

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETTY E. NEW,

Petitioner,

vs.

Case No. 15-6340

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in St. Petersburg and Tallahassee, Florida, on February 11, 2016, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark Herron, Esquire
Thomas H. Bateman, Esquire
Messer, Caparello, P.A.
Post Office Box 15579
2618 Centennial Place
Tallahassee, Florida 32317

For Respondent: Thomas E. Wright, Esquire
Office of the General Counsel
Department of Management Services
Suite 160
4050 Esplanade Way
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner, Betty E. New, is entitled to membership in the senior management services class (SMSC) of the Florida Retirement System (FRS) from July 1, 2004, through her retirement in 2015.

PRELIMINARY STATEMENT

Petitioner was employed by the Board of Commissioners of Pinellas County as court counsel on February 1, 2002. In this position, Petitioner was enrolled in the SMSC, effective September 1, 2003, retroactive to February 1, 2002, at the request of her employer, the Pinellas County Board of Commissioners. On June 30, 2004, Petitioner's employment with Pinellas County ceased and she received a payout for unused leave. On July 1, 2004, Petitioner was hired by the Office of State Courts as General Counsel for the 6th Judicial Circuit. This position was not included in the SMSC of the FRS. Petitioner contends that for retirement calculation purposes, her position as general counsel should have been classified as senior management services from July 1, 2004, through the date of her retirement in 2015.

In 2015, Petitioner applied for retirement benefits. Upon receipt of her estimate of benefits statement, Petitioner requested SMSC credit from July 1, 2004, through her retirement date. The Division of Retirement (Respondent) denied her

request. The matter was forwarded to the Division of Administrative Hearings (DOAH) for a disputed-fact hearing.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of Judge David Demers. Respondent presented the testimony of: Beatriz Caballero, human resource director of the Office of State Courts; Dave Blasewitz, human resource director of Pinellas County Clerk of Courts; and Stephen Bardin, benefits administrator, Bureau of Enrollments and Contributions, who was qualified as an expert in FRS enrollment matters.

Petitioner's Exhibits 1 through 18 were admitted into evidence. Respondent's Exhibits 1 through 6 were also admitted into evidence.

A Transcript of the disputed-fact hearing was filed with DOAH on February 23, 2016. By agreement of the parties, proposed recommended orders were filed on March 24, 2016. The Proposed Recommended Orders were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, on February 1, 2002, was employed by the Pinellas County Board of Commissioners (Pinellas County) as court counsel. In her position as court counsel, Petitioner, through an inter-local agreement, was under the supervision and control of the chief judge of the Sixth Judicial Circuit, but her salary

and benefits were paid by Pinellas County. Specifically as to benefits, Pinellas County was solely responsible for paying employer contributions to Petitioner's state retirement account.

2. When initially hired as court counsel, the position was designated in the Regular Class of the FRS.

3. In March of 2003, Pinellas County requested that Petitioner's position be added to the SMSC of the FRS, and the request was granted by Respondent, retroactive to her hire date of February 1, 2002.

4. On June 30, 2004, Petitioner ceased being employed by Pinellas County and she received a payout of all unused leave, pursuant to the termination payout rules of Pinellas County. Additionally, on June 30, 2004, Pinellas County ceased being responsible for making employer contributions to Petitioner's state retirement account.

5. On June 30, 2004, Judge David A. Demers, then chief judge of the Sixth Judicial Circuit, requested that Petitioner be paid a \$10,000.00 bonus due to the fact that Petitioner would "no longer be a member of the senior management class for retirement purposes." The bonus was approved and Petitioner accepted the same.

6. Effective July 1, 2004, funding for all court system employees was transferred to the State. Consequently, Petitioner, on July 1, 2004, was reported to the Division of

Retirement as an employee of the Office of State Courts, in the Regular Class of the FRS.

7. Petitioner was aware that her position would no longer be included in the SMSC at least as early as September 2004, and chose not to request an opportunity to challenge the determination until several years later.

8. Petitioner asserts that she was continuously an employee of the Office of State Courts from February 1, 2002, and that she was never an employee of Pinellas County.

