines of this.

14. During this conversation, Petitioner expressed his willingness to resign from office and refuse to accept payment from the County for his newly elected position. According to Mr. McNeill, Petitioner was not yet eligible to receive compensation from the County because the employment papers had not yet been processed. Mr. McNeill testified that he would have been able to discard the documents.

15. During this telephone conversation, Mr. Gaines advised that Petitioner was legally a person employed by the County by virtue of his being sworn into office on November 16, 2010.

Mr. Gaines equated bring sworn into office as being an employee. At hearing, Mr. Gaines reiterated his position: that he did not know any way Petitioner could not be enrolled in FRS when occupying an elected position.

16. As a result of this telephone conversation with Mr. Gaines and in reliance on Mr. Gaines' advice, Mr. McNeill processed Petitioner's employment papers including the FRS reenrollment form. Mr. Gaines then began receiving salary payments for being a county commissioner.

17. On December 6, 2010, Mr. Gaines sent a letter to Petitioner stating that his election to the position of County Commissioner had voided his DROP participation, and consequently, Petitioner would have to repay \$181,635.09 for the DROP payment, and \$11,286.76 in monthly retirement benefits. The letter further informed that Petitioner will continue to earn credit as an elected official in the Elected Officer's Class of FRS membership and that Petitioner's retirement account would be adjusted to reflect service from August 2005 through July 2010 (his DROP period) which he estimated would increase Petitioner's retirement benefits by \$1,200 per month.

18. In response to the December 6, 2010 letter, Petitioner appealed the voiding of his DROP participation. By letter dated February 1, 2011, the Division denied the request. The



February 1, 2011 letter also informed Petitioner of his right to request a hearing, which gave rise to this proceeding.

CONCLUSIONS OF LAW

19. 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).

20. This proceeding is de novo. § 120.57(1)(k), Fla. Stat. (2011).

21. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue unless the burden is established otherwise by statute. Young v. State, Dep't of Cmty. Aff., 567 So. 2d 2 (Fla. 3rd DCA 1990); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). The Division, as the party asserting that Petitioner's benefits be repaid, has the burden of proof in this proceeding.

22. The Division is the state agency responsible for administering the FRS. §§ 121.025 and 121.031, Fla. Stat.

23. The 2009 and 2010 Legislatures enacted substantial amendments to chapter 121, Florida Statutes, the Florida Retirement System Act. Section 121.021, as amended, reads in pertinent part as follows:

(10) "Employer" means any agency, branch, department, . . . or any county agency, branch, department, board. . . which participates in the system for the benefit of certain of its employees. . .

(11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position. . . .

\* \* \*

(39) (a) "Termination" occurs, except as provided in paragraph (b), when a member ceases all employment relationships with an employer, however:

\* \* \*

2. For retirements effective on or after July 1, 2010, if a member is employed by any such employer within the next six calendar months, termination shall be deemed not to have occurred. . . .

(b) "Termination" for a member electing to participate in the Deferred Retirement Option Program occurs when the program participant ceases all employment relationships with an employer in accordance with s.121.091(13), however:

\* \* \*

2. For termination dates occurring on or after July 1, 2010, if the participant becomes employed by any such employer within the next 6 calendar months, termination will be deemed not to have occurred, except as provided in s.121.091(13) (b) 4.c.

24. Florida Administrative Code Rule 60S-6.001(40) defines "officer or employee" as any person receiving compensation for work performed in a regularly established position with any agency, including county agency board, which participates in the FRS.

25. At the time Petitioner and Mr. McNeill initiated the telephone call to Mr. Gaines, Petitioner was not yet an officer or employee as defined in section 121.021(10) or rule 60S-6.001(40), as he had not received compensation and was willing to forego compensation. However, following the conversation with Mr. Gaines, and in reliance thereon, Petitioner received compensation for his position as County Commissioner and became an officer or employee as contemplated by those provisions.<sup>1/</sup>

26. Section 121.091 reads in pertinent part as follows:

(9) EMPLOYMENT AFTER RETIREMENT;  
LIMITATION.-

\* \* \*

(c) Any person whose retirement is effective on or after July 1, 2010, or whose participation in the Deferred Retirement Option Program terminates after July 1, 2010, who is retired under this chapter, except under the disability retirement provisions of subsection (4) or as provided in s. 121.053, may be reemployed by an employer that participates in a state-administered retirement system and receive retirement benefits and compensation from that employer. However, a person may not be reemployed by an employer participating in the Florida Retirement System before meeting the definition of termination in s. 121.021 and may not receive both a salary from the employer and retirement benefits for 6 calendar months after meeting the definition of termination. However, a DROP participant shall continue employment and receive a salary during the period of participation in the Deferred Retirement Option Program, as provided in subsection (13).

\* \* \*

(13) (c) Benefits payable under DROP.-

\* \* \*

5. At the conclusion of the participant's DROP, the division shall distribute the participant's total accumulated DROP benefits, subject to the following:

a. The division shall receive verification from the participant's employer or employers that the participant has terminated all employment relationships as provided in s. 121.021(39).

