

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BOBBIE JONES SCOTT, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 96-3761  
 )  
 DEPARTMENT OF MANAGEMENT SERVICES, )  
 DIVISION OF RETIREMENT, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This matter came on for hearing before Diane Cleavinger, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on March 27, 1997, in Fort Walton Beach, Florida.

APPEARANCES

For Petitioner: M. Christopher Bryant, Esquire  
Oertel, Hoffman, Fernandez and Cole, P.A.  
Post Office Box 6507  
Tallahassee, Florida 32314-6507

For Respondent: Robert B. Button, Esquire  
Division of Retirement  
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled to disability retirement benefits calculated as if she had reached the age of 65, irrespective of her true age.

PRELIMINARY STATEMENT

Respondent, Division of Retirement, notified Petitioner, Bobbie Jones Scott, of its denial of her claim to increased retirement benefits under the Teachers Retirement System (TRS). Petitioner challenged the Division's denial and filed a Petition for Formal Hearing. The Petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in her own behalf and offered the testimony of Virginia Bowles, a benefit specialist with the Okaloosa County School System; Mark Sadler, head of Disability Determination Section in the Division of Retirement; and the deposition testimony of Brenda Woodard, a benefits specialist in Mr. Sadler's section. Additionally, Petitioner offered eight exhibits into evidence. The Respondent presented the testimony of June Ferguson, a retirement administrator in the Division of Retirement Benefits Calculations Section and offered one exhibit into evidence.

After the hearing, Petitioner and Respondent submitted Proposed Recommended Orders on May 21, 1997, and May 15, 1997, respectively.

FINDINGS OF FACT

1. From April 1969 until March 1996, Petitioner, Bobbie Jones Scott, was employed as a school teacher by the Okaloosa County School Board. She served 27 years as an elementary school teacher, teaching at the same Okaloosa County

elementary school for her entire tenure. Prior to commencing her teaching career, Petitioner served as a library aide in Okaloosa County for the full 9-month term of that position in the 1967-1968 school year.

2. Petitioner is a member of the TRS. The TRS was closed to new members on December 1, 1970. Since closure, teachers have been enrolled in the Florida Retirement System (FRS). At some point, Petitioner purchased retirement credits in TRS for the school year during which Petitioner served as a library aide.

3. Early retirees under both TRS and FRS, retiring without disability, have their retirement benefits actuarially reduced by five percent per year or five-twelfths percent per month for each year or fraction of year that the retiree is under the age of 62. See, Section 121.021(30), Florida Statutes and Rule 6S-7.003, Florida Administrative Code.

4. Petitioner first inquired about retirement in 1993, when her husband, also a teacher, retired. She requested and obtained from the Division an estimate of early retirement benefits. In 1993, the early retirement penalty reduced Petitioner's retirement benefit to 67.9 percent of her normal retirement benefit. The reduction was so great that Petitioner elected to keep teaching.

5. On October 16, 1994, Petitioner severely injured her arm when she slipped on a freshly waxed floor at the elementary school. Several surgical procedures were required over the next

two years as a result of this accident. Despite extensive physical therapy, Petitioner did not regain full range of motion and full use of her dominant right arm. Petitioner could not raise her arm above shoulder level and could not raise it high enough to write on a blackboard. The injury clearly interfered significantly with Petitioner's ability to teach.

6. In December 1994, because of her injury, Petitioner requested an estimate of retirement benefits. Again, the early retirement penalty reduced the retirement benefit to 77.9 percent of normal benefits. The reduction was so great that Petitioner could not afford to retire.

7. Approximately three months after her accident on January 17, 1995, the Petitioner returned to teaching. Her physical therapy and surgical treatment continued.

8. In June 1995, while recuperating from the third operation on her arm, Petitioner called the Division of Retirement to request information on disability retirement. She specifically told the person she spoke with that she was a member of TRS. Petitioner was sent an application form and instructions for retirement under FRS instead of an application and instructions for TRS.

9. At that time, the Petitioner did not submit the application because a decision on the application would not be reached before the start of the 1995-1996 school year. Petitioner wished to avoid commencing the school year, only to

leave teaching several weeks into the school year, necessitating finding and hiring a replacement teacher and disrupting the students' course of studies.

10. In November 1995, Petitioner was diagnosed with diabetes. Teaching was becoming detrimental to Petitioner's health. At the urging of her physician she elected to pursue disability retirement. The Petitioner reviewed a booklet sent to her by Respondent entitled "Florida Retirement System Disability Benefits." The Petitioner relied on the statement on page 27 of the booklet which states, "Disability benefits are not reduced for early retirement." Based on that statement Petitioner applied for disability retirement and submitted the disability retirement application which she had received earlier along with the requisite supporting documentation on January 10, 1996.

