

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 295 Employment after Retirement of School District Personnel

SPONSOR(S): Porter

TIED BILLS: **IDEN./SIM. BILLS:** SB 560

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Harrington	Williamson
2) Appropriations Committee			
3) Education Committee			

SUMMARY ANALYSIS

Current law provides that instructional personnel may be awarded probationary contracts upon initial employment and may be awarded annual contracts thereafter; professional service contracts may not be issued to any instructional personnel hired on or after July 1, 2011. Additionally, the Florida Retirement System Act and the Teachers' Retirement System Act provide that retired instructional personnel who retired before July 1, 2010, may be rehired on an annual contractual basis. Although the law provides for the issuance of annual contracts after retirement, in 2012, the Fifth District Court of Appeals held that retired instructional personnel rehired prior to July 1, 2011, may be awarded professional service contracts.

The bill clarifies that instructional personnel may be reemployed after retirement but only under a 1-year probationary contract. If the instructional personnel successfully completes the probationary contract, such employee may receive an annual contract; reemployed retired instructional personnel may not receive professional service contracts. The bill further provides legislative intent and clarification for purposes of pending civil and administrative actions.

The bill does not appear to have a fiscal impact on state government; however, it could have a positive fiscal impact on local school districts.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Student Success Act

In 2011, the Legislature passed the Student Success Act (act),¹ which requires, among other things, the use of performance evaluations to assess performance. The evaluation system for administrative and instructional personnel differentiates among four levels of performance: highly effective, effective, needs improvement,² or unsatisfactory.³ The Commissioner of Education was required to consult with experts, instructional personnel, school administrators, and education stakeholders in developing the criteria for the performance levels.

Prior to 2011, instructional personnel with as little as three years of service could be granted a professional service contract, which provided for automatic renewal of the contract unless the superintendent charged the employee with unsatisfactory performance.⁴ For instructional personnel hired on or after July 1, 2011, the act, in effect, provides that professional service contracts and tenure may no longer be given to any instructional personnel who do not currently have a professional service contract.

Specifically, the act provides that employees hired on or after July 1, 2011, must be awarded probationary contracts for a period of one year upon initial employment in a school district.⁵ Probationary contract employees may be dismissed without cause or may resign without breach of contract.⁶ The district may not award a probationary contract more than once to the same employee;⁷ after the initial year, the school district may award an annual contract upon the successful completion of a probationary contract.⁸ An annual contract is an employment contract for a period of no longer than one school year, which the district school board may choose to award or not award at the end of the contract term without cause.⁹ Instructional personnel with an annual contract may be suspended or dismissed at any time during the term of the contract for just cause.¹⁰

In addition, the act ties the renewal of a professional service contract, for those employees who have a professional service contract, to the employee's performance evaluation; the professional service contract is no longer automatically renewed.¹¹ If an employee who holds a professional service contract is not performing his or her duties in a satisfactory manner, the act requires such an employee to receive notice and be placed on probation.¹² If the employee receives two consecutive annual performance evaluations of unsatisfactory, two annual performance evaluations of unsatisfactory within a three-year period, or three consecutive annual performance evaluations of needs improvement or a combination of needs improvement and unsatisfactory, the district may terminate or not renew the employee's contract.¹³

Florida Retirement System

¹ Chapter 2011-1, L.O.F.

² For instructional personnel in the first three years of employment, the evaluation may designate the performance as developing.

³ Section 1012.34, F.S.

⁴ See s. 1012.33(3)(e), F.S. (2010).

⁵ Section 1012.335(2)(a), F.S.

⁶ Section 1012.335(1)(c), F.S.

⁷ *Id.*

⁸ Section 1012.335(2)(a), F.S.

⁹ Section 1012.335(1)(a), F.S.

¹⁰ Section 1012.335(4), F.S.

¹¹ Section 1012.33(3)(b), F.S.

¹² Section 1012.34(4)(b), F.S.

¹³ See ss. 1012.33 and 1012.34, F.S.

The Florida Retirement System (FRS) was established in 1970 when the Legislature consolidated the Teachers' Retirement System, the State and County Officers and Employees' Retirement System, and the Highway Patrol Pension Fund. In 1972, the Judicial Retirement System was consolidated into the pension plan and, in 2007, the Institute of Food and Agricultural Sciences Supplemental Retirement Program was consolidated under the Regular Class of the FRS as a closed group.¹⁴ The FRS is a contributory system, with all members contributing 3 percent of their salaries.¹⁵

The FRS is governed by the Florida Retirement System Act.¹⁶ The FRS, which is a multi-employer, contributory plan, provides retirement income benefits to 621,774 active members,¹⁷ 334,682 retired members and beneficiaries, and 38,724 members of the Deferred Retirement Option Program (DROP).¹⁸ It is the primary retirement plan for employees of state and county government agencies, district school boards, community colleges, and universities. The FRS also serves as the retirement plan for participating employees of the 186 cities and 267 independent hospitals and special districts that have elected to join the system.¹⁹

Members of the FRS have two primary plan options available for participation:

- The defined benefit plan, also known as the pension plan; and
- The defined contribution plan, also known as the investment plan.

