

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KEVIN SPERRY HICKEY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 98-3895  
 )  
 DIVISION OF RETIREMENT, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was held in this case on December 7, 1998, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly designated administrative law judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Larry D. Scott, Esquire  
Division of Retirement  
Legal Office  
Cedars Executive Center  
2639-C North Monroe Street  
Tallahassee, Florida 32399-1560

For Respondent: Donald D. Slesnick, II, Esquire  
10680 Northwest 25th Street, Suite 202  
Miami, Florida 33172-2108

STATEMENT OF THE ISSUE

Whether Respondent should grant Petitioner's request that he be reclassified (for retirement purposes) as "Special Risk Administrative Support," effective January 1, 1994.

PRELIMINARY STATEMENT

By letter dated July 31, 1998, Respondent advised Petitioner that it was denying Petitioner's request "to reclassify [his] service from the Senior Management Service Class (SMSC) to the Special Risk Administrative Support Class (SRASC)." Petitioner thereafter filed a Petition contesting the denial. On September 2, 1998, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a Section 120.57(1) hearing.

As noted above, the hearing was held on December 7, 1998. Five witnesses testified at the hearing: Petitioner, Mercedes Delgado, Daniel Gonzales, R. Geoffrey Martin, and David Ragsdale. In addition to the testimony of these five witnesses, a total of 23 exhibits (Petitioner's Exhibits A through J and Respondent's Exhibits A through M) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced on the record that proposed recommended orders had to be filed no later than February 1, 1999. By order issued January 25, 1999, the filing deadline was extended to February 16, 1999, at the parties' request. On February 9, 1999, Petitioner filed an unopposed motion requesting a further extension of the deadline. By order issued February 10, 1999, the motion was granted and the deadline was extended to February 26, 1999.

On February 26, 1999, Petitioner and Respondent timely filed their proposed recommended orders. The undersigned has carefully

considered these post-hearing submittals.

FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

1. Petitioner is now, and has been since 1972, employed by Miami-Dade County's Correction and Rehabilitation Department.

2. He began work in 1972 as a Correctional Officer.

3. He now is the Assistant Director of General Administration.

4. In 1993, Petitioner held the position of Assistant Director of Corrections and Rehabilitation Services (position number 4594), and was a member of the Special Risk Administrative Support Class within the Florida Retirement System (FRS).

5. Miami-Dade County placed notices in the September 11, 1993, and September 18, 1993, editions of the Miami Herald of its intention to designate Petitioner's position (position number 4594) and others for inclusion in the Senior Management Service Class of the FRS, effective January 1, 1994.

6. Thereafter, Beth Carlton, Miami-Dade County's Employee Benefits Coordinator, issued a two-page memorandum, dated October 13, 1993, on the subject of "[c]hange in [r]etirement [c]lass [d]esignation." The first page of the memorandum read as follows:

A recent legislative change allows local government employers to designate certain positions to be included in the Senior Management Service Class (SMSC) of the

Florida Retirement System (FRS). As required by statute, a notice of intent was published and the Board of County Commissioners has designated executive positions in groups 1 and 2 as positions to be included in the SMSC. Effective January 1, 1994, your position is designated as one belonging to the SMSC. Attached is a booklet from FRS explaining the SMSC.

### Senior Management Service Class

There are essentially two differences between the Senior Management Service Class and Regular Class under FRS.

1. Under the SMSC you are vested after you have completed 7 years of Senior Management service (or 10 years of any FRS service). You may retire without reduction in benefits due to age if you are 62 and have 7 years of Senior Management service, or 10 years of any FRS service.

2. Each year of creditable Senior Management service earns you a 2% credit. Regular service earns 1.6% credit.

Additionally, in accordance with state statutes, the Board of County Commissioners has authorized the County to upgrade to SMSC service any creditable service you may have earned in a designated Senior Management position since February 1, 1987. This means that you will receive the 2% service credit for any upgraded service. This upgrade will take place after January 1, 1994, and will apply only to those employees occupying designated Senior Management positions on January 1, 1994.

### Lifetime Monthly Annuity Program

Employees in positions designated Senior Management may instead elect to withdraw from the Florida Retirement System altogether and participate in a lifetime monthly annuity program.

