

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAKE FISHER,)
)
 Petitioner,)
)
 vs.) Case No. 12-1266
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011), before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on June 20, 2012, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jake Fisher, pro se
Post Office Box 694762
Miami, Florida 33269-1762

For Respondent: Larry D. Scott, Esquire
Assistant General Counsel
Department of Management Services
Office of the General Counsel
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STATEMENT OF THE ISSUE

Whether Petitioner received a refund of retirement contributions made to the Florida Retirement System ("FRS") for his service from June 1969 to September 1975, thereby waiving his right to receive additional retirement benefits represented by the refunded contributions.

PRELIMINARY STATEMENT

In response to Petitioner's inquiry, Respondent Department of Management Services, Division of Retirement issued a letter dated February 28, 2012, to Petitioner stating that he previously had requested, and was issued, a refund of contributions he had made to the FRS between June 1969 and September 1975, so that had he waived his right to the service credit and retirement benefits represented by the refunded contributions. On or about March 16, 2012, Petitioner timely filed a request for formal administrative hearing challenging Respondent's determination regarding his service credit and retirement benefits.

The final hearing was held on June 20, 2012. Respondent put on its case first, presented the testimony of Charlene Fansler and John Nicholson, and offered Respondent's Exhibits 1 through 18 and 22, which were admitted into evidence without objection.

Petitioner testified on his own behalf, presented the testimony of

Gloria Fisher, and offered Petitioner's Exhibits 1 and 2, which were admitted into evidence over objection.

A transcript of the final hearing was not filed. The parties were given until July 23, 2012, to file their proposed recommended orders. Petitioner timely filed its Proposed Recommended Order on July 12, 2012, and Respondent timely filed his Proposed Recommended Order on July 23, 2012; both were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a member of the FRS. He was hired by Miami-Dade County ("County") in 1969, and terminated his employment with the County in 1989.

2. At all times relevant to this proceeding, Respondent, Division of Retirement Services,^{1/} was the state agency charged with administering the FRS. § 121.031(1), Fla. Stat. (1989).^{2/}

3. Prior to 1975, the FRS was a contributory system.^{3/} Under this system, members paid a portion of their salaries into the FRS Trust Fund ("Trust Fund") as a contribution toward future retirement benefits. Members who contributed to the Trust Fund could request a refund of those contributions at the time they left their FRS-eligible employment. Receipt of a refund constituted a waiver of the right to service credit for the employment period for which the contribution was paid.

4. At the time Petitioner terminated his employment with the County, he had accrued 18.77 years of service credit. He had contributed \$2,708.94 to the Trust Fund for creditable employment service from June 1969 through September 1975.

5. In April 1990, Petitioner requested an audit of his FRS account. Specifically, he requested an estimate of his retirement benefits based on his total service credit consisting of both contributory and non-contributory service, and an estimate of his retirement benefits based only on his non-contributory service from October 1975 to August 1989.

6. On May 17, 1990, Respondent responded to Petitioner's request. The response letter provided the requested estimates and further informed Petitioner that he had \$2,708.94 in contributions in his retirement account for the period between June 1969 and September 1975, that he had 18.77 total years of service, and that he had 12.52 years of non-contributory service credit. The letter explained that if Petitioner wished to receive a lump sum refund of his contributions, he must submit a completed Request For Refund Form, FRS M-81.

7. The letter was mailed to Petitioner at his then-current address^{4/} of 2221 Northwest 51st Street, Miami, Florida 33142.

8. In addition to the May 17, 1990, letter explaining Petitioner's options, Respondent's staff engaged in several documented telephone discussions with Petitioner to explain the

process for obtaining a refund of his contributions and the consequences of doing so.

9. In September 1990, Petitioner submitted a completed Request For Refund Form, FRS M-81, requesting a lump sum refund of the \$2,708.94 in retirement contributions he made for the period of June 1969 through September 1975. The form provided in pertinent part: "I give up all rights to receive any benefits from FRS based on service represented by this refund." Petitioner listed his address as 2221 Northwest 51st Street, Miami, Florida 33142, and signed the form.

10. Upon receiving the completed Request For Refund form, Respondent provided pertinent information from the form to the Department of Banking and Finance^{5/} and requested issuance of a warrant in the amount of \$2,708.94, the full amount of Petitioner's retirement contributions for his service between June 1969 and September 1975.

11. The Department of Banking and Finance issued the warrant, dated September 19, 1990, and returned it to Respondent with a computer-generated label listing Petitioner's name and social security number, refund amount, voucher number, and date of the warrant. On September 26, 1990, the warrant was mailed to 2221 Northwest 51st Street, Miami, Florida 33142.^{6/}

12. Respondent maintains a list of outstanding warrants. This list does not show the warrant sent to Petitioner as being

outstanding; thus, Respondent's records establish that the warrant was cashed.

13. In June 1993, Petitioner applied to receive his service retirement benefits. In the course of processing the retirement benefits application, Respondent provided Petitioner an estimate of the service benefits he would receive based on 12.52 years of creditable service.

14. At that time, Petitioner did not question the estimate or that his benefit was based on 12.52 years of creditable service.