The pension plan is administered by the secretary of the Department of Management Services through the Division of Retirement.²⁰ Investment management is handled by the State Board of Administration (SBA). The SBA is primarily responsible for administering the investment plan.²¹ The SBA is comprised of the Governor as chair, the Chief Financial Officer, and the Attorney General.²²

Employment after Retirement

Section 121.091, F.S., governs the payment of benefits under the FRS. It requires a member of the FRS to terminate employment to begin receiving benefits, or begin participation in DROP to defer and accrue those benefits until termination from DROP. Termination occurs when a member ceases all employment relationships with his or her FRS employer.²³ Termination is void if any FRS-participating employer reemploys a member a specified period of time.²⁴

Subsection 121.091(9), F.S., governs employment after retirement. It allows reemployment of FRS retirees by a non-FRS employer and authorizes those retirees to continue receiving retirement benefits.²⁵

An FRS retiree may be reemployed by an FRS employer provided certain requirements are met. A member who retired before July 1, 2010, may be reemployed by an FRS employer one calendar month after retiring or after the member's DROP termination date. If the retiree is reemployed during months two through 12 after retiring or terminating DROP, then the retiree may not receive her or his pension benefit until month 13. However, a retiree who retired before July 1, 2010, may be reemployed as

¹⁴ *The Florida Retirement System Annual Report*, July 1, 2011 – June 30, 2012, at 10. A copy of the report can be found online at: http://www.dms.myflorida.com/workforce_operations/retirement/publications/annual_reports (last visited February 21, 2014).

¹⁵ Prior to 1975, members of the FRS were required to make employee contributions of either 4 percent for Regular Class employees or 6 percent for Special Risk Class members. Employees were again required to contribute to the system after July 1, 2011.

¹⁶ Chapter 121, F.S.

¹⁷ As of June 30, 2013, the FRS defined benefit plan, also known as the pension plan, had 514,436 members, and the defined contribution plan, also known as the investment plan, had 107,338 members. Email from staff of the Division of Retirement, Department of Management Services, February 4, 2014 (on file with the Government Operations Subcommittee).

¹⁸ *Id.*

¹⁹ Florida Retirement System Participating Employers for Plan Year 2013-14, prepared by the Department of Management Services, Division of Retirement, Revised January 2014, at 8. A copy of the document can be found online at: http://www.dms.myflorida.com/workforce_operations/retirement/publications (last visited March 14, 2014).

²⁰ Section 121.025, F.S.

²¹ Section 121.4501(8), F.S.

²² Section 4, Art. IV, Fla. Const.

²³ Section 121.021(39)(a), F.S.

²⁴ *Id.*

²⁵ Section 121.091(9)(a), F.S.

instructional personnel on an annual contractual basis after one calendar month without having her or his retirement benefits disrupted.²⁶

A member who retires on or after July 1, 2010, may not be reemployed by an FRS employer until month seven after retiring or after the member's DROP termination date. If the retiree is reemployed during months seven through 12 after retiring or terminating DROP, then the retiree may not receive her or his pension benefit until month 13.²⁷ The reemployment exception for retirees reemployed as instructional personnel no longer applies to members who retire on or after July 1, 2010.

Teachers' Retirement System

The Teachers' Retirement System (TRS), which is closed to new members effective December 1, 1970, is governed by chapter 238, F.S. As of June 2013, there were 18 active members and eight DROP participants.²⁸ Similar reemployment provisions apply for instructional personnel who retire under the TRS.

Legal Ambiguity for Reemployment of Instructional Personnel

In 2011, two retired reemployed instructional personnel brought suit in Orange County, Florida to determine whether the county was required to issue professional service contracts after the employees' successfully completed three years of employment.²⁹ The Orange County Public Schools argued that s. 121.091, F.S., required the instructional personnel to be rehired on an annual contractual basis. The issue in the case centered on whether the FRS act required instructional personnel to be reemployed with an annual contract for the rest of the member's career, or whether the FRS act only pertained to the initial year of reemployment and such member may ultimately be given a professional service contract under s. 1012.33, F.S., which provided for such a contract after three years of service.

The circuit court, applying the rules of statutory construction, found that the legislature intended for retired, rehired teachers to be rehired on the same terms as newly hired teachers; at that time, newly hired teachers were placed on an initial annual contract and after serving three years in the district, received a professional service contract. At the time of this lawsuit, professional service contracts were still provided for in law.

The Orange County School Board appealed the final judgment to the Fifth District Court of Appeal arguing that the trial court erred and that s. 121.091, F.S., precludes the school board from ever issuing a contract longer than an annual contract when employing retired instructional personnel.³⁰ The court, however, agreed with the lower court and found that the limitations in s. 121.091, F.S., only apply at the time of the initial rehire.