The second page of the memorandum read as follows:

Members of the SMSC who elect to withdraw from FRS and participate in the annuity program do not earn additional FRS credit while they are in the annuity program and are not eligible for disability benefits under FRS. Your decision to withdraw from FRS and participate in the annuity program is irrevocable as long as you remain in a Senior Management position.

Should anyone occupying a position designated as Senior Management elect the Lifetime Monthly Annuity Program, the County would need to establish and fund a separate supplemental retirement program. The County would contribute 12.62% of the covered compensation of any such employee to the annuity program, and 10.45% to FRS for unfunded actuarial accrued liability (rates set by Florida legislature). For SMSC participants, the County will contribute 23.63% of covered compensation.

The annuity program does not guarantee any benefits payable on retirement, but merely guarantees the amount of contributions and actual investment earnings. The health insurance subsidy is not paid for service under the annuity program.

#### Next Steps

You will receive an election form from FRS. Forms are still being developed and are not currently available for distribution. On the election form you will elect either to remain in SMSC or to withdraw from FRS.

We are automatically preparing paperwork for FRS to upgrade all eligible prior service to SMSC and will notify you of the dates of service that we are requesting to upgrade. FRS will not process any upgrades until after January 1, 1994. Upgrades for those Senior Management employees who are planning to retire early in 1994 will be handled first. If you are planning to retire before June of 1994, please notify us immediately.

Once the upgrades are complete, you will be informed of your years of creditable Regular service and SMSC service according to FRS records.

7. Petitioner received a copy of the first page of the memorandum; however, he received neither a copy of the second page of the memorandum, nor a copy of the "booklet from FRS"

referenced on the first page of the memorandum (FRS Booklet),  
which explained, among other things, that, in lieu of  
participating in the Senior Management Service Class, those in

the Special Risk or Special Risk Administrative Support Classes had the option of remaining in these classes.

8. For purposes of benefits and compensation, executive positions in Miami-Dade County government are placed in one of three "Executive Benefit Groups" (Groups 1, 2, and 3). At the time of the issuance of Ms. Carlton's October 13, 1993, memorandum, Petitioner occupied a position (position 4594) in Executive Benefit Group 2. (Earlier, in December of 1991, when his position was reclassified to Assistant Director of Corrections and Rehabilitation Services, a Personnel Change Document was filled out which recommended that his position be included in Executive Benefit Group 3 instead of Executive Benefit Group 2. This recommendation, however, was not acted upon.) The benefits and compensation package received by Petitioner and the other executives in Executive Benefit Group 2 was more generous than those received by executives in Executive Benefit Group 3 and less generous than those received by executives in Executive Benefit Group 1.

9. In January of 1994, Andrea Romisher, Miami-Dade County's Employee Benefits Manager, issued a memorandum, dated January 11, 1994, addressed to "Group 1 and Group 2 Executives," on the subject of "[e]nrollment in the Senior Management Class of the FRS." The memorandum read as follows:

You received a memorandum in October which detailed the expansion of the Senior Management Class of the Florida Retirement System as of January 1, 1994. We have



received the necessary forms from the Division of Retirement and are in the process of formally designating executive positions in groups 1 and 2. However, prior to our changing your retirement class, you must complete the enclosed FRS M-10.

To enroll in the Senior Management Service Class:

1. Complete the top of the form;
2. Attach a copy of your Social Security card on the form;
3. Designate a beneficiary by choosing either section 1, 2, or 3 under the designation of beneficiaries section;
4. Sign and date the form.
5. Return the form to the Office of Labor Management and Employee Benefits, 111 N.W. 1st Street, Suite 2140 no later than January 21, 1994. Please direct the form to me or Beth Carlton.

The prior memorandum also explained the provision whereby members of the SMSC may irrevocably elect to withdraw from the Florida Retirement System and participate in an optional annuity program. We have contacted one of our providers and anticipate having the optional annuity program available in the near future. We have been instructed by the Division of Retirement to enroll all eligible executives in the SMSC in the interim.

If you are interested in participating in the optional annuity program, please advise either me or Beth Carlton so that we may send you an election form and details of the plan when it has been finalized. Additionally, you may elect to irrevocably withdraw from the Florida Retirement System and participate in the optional annuity program at any time you occupy a position which is covered by the SMSC.



