

**STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES**

BETTY E. NEW,

Petitioner,

Final Order No. DMS – 16-0106

vs.

DOAH Case No. 15-6340

DMS No.: 15-33104

**DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT**

Respondent.

FINAL ORDER

This cause came before the Secretary for the purpose of the issuance of a final agency order. The Administrative Law Judge, Linzie F. Bogan, assigned by the Division of Administrative Hearings (DOAH) in the above styled case, entered a Recommended Order on April 13, 2016, 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 the entry of the Recommended Order. The Petitioner has filed 8 exceptions.

APPEARANCES

For Petitioner: Thomas H. Bateman, III, Esq. and
Mark Herron, Esq.
Messer, Caparello P.A.
2618 Centennial Place
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For Respondent: Thomas E. Wright
Asst. General Counsel
Department of Management Services
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ISSUE

The issue in this case is to determine whether Petitioner is entitled to Senior Management Service Class (SMSC) retirement credit in the Florida Retirement System (FRS) for the period from July 1, 2004, through her retirement in 2015.

PRELIMINARY STATEMENT

On September 24, 2015, Department of Management Services, Division of Retirement (Respondent) issued a final agency action letter to Petitioner. The letter informed Betty E. New that Respondent denied her request to receive Senior Management Services Class (SMSC) retirement credit for the period from July 1, 2004, through her retirement in 2015. Ms. New was employed by Pinellas County as court counsel on February 1, 2002. For supervisory purposes, this position was solely under the direction and control of the Chief Judge of the Sixth Judicial Circuit. The position was in the Regular Class of the FRS. The following year, Pinellas County, pursuant to a request from the Chief Judge, requested that the Division of Retirement (Division) reclassify her position to be included in the SMSC. On March 4, 2003, the Division granted the request retroactive to February 1, 2002. Effective June 30, 2004, pursuant to a constitutional amendment, her position within Pinellas County was abolished. On July 1, 2004, Ms. New became an employee of the Office of State Courts. Her job duties remained the same, although her FRS employer changed. On August 6, 2004, Ms. New inquired of the Division whether her position would remain in the SMSC. The Division responded that it no longer would be. In 2015, as she was preparing to retire, Ms. New again requested to receive SMSC credit for her service since July 1, 2004. The request was denied because section 121.055(1), Florida Statutes, exclusively delineates the SMSC positions within the Office of State Courts, and Ms. New's position was not one of the named positions.

Ms. New also received a payout for all unused leave as of June 30, 2004, from Pinellas County, as well as a \$10,000 bonus for no longer being included in the SMSC.

The Petitioner timely filed a petition for hearing and the case was referred to the Division of Administrative Hearings on November 13, 2015.

At the final hearing on February 11, 2016, by video teleconference between St. Petersburg and Tallahassee, Florida, Ms. New testified on her own behalf and offered the testimony of Judge David Demers. Respondent offered 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 for the Bureau of Enrollments and Contributions at the Division of Retirement, who was accepted as an expert in FRS enrollment and classification.

Petitioner offered 18 exhibits and Respondent offered six, all of which were admitted.

The Parties filed Proposed Recommended Orders and a Recommended Order was issued April 13, 2016, which is incorporated by reference into this Final Order. Exceptions to the Recommended Order have been filed by Petitioner. A transcript of the hearing has been reviewed in the preparation of this Final Order, and references to it will be (T-).

STANDARD OF REVIEW

Subsection 120.57(1)(I), Florida Statutes (2015), provides that an agency reviewing a Division of Administrative Hearings (DOAH) recommended order may not reject or modify the findings of fact of an administrative law judge, "unless 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." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla., 1975). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of fact. See Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347, 1348 (Fla. 1st DCA, 1987).

Subsection 120.57(1)(l), Florida Statutes (2015), 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 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. 2d DCA, 2001); Barfield v. Department 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 Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA, 1998).

EXCEPTIONS

Petitioner's Exception 1 to the Recommended Order is hereby rejected as not material. The Preliminary Statement is just that. It is not a Finding of Fact or a Conclusion of Law.

Petitioner's Exception 2 to the Recommended Order is hereby rejected. While the testimony did show that for supervisory purposes Petitioner was a judicial employee, for the purposes of Chapter 121, her position was that of a county employee. In fact, the initial request to reclassify her position to one in the SMSC was submitted by Pinellas County, not the Office of State Courts or the Sixth Judicial Circuit. (T-125). Moreover, it was clearly understood by all parties, including Ms. New, that her position was with the county for FRS purposes, as Judge Demers requested that the Pinellas County ask the Division of Retirement to reclassify her position to the SMSC. (See Petitioner's Exhibits 6, 8, and 10). The unrebutted expert testimony demonstrated that had she been a judicial employee when hired, she would never have been eligible for SMSC credit from February 2002 through June 2014.

Petitioner's Exception 3 to the Recommended Order is hereby rejected. As noted above, for supervisory purposes Petitioner was a judicial employee, but for FRS purposes was a county employee.

Petitioner's Exception 4 to the Recommended Order is hereby rejected. It is not clear what Petitioner's exception is. Finding of Fact 8 is simply a precise reaffirmation of her stated position in the Petition. (See Petition, Paragraphs 4-e, l, and m).

Petitioner's Exception 5 to the Recommended Order is hereby rejected. Conclusions of Law 19, 20, and 21 are correct statements of law based on the facts of this case. To adopt Petitioner's proposed language would require that Petitioner lose the SMSC credit that she enjoyed from February 1, 2002, through June, 2004. As set forth in Conclusion of Law 18 (to which Petitioner does not take exception), the position Petitioner held, if a part of the State Courts, would never have been approved for SMSC inclusion as it is not in the exclusive list of State Courts employees eligible for the SMSC.

Petitioner's Exception 6 to the Recommended Order is hereby rejected. Conclusion of Law 22 is a correct statement of the law as applied to the facts of this case. Petitioner received payment specifically because she would no longer be eligible for SMSC coverage. (See Respondent's Exhibit 6).

Petitioner's Exception 7 to the Recommended Order is hereby rejected. Conclusion of Law 23 is simply a statement by the Administrative Law Judge that Petitioner failed to meet her burden of persuasion.

Petitioner's Exception 8 to the Recommended Order is hereby rejected. The recommendation of the Administrative Law Judge is based on the Findings of Fact, which are supported by competent, substantial evidence, and is the correct application of the provisions of Chapter 121, Florida Statutes.

FINDINGS OF FACT

The Department of Management Services accepts the Findings of Fact set forth in the Recommended Order, which are incorporated by reference.

CONCLUSIONS OF LAW

The Department of Management Services accepts the Conclusions of Law set forth in the Recommended Order, which are incorporated herein by reference.

ORDER

Based on the foregoing, it is hereby ORDERED AND DIRECTED that the Petitioner's request for Senior Management Service Class retirement credit from July 1, 2004, through her retirement in 2015, is hereby DENIED.

DONE AND ORDERED this 14th day of December 2016, in Tallahassee, Leon County, Florida.

 *on behalf of*

Chad Poppell
Secretary
Department of Management Services
4050 Esplanade Way
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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 Department of Management Services, and copies distributed by U.S. Mail to the parties below, on the 15th day of December, 2016.



Celynna Southall
Deputy Clerk
Department of Management Services

Copies furnished to:

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