According to information supplied by the Orange County Public Schools, approximately 779 instructional personnel were rehired in Florida prior to July 1, 2011; 324 of the reemployed retired instructional personnel have been awarded professional service contracts.³¹

²⁶ Section 121.091(9)(b), F.S.

²⁷ Section 121.091(9)(c), F.S.

²⁸ Telephone conversation with staff of the Division of Retirement, Department of Management Services, on March 14, 2014.

²⁹ A copy of the circuit court decision is on file with the Government Operations Subcommittee.

³⁰ *Orange County School Board v. Rachman and Schuman*, 87 So.3d 48 (Fla. 5th DCA 2012).

³¹ Although 455 instructional personnel were rehired prior to 2011 and have not been issued professional service contracts, it is unclear if such employees qualified for professional service contracts prior to the 2011 changes to the act. Once such changes were made, a teacher not previously provided a professional service contract was ineligible to receive one. A class action lawsuit was filed in 2013 in Orange County; the plaintiffs allege that they were rehired retirees and qualified for professional service contracts prior to the 2011 legislation. A copy of the amended complaint is on file with the Government Operations Subcommittee.

Effect of the Bill

The bill provides that instructional personnel rehired after retirement from the FRS Pension Plan or the TRS may only be initially hired under a 1-year probationary contract, rather than an annual contract. If the retiree successfully completes the probationary contract, the district school board may reemploy the retiree on an annual contract basis. The bill clarifies that reemployed retired instructional personnel may not receive professional service contracts.

The bill provides that the holding in *Orange County School Board v. Rachman and Shuman*³² was contrary to legislative intent at the time the statutes were enacted and that retirees were never entitled to professional service contracts. The bill directs the judge in a civil action or administrative proceeding to rule against a classroom teacher on any claim or cause of action against the district school board, district superintendent, or district school board employee for not awarding such a teacher a professional service contract.

B. SECTION DIRECTORY:

Section 1. and 2. amend ss. 121.091 and 238.181, F.S., revising provisions relating to reemployment of retirees as instructional personnel on a contract basis; clarifying applicability and legislative intent.

Section 3. amends s. 1012.33, F.S., revising provisions relating to reemployment of retirees as instructional personnel on a contract basis; providing legislative intent and findings to clarify authorization to award contracts; providing requirements for a judge in certain civil actions or administrative proceedings.

Section 4. providing an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

As a result of the bill, local school districts could experience a positive fiscal impact associated with any pending litigation.

³² *Supra* at n. 30.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

It is unclear if the intent of the bill is to retroactively impair professional service contracts that have already been issued to retired instructional personnel. Retroactive legislation may violate the Contract Clause of Art. 1, s. 10 of the United States Constitution;³³ the prohibition against ex post facto laws in Art. I, s. 10 of the State Constitution;³⁴ and the Due Process Clauses of the Fifth and 14th Amendments.³⁵ Even where these constitutional clauses do not apply, the common law provides that the government, through rule or legislation, cannot adversely affect substantive rights once such rights have vested.³⁶

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Amendments to the FRS Act and TRS Act

The changes proposed to s. 1012.33, F.S., address employment contractual issues that arose under *Rachman v. Orange County School Board*.³⁷ However, the bill also amends ss. 121.091 and 238.181, F.S., which are retirement provisions and not contractual provisions. It is unclear why contractual provisions are being placed in the FRS Act and the TRS Act, which govern retirement and payment of retirement benefits to FRS and TRS retirees.

The Department of Management Services also raised concerns regarding the proposed changes to the FRS Act and TRS Act. According to the department's bill analysis for HB 295:³⁸

Because this bill and the underlying court decision deal with a contractual issue and not a retirement issue, the proposed changes to sections 121.091 and 238.181, Florida Statutes, are not necessary and could result in the Department being subject to a lawsuit. Since the proposed amendments to section 1012.33, Florida Statutes, achieves the goal sought, and is achieved without amending sections 121.091 or 238.181, Florida Statutes, the recommendation of the Department would be to proceed without the proposed changes to sections 121.091 and 238.181, Florida Statutes, and to remove the conforming references to these sections in section 1012.33, Florida Statutes, as amended.

³³ The Contract Clause prohibits states from passing laws which impair contract rights. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). It only prevents substantial impairments of contracts. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

³⁴ Article 1, s. 10 of the State Constitution prohibits ex post facto laws impairing the obligation of contracts.

³⁵ The Due Process Clauses require a state to provide due process of law before depriving any person of life, liberty, or property. Under a due process analysis, "property" includes items such as personal belongings, real property, intellectual property, or money. It may also include any benefit or entitlement to which a legitimate claim attaches. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

³⁶ *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

³⁷ *Supra* at n. 30.

³⁸ Department of Management Services, 2014 Legislative Bill Analysis for HB 295 (on file with the Government Operations Subcommittee).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.