\_\_\_\_\_ I elect to remain in the Florida Retirement System's SMSC, or

\_\_\_\_\_ I elect to withdraw from the FRS and participate in a lifetime monthly annuity program. I understand that my decision to withdraw from the FRS is irrevocable for as long as I hold a position eligible for the membership in the SMSC. I also understand information concerning the annuity program will need to be obtained through my employer.

\_\_\_\_\_  
Member's Signature

\_\_\_\_\_  
Date

TO BE COMPLETED BY EMPLOYER:

I certify that the above member's payroll records have been changed effective \_\_\_\_\_ to reflect the above member's choice of membership.

\_\_\_\_\_  
Signature of Personnel Officer

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name of Employing Agency

\_\_\_\_\_  
Reporting  
Unit  
Number

12. Inasmuch as he "did not want to leave FRS," Petitioner indicated on the form that he "elect[ed] to remain in the Florida Retirement System's SMSC." Had Petitioner known that he had the option of staying in the Special Risk Administrative Support Class, he would have elected this option instead of the one that he selected.

13. The Miami-Dade County "Personnel Officer" who completed the bottom portion of the form indicated thereon that Petitioner's "pay roll records ha[d] been changed effective 1/1/94 to reflect [Petitioner's] choice of membership."

14. The completed Division Form SMS-3 was sent to the Division of Retirement (Division).

15. The Division also received a form completed by Miami-Dade County which reflected that Miami-Dade County had "published notice of [its] intent to include [Petitioner's position, among others] in the SMSC [Senior Management Service Class] in the Miami Herald on 9/11/93 and 9/18/93," and that the position had been so designated for inclusion in the SMSC in accordance with the requirements of Section 121.055(3) and (7), Florida Statutes.

16. In 1997, after learning that he had to wait another five years to retire with full benefits because of his having been "place[d] . . . in the Senior Management Service Class" in 1994, Petitioner, by memorandum dated December 26, 1997, formally requested Miami-Dade County's Employee Benefits Supervisor, Daniel Gonzales, to "take the appropriate action to accomplish [his] conversion to the [S]pecial [R]isk [A]dministrative [S]upport [Class] for the period [he has been] included in [the] SMSC."

17. Petitioner received the following written response to his request:

This memo is in response to your request to change your retirement class from the Senior Management Service Class (SMSC) to the Special Risk Administrative Support Class.

In February 1994, Metro Dade designated your position to be included in the Senior Management Service Class. Simultaneously, you completed a FRS-M10 Form [Designation of Beneficiaries form] and Form SMS-3 thereby

enrolling in the SMSC. This election enabled you to receive an increase in your annual retirement percentage from 1.6% for Special Risk Administrative Support Class to 2.0% for the Senior Management Service Class. Since 1994, the Employee Benefits Office has been working with the Florida Retirement System (FRS) to upgrade the service time of all executives serving in a position designated as Executive Benefits Level 2 or higher. Based on the elections you made in February 1994, the effective date of your SMSC service is January 1994.

On July 3, 1997, you requested that your service from January 1987 through December 1993, not be upgraded until you received a decision from the FRS regarding your Special Risk Service Class. Although you received a determination on the Special Risk Service Class, your memo dated December 26, 1997, indicated that there are still some pending issues with the FRS. Therefore, we will continue to honor your request until all your issues with the FRS are resolved.

In regards to changing your retirement class to Special Risk Administrative Support, we are unable to process your request. As specified in the Florida Retirement System Rules Chapter 60S-1.0057(2)(a), a member may elect to remain in the Special Risk Class in lieu of participating in SMSC, however such election must be made in writing and filed with the employer and the Division within 90 days after employment begins in a Senior Management Service Class position. By completing the SMSC enrollment paperwork, you made a decision to join the Senior Management Class. A copy of the Florida Retirement System Rules Chapter 60S-1.0057 has been attached for your review. Further questions on this issue should be directed to Mr. David Ragsdale, Division of Retirement, Bureau of Enrollment and Contributions, 2639-C, North Monroe Street, Tallahassee, Florida, 32399-1560.