15. On February 16, 2012—almost 22 years after the contributions refund warrant was sent to Petitioner and almost 19 years after Petitioner began receiving his retirement benefits based on 12.52 years of service—Petitioner contacted Respondent to inquire why he was not receiving retirement benefits based on 18 years of creditable service. Respondent's staff advised Petitioner that he was not entitled to benefits for 18 years because he had requested and received a refund of the contributions he had paid into the FRS Trust Fund between June 1969 and September 1975.^{7/}

16. Petitioner insists that he did not submit the Request For Refund Form in 1990 and claims that the signature on the form was forged.^{8/} He further claims that he never received the warrant because Respondent mailed the warrant to an address

using an incorrect zip code. He posits that an employee of Respondent forged his signature and cashed the warrant. However, the credible evidence in the record does not support these claims.

17. The credible, persuasive evidence in the record establishes that Petitioner requested and received a refund of his retirement contributions in the amount of \$2,708.94 for his employment service between June 1969 and September 1975, thereby waiving his right to receive retirement benefits for this period.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

19. Petitioner bears the burden in this proceeding to prove, by a preponderance of the evidence, that he did not receive a refund of his contributions paid between June 1969 and September 1975, so that he is entitled to receive retirement benefits for this period. See Wilson v. Dep't of Admin., 538 So. 2d 139 (Fla. 4th DCA 1989) (burden is on the beneficiary to establish his right to creditable service); see also Delores F. Johnson v. Dep't of Mgmt. Servs., Case No. 04-1685 (Fla. DOAH Sept. 22, 2004; Fla. DMS Nov. 2, 2004). This evidentiary standard requires proof by the "greater weight of the evidence,"

or evidence that "more likely than not" tends to prove a certain proposition. Green v. Lyons, 763 So. 2d 276, 280 (Fla. 2000).

20. Prior to 1975, the FRS was contributory. Beginning October 1, 1975, employers of specified persons participating in the FRS were required to contribute to the FRS on behalf of the participating employee. See § 121.075(2) (a), Fla. Stat. (1989).

21. Section 121.071(2) (b), Florida Statutes (1989), provided in pertinent part: "Upon termination of employment for any reason other than retirement, a member shall be entitled to a full refund of the contributions he has made prior or subsequent to his participation in the noncontributory plan"

22. Florida Administrative Code Rule 22B-4.09(5) (1989)^{9/} provided in pertinent part: "By obtaining a refund of contributions a member waives all rights, title and interest under the Florida Retirement System except the right to purchase his prior service credit in accordance with Section 22B-2.04."

23. Petitioner did not meet his burden of proof to show that he did not request and receive a refund of his retirement contributions for his service between June 1969 and June 1975, so that he is entitled to receive benefits for this period. Rather, the persuasive evidence establishes that Petitioner requested and received a refund of his contributions for this

time period, and, accordingly, waived his right to receive retirement benefits for his service for this period.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Department of Management Services, Division of Retirement, issue a Final Order determining that Petitioner is not entitled to receive retirement benefits for his service between June 1969 and September 1975.

DONE AND ENTERED this 30th day of August, 2012, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2012.

ENDNOTES

^{1/} In 1990, the Division of Retirement Services was a division within the Florida Department of Administration.

^{2/} Respondent asserts that Petitioner requested and received the refund of his contributions in 1990. At that time, the Florida Legislature only published Florida Statutes in odd-numbered years, with supplements containing only the statutes amended published in even-numbered years. Because Petitioner is alleged to have received the refund of contributions in 1990, Florida Statutes 1989 applies to this proceeding.

^{3/} On October 1, 1975, the FRS became non-contributory for employees of entities participating in the FRS, other than employees of state agencies, school districts, and community colleges. See Ch. 74-302, Laws of Fla.

^{4/} Petitioner provided this address to Respondent's staff during his telephone inquiries regarding obtaining a refund of his retirement contributions.

^{5/} The Department of Banking and Finance, which was the precursor of the Department of Financial Services, existed in 1990, when Petitioner is alleged to have requested a refund of his retirement contributions.

^{6/} Petitioner provided this address to Respondent during his telephone conferences with Respondent's staff and on the completed Request For Refund form. No evidence was presented regarding whether the warrant was sent to Petitioner by certified mail.

^{7/} Respondent contacted the Department of Financial Services ("DFS") to obtain a copy of the cancelled warrant to provide to Petitioner; however, pursuant to DFS' records retention schedule, warrants older than ten years are not retained and are destroyed.

^{8/} Neither party presented testimony of a handwriting expert regarding Petitioner's signature. However, the undersigned notes that the signature on the Request For Refund form appears identical to that in an affidavit signed by Petitioner in 1988 that was admitted into the record as part of Petitioner's Exhibit 2, as well as on the Application For Service Retirement admitted into evidence as Respondent's Exhibit 11; Petitioner does not dispute that the signature on these two exhibits is his.

^{9/} This rule was in effect in 1990, when Petitioner requested and received the refund of contributions for his employment service between June 1969 and September 1975.

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.