11. Neither the FRS disability retirement application form nor the FRS Disability Retirement Handbook informed Petitioner that there would be an early retirement penalty for disability retirees. However, the FRS literature also indicates that employees who are members of other retirement systems may be governed by different rules and should look to those other retirement systems.

12. Unfortunately, Petitioner had been given the wrong information by the Division of Retirement even though she had specified she was a member of TRS.

13. On February 9, 1996, after receiving Petitioner's application, the Division of Retirement sent a letter to Petitioner advising her that the incorrect disability retirement application form had been used. A TRS Disability Retirement Application form was enclosed with the letter. Only the title of the application was changed. In essence, the TRS application was the same as the FRS application. No booklet or pamphlet explaining the TRS system was provided.

14. On February 14, 1996, immediately upon her receipt of the February 9, letter and the TRS Disability Retirement Application form, Petitioner telephoned the Division of Retirement and spoke with Mark Sadler, a retirement administrator in the disability determination section within the Division of Retirement. The Petitioner explained that she had used the disability retirement forms provided to her by the Division. She inquired as to whether an additional 30 days would be needed to process her application. She also indicated that the reason she was still working and had not retired previously is that she could not afford to be assessed the early retirement penalty.

15. Mr. Sadler informed the Petitioner that she would need to submit the correct TRS Disability Retirement application. However, Mr. Sadler agreed to accept the physician's report of disability already submitted with the FRS form and to expedite her request for disability retirement since the medical

information which Petitioner had submitted met the TRS requirements for disability documentation.

16. On or about March 7, 1996, Petitioner received notification from the Division of Retirement that her application for disability retirement had been approved. The next day, Petitioner met with Virginia Bowles, a benefits specialist with the Okaloosa County School Board, to obtain an estimate of her retirement benefits under Plan E of the TRS system. Mrs. Bowles prepared an estimate of Petitioner's benefits. The estimate did not show any reduction of benefits for early retirement.

17. The form Ms. Bowles prepared was clearly labeled "estimate" and provided, *inter alia*, that Petitioner would receive a calculation of her retirement benefits from the Division of Retirement in approximately three weeks.

18. While in Mrs. Bowles' office, Petitioner insisted on confirmation from the Division of Retirement that an early retirement penalty would not be imposed on her benefits. In the Petitioner's presence, Mrs. Bowles called the Division of Retirement to verify that there was no early retirement penalty for disability retirees. Mrs. Bowles was assured that there was no such penalty. Mrs. Bowles immediately relayed that information to Petitioner.

19. Based on this representation, Petitioner immediately resigned her position on March 8, to be effective March 13, 1996.<sup>1</sup> Had Petitioner known there would be a reduction in her

disability retirement benefits and had she not received incorrect information from both the Division of Retirement and the Okaloosa County School Board, she would have found some way to continue working to avoid the early retirement penalty even though continued employment would have been detrimental to her health.<sup>2</sup>

20. At the time of her retirement, Petitioner had attained the age of 58 years and 4 months, 44 months short of the normal retirement of age 62. The estimate prepared by Ms. Bowles reflected that Petitioner's monthly retirement benefit would fall between \$1,458.20 and \$1,512.41.

21. At the time of her resignation, Petitioner was earning over \$39,000 per year as an experienced teacher.

22. Once Petitioner resigned her position, she could not immediately return to work. Board policy required her to wait one year before re-employment and then she could be rehired at a starting teacher's salary of about \$21,000.

23. A couple of weeks after resigning her position, Petitioner received a calculation of her retirement benefits from the Division of Retirement. The benefits were significantly lower than the estimate of benefits prepared by Mrs. Bowles.

24. Retirement benefits under Plan E are calculated by, first, determining an "average final compensation," or AFC, for an employee by averaging the 10 highest years of salary in the employee's last 15 years of employment. The employee's compensation percentage, or "comp percent," is then determined by



assigning a 2 percent value for every year of creditable service. The AFC is then multiplied by the comp percent to arrive at a retirement benefits figure.

25. In Petitioner's case, the Division calculated AFC as \$32,601.10. The Division, based on 27.9 years of service, arrived at a comp percent of .558, resulting in a normal retirement allowance of \$18,191.41 per year or \$1,515.95 per month.<sup>3</sup>

26. However, because Ms. Scott fell into the early retirement category under TRS her benefits were reduced.

27. In calculating Petitioner's disability benefits, the Division of Retirement reduced the otherwise normal retirement benefit calculation by 18.33 percent to 81.667 percent of her normal benefit. The reduction resulted in a monthly retirement benefit of \$1,238.03. The reduction is the result of a five-twelfths of one percent reduction for each month that Petitioner was short of age 62 and is the correct benefit calculation under TRS. See Rule 6S-7.003, Florida Administrative Code.

#### CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

29. Petitioner retired under Plan E of TRS.

30. Sections 238.07(2)(e), 1., 2., Florida Statutes, govern retirement benefits under TRS and states in part:

(2) The provisions for the retirement of a member are as follows:

\* \* \*

(e) To retire:

1. At normal retirement age which shall be age 60 for those persons whose membership date, or last renewal thereof, occurred prior to July 1, 1963, and age 62 for those persons whose membership date, or last renewal thereof, occurred on or after July 1, 1963; or

2. Prior to normal retirement age but at or subsequent to age 55, provided that upon such date the member has completed 10 years of creditable service, which shall be the early retirement age; or

\* \* \*

31. Sections 238.07(7), (a), (b), (c), Florida Statutes states in part:

Upon service retirement under plan E, a member shall receive a service retirement allowance which shall be determined as follows:

(a) At normal retirement age: Two percent of his or her average final compensation multiplied by the number of years of creditable service.

(b) At early retirement age: Two percent of his or her average final compensation multiplied by the number of years of creditable service and adjusted for actuarial equivalents based on completed months by which early retirement precedes normal retirement as provided in paragraph (2)(e).

(c) At delayed retirement age: Two percent of his or her average final compensation multiplied by the number of years of creditable service.

32. Sections 238.07(11)(a) and (e), Florida Statutes, states in part:

\* \* \*

(11) Upon retirement on account of disability, a member shall be paid his or her service retirement allowance if he or she is eligible for a service retirement allowance; otherwise, the member shall receive a retirement allowance which shall consist of:

(a) An annuity which shall be the actuarial equivalent of his or her accumulated contributions at the time of retirement; and

\* \* \*

(e) If the member is making contributions for retirement under plan E, he or she shall receive a retirement allowance which shall consist of 100 percent of the retirement allowance to which he or she would be entitled if his or her date of disability retirement were his or her otherwise normal retirement date; provided, however that the retirement allowance payable upon disability retirement shall not be less than 25 percent of average final compensation nor, if disability retirement occurs prior to the date on which the member is first eligible for service retirement, shall it be greater than the service retirement allowance to which the member would be entitled if he or she continued in active service to such date at the same rate of compensation effective on the date of disability retirement.

33. Section 238.07(11), Florida Statutes, provides, among other things, that upon retirement on account of disability a TRS member shall be paid his or her service retirement allowance if the member is eligible for service retirement. Petitioner, as a Plan E participant, was eligible for one of the service retirement categories as defined in Subsection 238.07(2)(e), Florida Statutes.

34. Petitioner was past the age of 55, but not yet 62 and had completed at least ten years of service. Petitioner was, therefore, entitled to retire under the early retirement service category of Subsection 238.07(2)(e)2, Florida Statutes. Petitioner was not entitled to retire under the normal service retirement category because she did not meet the age requirements for such retirement. Subsection 238.07(2)(e)1, Florida Statutes.

35. Section 238.07, Florida Statutes, establishes the methodology for calculating retirement benefits or service allowances once the service retirement category is determined. Normal retirement benefits under Plan E are calculated by, first, determining an "average final compensation," or AFC, for an employee by averaging the ten highest years of salary in the employee's last fifteen years of employment. The employee's compensation percentage, or "comp percent," is then determined by assigning a two percent value for every year of creditable service. The AFC is then multiplied by the comp percent to arrive at a retirement benefits figure. Early retirement benefits are actuarially reduced.

36. In Petitioner's case, the Division calculated her AFC as \$32,601.10. The Division, based on 27.9 years of service, arrived at a comp percent of .558, resulting in a normal retirement allowance of \$18,191.41 per year or \$1,515.95 per month.<sup>3</sup>

37. However, because Ms. Scott fell into the early retirement service category her benefits were reduced pursuant to the formula set forth in 238.07(7)(b), Florida Statutes.

38. Under Section 238.07(2)(e)1., Florida Statutes, normal retirement age is 62. In this case, Petitioner retired at age 58, 44 months prior to her normal retirement age. Therefore, under Section 238.07(7)(b), Florida Statutes, Petitioner's retirement benefit should be actuarially adjusted by .28333 to .81667 of her normal retirement benefit. The reduction resulted in a monthly retirement benefit of \$1,238.03. The Division's methodology and calculations were legally correct in Petitioner's case. Section 238.07(11), Florida Statutes.

