STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

HARRY MARCUS,

Petitioner,

Final Order No. DMS – 14-0067

vs.

CASE NO. 14-2554

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent.
_____/

FINAL ORDER

This cause came before the Secretary of the Department of Management Services for the purpose of the issuance of a final agency order. The Administrative Law Judge, Darren A. Schwartz, assigned by the Division of Administrative Hearing (DOAH) in the above styled cause, entered a Recommended Order on August 28, 2014, attached hereto and incorporated herein as "Exhibit A."

Pursuant to Uniform Rules, Section 28-106.217, Florida Administrative Code, exceptions may be filed within 15 days of the date of entry of the Recommended Order. The Petitioner, Harry Marcus ("Petitioner") filed timely exceptions. The Respondent, Department of Management Services, Division of Retirement ("Respondent") did not file exceptions.

APPEARANCE

For Petitioner: Harry Marcus, pro se
831 Cumberland Terrace
Davie, Florida 33325-1236

For Respondent: Larry D. Scott, Esquire
Department of Management Services
Office of the General Counsel

4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

ISSUES

Whether Petitioner, timely claimed creditable service for retirement benefits pursuant to section 121.085, Florida Statutes, and whether the adult education teacher position Petitioner held, was a temporary position ineligible as credible service for retirement benefits.

PRELIMINARY STATEMENT

On February 20, 2014, Respondent issued a final agency action letter to Petitioner, informing Petitioner that his request for creditable service for retirement benefits was denied, because the position he held for which he seeks creditable service was a temporary position, pursuant to 121.021(53)(b), Florida Statutes and Rule 60S-1.004, Florida Administrative Code. Dissatisfied with Respondent's determination, Petitioner timely filed a request for an administrative hearing.

On April 23, 2014, Respondent issued a supplemental final agency action letter to Petitioner, informing Petitioner that his request for creditable service was also denied because his request was untimely pursuant to section 121.085, Florida Statutes. Respondent notified Petitioner that it was placing "its February 20, 2014 final agency action letter into abatement until the issue presented in this supplemental final agency action letter is determined." Dissatisfied with Respondent's determination as set forth in the April 23, 2014, letter, Petitioner timely filed a second request for an administrative hearing. Furthermore, in his second request for an administrative hearing, Petitioner specifically requested that "the abatement be lifted and a hearing date be set."

On May 30, 2014, Respondent referred this matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing.

On June 5, 2014, the Administrative Law Judge issued a Notice of Hearing by Video Teleconference ("Notice"), setting this matter for final hearing on July 31, 2014. The Notice states the issue as follows: "Whether Petitioner timely claimed creditable service pursuant to section 121.085, Florida Statutes."

On July 29, 2014, a telephonic pre-hearing conference ("Conference") was held with the parties. During the Conference, the parties agreed to go forward with the hearing on July 31, 2014, and that the hearing would involve both issues of whether Petitioner timely claimed creditable service pursuant to section 121.085, Florida Statutes, and whether the adult education teacher position Petitioner held, for which he seeks creditable service for retirement benefits, was a temporary position.[1]

At the final hearing, Petitioner testified on his own behalf, and Petitioner's Exhibits 1, 3, 4, 6, 7, 12, and 14 through 16 were received into evidence. Respondent presented the testimony of Petitioner, Ronley Alexander, Stephen Bardin, and Joyce Morgan,[2] and Respondent's Composite Exhibits 1 through 8 were received into evidence. At the hearing, Respondent's request for official recognition of sections 121.021(11), 121.021(52)(b), 121.021(53)(b), 121.193, and 121.085, Florida Statutes, and Florida Administrative Code Rules 60S-1.002 and 1.004 was granted.

The final hearing was recorded, but no transcript was filed. At the conclusion of the final hearing, the parties agreed that their proposed recommended orders would be filed by August 20, 2014. Respondent timely filed a Proposed Recommended Order, which was given consideration in the preparation of the Recommended Order. Petitioner filed a Proposed Recommended Order on August 21, 2014, one day late. Nevertheless, Petitioner's Proposed Recommended Order was given consideration in the preparation of the Recommended Order.

STANDARD OF REVIEW

Section 120.57(1)(1), Florida Statutes (2013), provides that an agency reviewing a DOAH recommended order may reject or modify the findings of fact of an administrative law judge if "the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1975). However, an agency may not create or add to findings of fact because it is not the trier of fact. See Friends of Children v. Dep't of Health & Rehabilitative Servs., 504 So.2d 1345, 1347-48 (Fla. 1st DCA 1987).

Section 120.57(1)(1), Florida Statutes (2013), 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 conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the administrative law judge. Florida courts have consistently applied this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusion of law that are based upon 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 a statute or rule over which the Legislature has provided the agency administrative authority. See Deep Lagoon Boat Club, Ltd. V. Sheridan, 784 So.2d 1140, 1141-42 (Fla. 2nd 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, 884 (Fla. 1st DCA 1998).

PETITIONER'S EXCEPTIONS TO CONCLUSIONS OF LAW

Petitioner submitted exceptions which are ruled upon as follows:

In exceptions 1-6, Petitioner merely reiterates the conclusions of law he presented at hearing and in his proposed recommended order. The Department notes the Administrative Law Judge clearly and specifically addressed the various aspects of Petitioner's positions on these matters in his Recommended Order. Under these circumstances, the Department is not obligated to respond to Petitioner's exceptions to conclusions of law. Britt v. Dep't of Prof'l Regulation, 492 So.2d 697 (Fla. 1st DCA 1986); Adult World, Inc. v. State of Fla., Div. of Alcoholic Beverages & Tobacco, 408 So.2d 605 (Fla. 5th DCA 1982). Accordingly Petitioner's exceptions 1-6 are denied.

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the Findings of Fact set forth in the Recommended Order.

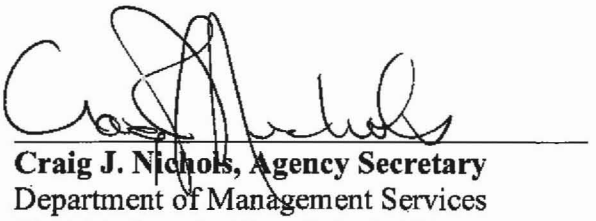
CONCLUSIONS OF LAW

The Department hereby adopts and incorporates by reference the Conclusions of Law set forth in the Recommended Order.

Based upon the foregoing it is,

ORDERED and DIRECTED that Petitioner is not eligible for creditable service for his employment with the School Board.

DONE AND ORDERED this 15th day of October, 2014.



Craig J. Nichols, Agency Secretary
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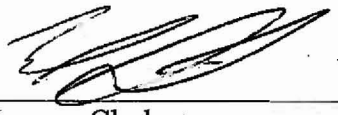
NOTICE OF RIGHT TO APPEAL

Unless expressly waived by a party such as in a stipulation or in other similar forms of settlement, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Agency Clerk of the Department of Management Services, and a copy, accompanied by filing fees prescribed by law, with the Clerk of the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Fla.R.App.P., and section 120.68, Florida Statutes.

Certificate of Clerk:

Filed in the office of the Clerk of the
Department of Management Services
On this 15th day of October,
2014.



Agency Clerk

ENDNOTES

[1] During the Conference both parties expressed their intent to go forward with the final hearing on July 31, 2014, as indicated above.

[2] The testimony of Ms. Morgan was offered by deposition. The deposition transcript and accompanying exhibits were received into evidence at the hearing as Respondent's Composite Exhibit 8. The deposition transcript shows that Ms. Morgan was unavailable for the hearing.