18. Petitioner subsequently requested the Division to change his classification. By letter dated July 31, 1998, which provided in pertinent part as follows, the State Retirement Director notified Petitioner that a final decision had been made that his request could not be granted:

This is in response to your June 8, 1998 letter requesting the Division of Retirement reconsider its decision to reclassify your service from the Senior Management Service Class (SMSC) to the Special Risk Administrative Support Class (SRASC).

By letter dated April 23 (copy enclosed), we advised you of our determination that there is no provision in the FRS law that would allow the Division to honor your request for reclassification.

Enclosed is a copy of Section 60S-1.0057(2)(a)1., F.A.C. Based on the information provided, it appears you failed to elect to remain in the Special Risk Administrative Support Class within the 90 day period as provided in the law. You indicated an election to remain in the SMSC when you executed a Ballot/Enrollment FORM SMS-3, dated February 4, 1994 (copy enclosed), and are consequently a compulsory member of the SMSC. Therefore, the ruling is now final, and if you do not agree with the decision, you are entitled to an Administrative Hearing.

#### CONCLUSIONS OF LAW

19. Section 121.055, Florida Statutes, created a Senior Management Service Class (SMSC) within the Florida Retirement System (FRS), effective February 1, 1987.

20. Subsection (1)(b)1 of Section 121.055, Florida Statutes, describes those "local agency" employees who are

included in the SMSC. It provides as follows:

(b)1. Except as provided in subparagraph 2., effective January 1, 1990, participation in the Senior Management Service Class shall be compulsory for the president of each community college, the manager of each participating city or county, and all appointed district school superintendents. Effective January 1, 1994, additional positions may be designated for inclusion in the Senior Management Service Class of the Florida Retirement System, provided that:

a. Positions to be included in the class shall be designated by the local agency employer. Notice of intent to designate positions for inclusion in the class shall be published once a week for 2 consecutive weeks in a newspaper of general circulation published in the county or counties affected, as provided in chapter 50.

b. One nonelective full-time position may be designated for each local agency employer reporting to the Division of Retirement; for local agencies with 100 or more regularly established positions, additional nonelective full-time positions may be designated, not to exceed 1 percent of the regularly established positions within the agency.

c. Each position added to the class must be a managerial or policymaking position filled by an employee who is not subject to continuing contract and serves at the pleasure of the local agency employer without civil service protection, and who:

(I) Heads an organizational unit; or

(II) Has responsibility to effect or recommend personnel, budget, expenditure, or policy decisions in his or her areas of responsibility.<sup>1</sup>

21. Subsection (1)(b)2 of Section 121.055, Florida Statutes, provides that "[i]n lieu of participation in the Senior

Management Service Class, members of the Senior Management Service Class pursuant to the provisions of subparagraph 1. may withdraw from the Florida Retirement System altogether and participate in a lifetime monthly annuity program which may be provided by the employing agency," and it further provides that "[t]he decision to participate in such local government annuity shall be irrevocable for as long as the employee holds a position eligible for the annuity."

22. According to subsection (6)(c)2 of Section 121.055, Florida Statutes:

Any employee who becomes eligible to participate in the optional annuity program by reason of initial employment commencing after February 1, 1987, may, within 90 days after the date of commencement of employment, elect to participate in the optional annuity program. Such election shall be made in writing and filed with the personnel officer of the employer. Any eligible employee who does not within 90 days after commencement of such employment elect to participate in the optional annuity program shall be deemed to have elected membership in the Senior Management Service Class.

23. Subsection (6)(c)3 of Section 121.055, Florida Statutes, which provides as follows, establishes another option for employees eligible for the SMSC who are in the Special Risk or Special Risk Administrative Support Classes:

A person who is appointed to a position in the Senior Management Service Class and who is a member of an existing retirement system or the Special Risk or Special Risk Administrative Support Classes of the Florida Retirement System may elect to remain in such system or class in lieu of participation in



the Senior Management Service Class or optional annuity program. Such election shall be made in writing and filed with the department and the personnel officer of the employer within 90 days of such appointment. Any eligible employee who fails to make an election to participate in the existing system, the Special Risk Class of the Florida Retirement System, the Special Risk Administrative Support Class of the Florida Retirement System, or the optional annuity program shall be deemed to have elected membership in the Senior Management Service Class.

