

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD HODGE,)
)
 Petitioner,)
)
 vs.) Case No. 98-3066
)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This matter came before Diane Cleavinger, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on March 24, 1999, on Respondent's Motion for Final Summary Order.

APPEARANCES

For Petitioner: Anthony J. Salzman, Esquire
Moody and Salzman, P.A.
Post Office Drawer 2759
Gainesville, Florida 32602

For Respondent: Emily Moore, Esquire
Division of Retirement
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STATEMENT OF THE ISSUE

Whether Respondent should grant Petitioner's request to change Petitioner's type of retirement from In-Line-Of-Duty (ILOD) disability retirement to regular service retirement, after

he had made application for ILOD and received some of those benefits.

PRELIMINARY STATEMENT

By letter dated March 18, 1998, Respondent notified Petitioner that it was denying Petitioner's request to change from ILOD disability retirement to regular service retirement. Petitioner thereafter filed a petition contesting the denial and requesting a formal administrative hearing. The matter was referred to the Division of Administrative Hearings.

Prior to the scheduled hearing, Respondent filed a Motion for Summary Final Order, with a supporting affidavit. This Motion was heard telephonically on March 24, 1999. Petitioner agreed that the case would be most economically and efficiently resolved on the Motion for Summary Final Order. At the conclusion of the Motion hearing, the Administrative Law Judge authorized the filing of proposed recommended orders.

The parties filed proposed recommended orders on April 9, 1999.

FINDINGS OF FACT

1. Petitioner, Ronald Hodge, was employed under the Florida Retirement System (FRS) for 31.34 years. On December 19, 1996, he filed the Application for In-Line-Of-Duty (ILOD) Disability Retirement, Form FR-13, with Respondent, Florida Division of Retirement. The Application for ILOD Disability Retirement was signed by Petitioner in the presence of a notary public. In the

lines of text immediately before Petitioner's signature, the Application for ILOD Disability Retirement provides, in relevant part:

. . . . I also understand that I cannot add additional service change options, or change my type of retirement (Regular, Disability, and Early) once my retirement becomes final. My retirement becomes final when any benefit payment is cashed or deposited. (emphasis added)

See also Rule 60S-4.002(4), Florida Administrative Code.

2. On February 19, 1997, Petitioner was accepted as permanently and totally disabled by the State of Florida and began receiving Workers' Compensation permanent total disability benefits for the same accident for which his ILOD disability benefits were accepted by the Division of Retirement.

3. On April 25, 1997, the Division notified Petitioner that his application for ILOD disability benefits had been approved, but that since he also qualified for regular retirement benefits, he had several options available to him. With the letter of April 25, 1997, he was given four different estimates of retirement benefits. He was further advised to send his decision in writing.

4. The letter of April 25, 1997, also advised Petitioner that "You have the option of choosing the type of retirement you wish to receive If you decide to change from disability to service retirement, complete the enclosed application for service retirement, Form FR-11 and return it also." No deadline

for changing his service retirement was specified in the letter. At the time of the April 25, 1997, letter Petitioner had not received any retirement benefit payments.

5. Petitioner responded to the Division's April 25, 1997, letter on May 4, 1997. Petitioner clarified that he had ". . . selected F.R.S. ILOD (In-Line-Of-Duty) disability benefit Option 2 . . ." His decision was based on the estimates of benefits enclosed in the Division's letter of April 25, 1997.

6. In June 1997, Petitioner began to receive disability retirement benefits in the monthly amount of \$1,850.33.

7. In May 1997, in a case in which neither Petitioner nor Respondent was a party, the Florida Supreme Court ruled that ILOD disability retirement benefits paid to recipients of Workers' Compensation benefits could be used to offset/reduce Workers' Compensation benefits. Escambia County Sheriff's Department v. Grice, 692 So. 2d 896 (Fla. 1997).

8. Importantly, Respondent was not aware at the time that it sent the estimates of benefits to Petitioner in April 1997, of the Supreme Court's decision in Escambia County Sheriff's Department v. Grice, 692 So. 2d 896 (Fla. 1997), in May 1, 1997. However, Respondent was aware of the decision before the election was made and before the first benefit was paid of prior decisions in Barragan v. City of Miami, 454 So. 2d 252 (Fla. 1989), and Brown v. S.S. Kresge Co., 305 So. 2d 191 (Fla. 1974), which limit the combination of such benefits to 100 percent of a claimant's

average weekly wage. However, these decisions did not address the offset issue. Respondent never informed Petitioner of this potential reduction when advising him of the selection options.

9. In September 1997, the State of Florida began to take an offset against Petitioner's Workers' Compensation benefits for his disability retirement benefits, thereby reducing the total amount of his Workers' Compensation benefits. If Petitioner had been receiving service retirement benefits, no offset against his Workers' Compensation benefits would have been taken.

10. Based on the effect of the Grice, decision supra. Petitioner sought to change his type of retirement from ILOD disability retirement to regular service retirement.

11. Petitioner's retirement benefit has never been reduced.

12. Petitioner, subsequently filed Application for Service Retirement, Form FR-11, notarized on October 8, 1997, and by letter dated October 7, 1997, which advised that he " . . . had decided to change from disability to service retirement. . . ."