\* \* \*

d. A DROP participant who fails to terminate all employment relationships as provided in s. 121.021(39) shall be deemed as not retired, and the DROP election is null and void. Florida Retirement System membership shall be reestablished retroactively to the date of the commencement of DROP, and each employer with whom the participant continues employment must pay to the Florida Retirement System Trust Fund the difference between the DROP contributions paid in paragraph (i) and the contributions required for the applicable Florida Retirement System class of membership during the period the member participated in DROP, plus 6.5 percent interest compounded annually.

6. The retirement benefits of any DROP participant who terminates all employment relationships as provided in s. 121.021(39) but is reemployed in violation of the reemployment provisions of subsection (9) shall be suspended during those months in which the retiree is in violation. Any retiree in violation of this subparagraph and any employer that employs or appoints such person without notifying the Division

of Retirement to suspend retirement benefits are jointly and severally liable for any benefits paid during the reemployment limitation period. The employer must have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Any retirement benefits received by a retiree while employed in violation of the reemployment limitations must be repaid to the Florida Retirement System Trust Fund, and his or her retirement benefits shall remain suspended until payment is made. Benefits suspended beyond the end of the reemployment limitation period apply toward repayment of benefits received in violation of the reemployment limitation. (emphasis added).

27. Petitioner argues that section 121.091(13)(c)6. is applicable whereas FRS argues that section 121.091(13)(c)5.d. is applicable to Petitioner. FRS further asserts in its Proposed Recommended Order that section 121.091(13)(c)6. applies only to FRS members who have met the six-month termination requirement set forth in section 121.021(39) and return to work in the following six months. Petitioner, however, argues that section 121.091(13)(c)5.d. is intended only to apply where termination of employment relationships, and the corresponding payment of DROP benefits, is never made. Petitioner's situation does not neatly fit into either statutory provision, so an analysis of each provision is in order.

28. First, the definition of "termination" in section 121.021(39)(b)2. states that for termination occurring on or after July 1, 2010, if the participant becomes employed by any such employer within the next six calendar months, termination shall be deemed not to have occurred.

29. Section 121.091(13)(c)5.d. (asserted by FRS as controlling) states that a DROP participant who fails to terminate all employment relationships as provided in section 121.021(39) (which defines termination) shall be deemed as not retired, and the DROP election is "null and void." This part of the statutory language appears to fit Petitioner's circumstances. However, the section continues by describing a method of payment by the employer, not the employee, to the Florida Retirement System Trust Fund that does not fit Petitioner's situation and that does not describe what is being sought by the Division. That is, section 121.091(13)(c)5. d. requires "each employer with whom the participant continues employment" to pay the difference between the DROP contributions paid in paragraph (i) (which deals with "contributions" from the employer) for retroactive reinstatement to FRS. It does not describe, nor mandate, forfeiture of DROP monies by the DROP participant who becomes reemployed by an FRS employer.

30. Section 121.091(13)(c)6. (asserted by Petitioner as controlling) addresses a DROP participant who terminates all employment relationships as provided in s. 121.021(39) but is reemployed in violation of the reemployment provisions of subsection (9) (which provides limitations to reemployment and prohibits the person from receiving both a salary and retirement benefits for six calendar months after meeting the definition of termination), and requires that the person's retirement benefits be suspended "during those months in which the retiree is in violation." Petitioner argues that Petitioner fits within this provision because he terminated all relationships with his original employer, DFS, and became reemployed by Jefferson County. Respondent asserts this provision only relates to those employees who are reemployed after the six months' prohibition found in 121.039(39) but before 12 months have passed since retirement.

31. While the interrelationship of these statutes is confusing, Respondent's argument that section 121.091(13)5.d. is controlling is more persuasive. This is because Petitioner, although having terminated employment from DFS, did not meet the definition of "termination" in 121.021(39) because he became employed by "any such employer" within six calendar months of terminating employment from FRS. Therefore, "termination will be deemed to have not occurred." § 121.021(39)(b)2., Fla. Stat.

32. However, Petitioner argues in the alternative that, even if section 121.091(13)(c)5.d. is controlling, it does not contain forfeiture provisions. Petitioner notes that the same subsection contains language requiring forfeiture of retirement benefits for those employees who commit specified felonies while employed. § 121.091(13)(j), Fla. Stat. Petitioner's argument in this regard is well taken. "Statutes imposing forfeiture will be strictly construed in a manner such as to avoid the forfeiture and will be liberally construed so as to avoid and relieve from forfeiture." Williams v. Christian, 335 So. 2d 358, (citing Ireland v. Thomas, 324 So. 2d 146,147 (Fla. 1st DCA 1976) (holding that where[t]he statute does not clearly require a forfeiture or irremediable penalty[n]one should be supplied by unnecessary implication.").