9. Stephen Bardin credibly testified that if Petitioner had been an employee of the Office of State Courts, rather than of Pinellas County, her position would never have been eligible for inclusion in the SMSC in 2002.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).^{1/}

11. Petitioner bears the burden of establishing by a preponderance of the evidence her entitlement to membership in the SMSC. 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. . . .”).

12. “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).

13. The Florida Retirement System is codified in chapter 121, Florida Statutes.

14. There are two different FRS membership classes at issue in the present case, the FRS Regular Class and the Senior Management Services Class.

15. Section 121.091(1) governs the Regular Class, and sets the retirement credit multiplier at 1.6 percent.

16. Section 121.055 defines the Senior Management Services Class, and sets the retirement credit multiplier at 2.0 percent.

17. The Division of Retirement, as designated by the Secretary of the Department of Management Services, is the sole administrator of the FRS, and is tasked with making all membership determinations, including membership class. § 121.025, Fla. Stat.

18. Section 121.055(1) provides, in part, as follows:

(h)1. Except as provided in subparagraph 3., effective January 1, 1994, participation in the Senior Management Service Class shall be compulsory for the State Courts Administrator and the Deputy State Courts Administrators, the Clerk of the Supreme Court, the Marshal of the Supreme Court, the Executive Director of the Justice Administrative Commission, the capital collateral regional counsel, the clerks of the district courts of appeals, the marshals of the district courts of appeals, and the trial court administrator and the Chief Deputy Court Administrator in each judicial circuit.

* * *

2. Participation in this class shall be compulsory, except as provided in subparagraph 3., for any judicial employee who holds a position designated for coverage in the Senior Management Service Class, and such participation shall continue until the employee terminates employment in a covered position.

19. Petitioner contends that section 121.055(1)(h)2. requires that she be included in the SMSC after July 1, 2004, because her employer never changed. However, the record indicates that, for FRS purposes, her employer did in fact change on July 1, 2004, from Pinellas County to the Office of State Courts.

20. A review of section 121.055(1)(h) demonstrates that if Petitioner was always an employee of the State Courts System, as she contends, then she would not have been eligible for inclusion in the SMSC in 2002 because the positions included in the SMSC in

the Office of State Courts do not include court counsel or general counsel, either at the state or circuit level.

21. Respondent's position is that Petitioner was initially employed by Pinellas County, was terminated from that employment on June 30, 2004, thus ending her SMSC participation, and that she was a new hire of the Office of State Courts on July 1, 2004, in the Regular Class. The fact that Petitioner received a leave payout under the Pinellas County termination of employment rules supports Respondent's position.

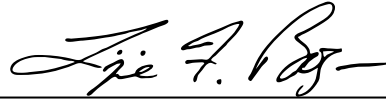
22. Further, it was well known in 2004 that Petitioner would not be in an SMSC position after June 30, 2004, and she was compensated for this loss of SMSC benefits with a \$10,000.00 bonus.

23. Petitioner has failed to meet her burden of proving that she is entitled to SMSC credit from July 1, 2004, through the date of her retirement in 2015.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order denying Petitioner's request for SMSC credit from July 1, 2004, through the date of her retirement in 2015.

DONE AND ENTERED this 13th day of April, 2016, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
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 13th day of April, 2016.

ENDNOTE

^{1/} All statutory references are to 2015 Florida Statutes, unless
otherwise indicated.

COPIES FURNISHED:

Thomas E. Wright, Esquire
Office of the General Counsel
Department of Management Services
Suite 160
4050 Esplanade Way
Tallahassee, Florida 32399
(eServed)

Thomas H. Bateman, Esquire
Messer Caparello, P.A.
2618 Centennial Place
Tallahassee, Florida 32308
(eServed)

Mark Herron, Esquire
Messer, Caparello, P.A.
Post Office Box 15579
2618 Centennial Place
Tallahassee, Florida 32317
(eServed)

Dan Drake, Director
Division of Retirement
Department of Management Services
Post Office Box 9000
Tallahassee, Florida 32315-9000
(eServed)

J. Andrew Atkinson, General Counsel
Office of the General Counsel
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950
(eServed)

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.