13. Petitioner's Application for Service Retirement was cancelled by Respondent on November 4, 1997, with notice to Petitioner that Respondent's records indicated that he was added to the June 1997 Retired Payroll under ILOD Electronic Fund Transfer (EFT) monthly benefit. Because benefit payments had been deposited, Petitioner's retirement was final.

14. By letter dated December 8, 1997, Petitioner requested reconsideration by the Respondent of its decision to cancel his

Application for Service Retirement and to deny his request to change his type of retirement. He stated that he was " . . . not receiving the benefits I was led to believe I would receive because of setoffs taken by the state of Florida on my Workers' Compensation benefits" He further stated he was misled in that the Division representative informed him that he could change from disability retirement to service retirement by just completing the Form FR-11.

15. At best, the letter of April 25, 1997, is ambiguous as to when the election to change types of benefits could be made and as to whether this letter superseded the previous statement in the original application for ILOD benefits signed by Petitioner that stated he could not change his election of benefits once benefits had been paid. However, the ambiguity in the letter does not constitute a misrepresentation of fact by the Division. The letter simply did not address the issue. Moreover, Petitioner was aware of the language in Form FR-13 that benefit elections were final once benefits were received.

16. Respondent has never reduced or offset any member's benefit, whether disability or regular service retirement, due to receipt of any other benefit. In short, Petitioner's retirement benefit is not being reduced. Moreover, the reduction in Petitioner's Workers' Compensation benefits was not due to Respondent's fault, action, or representation to Petitioner.

17. At the time of retirement, Petitioner was eligible to receive either service retirement because of his more than 30 years of service, or disability retirement because of his ILOD injury. If Mr. Hodge were to be granted service retirement benefits rather than disability retirement benefits, his total monthly payments from the State of Florida (retirement and Workers' Compensation) would be substantially increased.

CONCLUSIONS OF LAW

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

19. The Florida Retirement System (FRS) is established in Chapter 121, Florida Statutes. There is no dispute that Mr. Hodge is a member of the system and that at the time of his retirement he would have been entitled to select either regular retirement benefits based on his 30-plus years of service, or disability benefits based on his ILOD disability.

20. Section 121.091, Florida Statutes, directs how benefits are paid under the FRS; it does not authorize the Respondent to alter the type of retirement benefits once a selection of the type of retirement is final. Further, Respondent has duly promulgated rules, including the Form FR-13, Application for Retirement, which expressly prohibits a change in the type of retirement such as is requested by the Petitioner once a benefit payment is deposited. See Rule 60S-4.002(4), Florida

Administrative Code. In short, Respondent has neither statutory nor regulatory authority to change Petitioner's type of retirement once benefit payments are made to him.

21. The representations made by the Respondent to Petitioner concerned the types and taxable status of FRS retirement benefits. Respondent's representations did not concern any type of Workers' Compensation benefits. Moreover, it is unlikely that Respondent could make any representations concerning Workers' Compensation benefits. No representations were made regarding any offset or reduction of Petitioner's Workers' Compensation benefits based on Petitioner's selection of ILOD disability retirement benefits since Respondent had no knowledge of any such offset or reduction to Petitioner's Workers' Compensation benefit. In fact, the law in this regard changed after Respondent's April 1997, representations to Petitioner. See Grice, supra. The representations as to the amount of retirement benefits Petitioner could receive made by Respondent were accurate when made. In fact, those representations remain accurate to date, since Petitioner's retirement benefits have not been reduced.

22. The elements of equitable estoppel against the State are: (1) a representations 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); See also Bobby Scott v. Department of Management Services, Division of Retirement, Case No. 96-3761 (Div of Ret. July 30, 1997).

23. Kuge v. State, Department of Administration, Division of Retirement, supra, involved a Petitioner who was told by the Division of Retirement she would be eligible for retirement benefits based on two prior periods of employment in state government. Based on these assurances by the Division of Retirement, Kuge chose her date of retirement. She was subsequently notified by the Division that she had only 9.33 years of credible state retirement service instead of 10 years. The District Court held that the State, by its statement of fact as to the length of time which Kuge had to serve in order to qualify for benefits, was estopped to deny Kuge state service retirement benefits. See also Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376 (Fla. 3d DCA 1983).

24. Respondent, having made no misrepresentation of fact, has not engaged in conduct which could provide the basis for estoppel. Kuge, supra.

25. Moreover, even if Respondent had made a mistake of law, which it did not in this case, the State may not be estopped for conduct resulting from mistakes of law. Salz v. Department of

Administration, Division of Retirement, 432 So. 2d 1376 (Fla. 3d DCA 1983).

26. Under the facts and law of this case, Petitioner should be denied relief and Respondent's Motion for Summary Final Order should be granted.

RECOMMENDATION

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

RECOMMENDED:

That the Division of Retirement issue a Final Order denying Petitioner, Ronald Hodge, the relief sought herein, as Respondent has no basis in law or equity to change Petitioner's type of retirement.

DONE AND ENTERED this 28th day of April, 1999, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of April, 1999.

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.