33. In his Amended Petition for Formal Administrative Hearing, Petitioner asserts that FRS' intended action is impermissibly based on an unadopted rule. Section 120.57(1)(e), Florida Statutes, prohibits an agency or an administrative law judge from basing agency action that determines the substantial interests of a party on an unadopted rule. However, it is unnecessary to address Petitioner's argument in this regard as neither the content of the new form, nor the old form to the extent that it goes beyond the language of the controlling statute, forms the basis of the determination of Petitioner's



interests. While the second DP-TERM form (revised 04/10) informed Petitioner of FRS' position, the agency's notice letter dated February 1, 2011, which forms the basis of this proceeding, did not reference the form as authority for its decision. The notice letter referenced statutes as authority and the determination made herein is based upon the controlling statutes as described above.

34. Finally, Petitioner argues that Petitioner did not violate termination or reemployment requirements because he is an elected official. Section 121.053 reads in pertinent part as follows:

Participation in the Elected Officers' Class  
for retired members.-

(3) On or after July 1, 2010:

(a) A retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System.

(b) An elected officer who is elected or appointed to an elective office and is participating in the Deferred Retirement Option Program is subject to termination as defined in s.121.021 upon completion of his or her DROP participation period. An elected official may defer termination as provided in subsection (7).

\* \* \*

(7) A member who is elected or appointed to an elective office and who is participating in the Deferred Retirement Option Program is not subject to termination as defined in s. 121.021, or reemployment limitations as provided in s. 121.091(9), until the end of his or her current term of office or, if the officer is consecutively elected or reelected to an elective office eligible for coverage under the Florida Retirement System, until he or she no longer holds an elective office, as follows:

\* \* \*

(a) At the end of the 60-month DROP period:

1. The officer's DROP account may not accrue additional monthly benefits, but does continue to earn interest as provided in s. 121.091(13). However, an officer whose DROP participation begins on or after July 1, 2010, may not continue to earn such interest.

2. Retirement contributions are not required of the employer of the elected officer and additional retirement credit may not be earned under the Florida Retirement System.

(b) An elected officer may voluntarily terminate his or her elective office at any time and receive his or her DROP proceeds. However, until termination occurs, an elected officer whose termination limitations are extended by this section is ineligible for renewed membership in the system and may not receive pension payments, DROP lump sum payments, or any other state payment other than the statutorily determined salary, travel, and per diem for the elective office.

(c) Upon termination, the officer shall receive his or her accumulated DROP account, plus interest, and shall accrue and commence receiving monthly retirement benefits, which must be paid on a prospective basis only. (emphasis supplied)

35. This case appears to be a case of first impression in this regard. It is clear from reading section 121.053 that the Legislature placed elected officials in a different category from other government employees regarding termination requirements. However, the language of section 121.053 does not appear to fit Petitioner's circumstances.<sup>2/</sup> This exemption appears to apply to a member who is an elected officer and who is participating in DROP at the same time.

36. Section 121.122 states that a retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership. This is consistent with section 121.053(3)(a), which also prohibits a retiree of a state-administered retirement system who is elected for the first time on or after July 1, 2010, from reenrolling in the FRS.

37. This statutory language is relevant in that the intended agency action of FRS, in addition to seeking reimbursement of DROP monies, notified Petitioner that he would continue to earn retirement credit as an elected official in the Elected Officer's Class of FRS membership.

38. FRS relied on section 121.091(13)(c)5.d., which does not contain a forfeiture provision. Because forfeiture provisions must be strictly construed, forfeiture cannot be implied. Further, because Petitioner was reemployed after July 1, 2010, he is not eligible to reenroll in FRS in the Elected Officer's Class of FRS.

RECOMMENDATION

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

RECOMMENDED:

That the Division of Retirement enter a final order rescinding the February 1, 2011, notification letter requiring reimbursement of Petitioner's DROP distribution and reimbursement of Petitioner's monthly retirement benefits from August 2010 through December 2010 when those benefits were discontinued; reinstating those monthly benefits beginning six months following the completion of Petitioner's DROP period, and nullifying Petitioner's reenrollment in the Elected Officers' Class of FRS membership.

DONE AND ENTERED this 8th day of March, 2012, in  
Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
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 8th day of March, 2012.

ENDNOTES

<sup>1/</sup> Petitioner asserts that the doctrine of equitable estoppel applies. That determination is beyond the scope of this tribunal's authority, as it does not have jurisdiction to grant equitable remedies. § 26.012, Fla. Stat.

<sup>2/</sup> What does not appear to have been contemplated by the Legislature is Petitioner's unique circumstance: must a former state employee who received his or her DROP benefits refrain from running from public office for six months after receiving DROP benefits, or risk losing them by falling into the same category as other government employees who are simply hired for their positions, not elected to them.

COPIES FURNISHED:

Amy W. Schrader, Esquire  
Gray Robinson, P.A.  
Post Office Box 11189  
Tallahassee, Florida 32302  
aschrader@gray-robinson.com

Elizabeth Regina Stevens, Esquire  
Department of Management Services  
Office of the General Counsel  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32327  
Elizabeth.Stevens@dms.myflorida.com

Courtney Strickland Brogan, Esquire  
Department of Management Services  
Division of Retirement  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32399-0950  
Courtney.Brogan@dms.myflorida.com

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

Jason Dimitris, General Counsel  
Department of Management Services  
Division of Retirement  
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.