39. In the instant case, the Division made a representation to Petitioner and to a person calling on the behalf of the Petitioner that there would be no reduction in disability retirement benefits for early retirement. In reliance on that representation, Petitioner resigned her position as a teacher in the Okaloosa County school system. Petitioner's change in position is not reversible and is detrimental because any attempt to return to employment once resigning the position would be at a significantly reduced salary.

40. The elements of equitable estoppel against the State are (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the

party claiming estoppel, caused by the representation and reliance thereon. Kuge v. State, Department of Administration, Division of Retirement, 449 So. 2d 389, 391 (Fla. 3d DCA 1984).

41. In Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376 (Fla. 3d DCA 1983), Mrs. Salz, a teacher in the Dade County school system, inquired of the Division of Retirement as to her ability to purchase eight years' out-of-state service was not creditable because the school in which she taught was a private school.

42. Following an administrative hearing on the matter, a hearing officer determined that the Division was estopped from denying Mrs. Salz's retirement credit for the eight-year period. The Division's final order reversed the hearing officer, and Mrs. Salz appealed. The Third District Court of Appeal reversed, noting that the Division's mistaken belief that the Missouri school in which she taught was a public school was a mistake of fact, not of law, which may have prevented application of estoppel. Estoppel applied.

43. Similarly, in Kuge v. Department of Administration, Division of Retirement, supra, an employee of the Department of Health and Rehabilitative Services was told by the Division of Retirement that she would be eligible for retirement benefits based on two prior periods of employment in state government. Before resigning from the state during her second period of state employment to accept a position with the federal government,

Mrs. Kuge had been informed that she had to continue to work through a certain date to achieve the necessary ten years of creditable retirement service to be eligible for state retirement benefits.

44. After working the specified length of time, and resigning her state position, the Division of Retirement informed Ms. Kuge that she was not eligible for retirement benefits as she had only 9.33 years of creditable State retirement service, instead of ten years necessary to vest in the state retirement system. Following an informal administrative proceeding in which Ms. Kuge challenged the determination that she was ineligible for retirement benefits, the Division of Retirement entered a final order finding her ineligible.

45. On appeal, the Third DCA reversed, noting that the Division was estopped from denying benefits. The State had made a statement of fact as to the length of time which Ms. Kuge had to serve in order to qualify for benefits. Ms. Kuge's detrimental reliance on this statement formed the basis for estoppel.

46. The Third District also specifically rejected the Division's argument that there was no detrimental reliance as Ms. Kuge "could always return to state employment and serve out an additional eight months, thereby becoming eligible for state retirement benefits." Kuge, 449 So. 2d at 392. As noted by the Third DCA, "this argument ignores the real world as the

employment market does not ordinarily permit such cavalier changes in job placement." Id. As in Petitioner's case, a return to employment to earn additional years of service, or termination of benefits until the age of 62 is reached, during which time Petitioner would receive no income, is not a reasonable alternative.

47. In Austin v. Division of Retirement, 350 So. 2d 102 (Fla. 1st DCA 1977), the court held that a mis-statement of law contained in a pamphlet issued by the Division did not bind the Division of Retirement with respect to certain death benefits. In short, the court said that administrative officers of the state cannot estop the state through mistaken statements of the law. Likewise, as provided in Division of Retirement v. Flowers, 356 So. 2d 14 (Fla. 1st DCA 1978), although an incorrect estimate had been mistakenly furnished by the Division's Benefit Calculation Section in response to a member's inquiries about his prospective retirement benefits, the incorrect estimate did not warrant estoppel, and the Division was not required to pay retirement benefits in accordance with the incorrect estimate.

48. In the instant case, an affirmative mis-representation was made to Petitioner by both the Division of Retirement and Okaloosa County School District that no early retirement penalty was imposed on disability retirees. Petitioner relied on that statement. However, the representation can only be characterized as a mis-statement of the law and not a mis-statement of fact.



Therefore, Petitioner is not entitled to an increase in her retirement benefit.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is,

RECOMMENDED:

That the Division of Retirement calculated Petitioner's benefits correctly and is not estopped from reducing Petitioner's benefits based on her status as a disability retiree.

DONE AND ENTERED this 30th day of July, 1997, in Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of July, 1997.

ENDNOTES

<sup>1/</sup> Technically, Petitioner's retirement for TRS purposes would not begin until the first of the next month following her termination date with the Okaloosa County School System.

<sup>2/</sup> Petitioner's disability was not challenged in this proceeding.

<sup>3/</sup> Mrs. Bowles' annual benefit calculation was \$17.498 due to an erroneous comp percent of .538, which assumed only 26.9 years of service.

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.