24. In 1994, when his position was designated for inclusion in the SMSC, Petitioner was such an employee. At that time, he opted to be included in the SMSC. He now claims that he should not be bound by that election inasmuch as it was based upon incomplete and misleading information provided to him concerning the options he had available. According to Petitioner, under the circumstances present in the instant case, to "bring about a fair and just result," he "should be reinstated to [the] SRASC [Special Risk Administrative Support Class] retroactively to January 1, 1994." The Division, on the other hand, contends that neither Section 121.055, Florida Statutes, nor the Division's rules, authorize the Division to grant such relief.

25. In appropriate circumstances, principles of equity and fairness may be applied in administrative proceedings to prevent unjust results, notwithstanding the absence of any statutory or rule provision expressly authorizing the application of these principles. See Occidental Chemical Agricultural Products, Inc. v. Department of Environmental Regulation, 501 So. 2d 674 (Fla.

1st DCA 1987) and cases cited therein<sup>2</sup> ("It is noteworthy that the administrative process in this State routinely handles cases in which parties have introduced equitable estoppel issues."); Machules v. Department of Administration, 523 So. 2d 1132, 1133-34 (Fla. 1988) ("The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period. . . . The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which 'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.' . . . [E]quitable tolling, unlike estoppel, does not require active deception or employer misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights. . . . 'The doctrine (of equitable tolling) serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules.' . . . Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong

forum. . . . We do not find it unreasonable to excuse Machules, a layperson, from clearly understanding which avenue of review to pursue when the Employer itself acquiesced in the procedure chosen"; held that doctrine of equitable tolling "applied to toll the time for seeking review [of employer's determination of employee's abandonment of position] with the Department of Administration.") The party urging that these equitable principles be applied bears the burden of establishing the appropriateness of their application. See Flanigan's Enterprises, Inc. v. Barnett Bank of Naples, 614 So. 2d 1198, 1200 (Fla. 5th DCA 1993)("It is well established that when estoppel is raised as a defense, the burden of proof is on the party asserting it."); see also Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.").

26. Rescission of an executed instrument (such as the Ballot/Enrollment Form for Local Agency Employees signed by Petitioner on February 4, 1994) and restoration of the parties to their pre-execution positions (which, together with a tolling of the statutorily prescribed 90-day period for electing continuing Special Risk Administrative Support Class status, is essentially the relief Petitioner is requesting in the instant case) is an equitable remedy that the Division may provide in those

exceptional cases where application of the rules of fair play warrants such a remedy. Cf. Branca v. City of Miramar, 634 So. 2d 604, 606 (Fla. 1994) ("The theory of estoppel is an application of the rules of fair play."); 9 Fla. Jur.2d, Cancellation, Recission, and Reformation of Instruments, Section 2 ("The remedy of recission . . . is essentially equitable in character, the granting of which depends upon the application of equitable principles as distinguished from substantive rules of law."). Such an exceptional situation exists where a member of the FRS, in executing a Division-provided form or other retirement-related instrument, has acted to his detriment based upon inaccurate or misleading information provided by the Division (or its agent) concerning matters about which the Division had superior knowledge, regardless of whether there was any intent on the part of the Division (or its agent) to deceive or mislead the employee. Cf. Yost v. Rieve Enterprise, Inc., 461 So. 2d 178, 182 (Fla. 1st DCA 1984) ("[T]he purchaser of business property is entitled to rely on the truth of the seller's representations even though the falsity could have been ascertained had the buyer made an investigation--unless the latter knew the representations to be false, or the falsity was obvious to him--if the seller, as owner of the property had superior knowledge of its size, condition and income"; trial court's recission of contract upheld); Sutton v. Cast Crete Corporation of Florida, 197 So. 2d 556, 558 (Fla. 2d DCA 1967), quoting, with approval, from Langley

v. Irons Land and Development Co., 114 So. 769, 771 (Fla. 1927)("According to the weight of authority, misrepresentation of material facts, although innocently made, if acted on by the other party to his detriment, will constitute a sufficient ground for rescission and cancellation in equity. The real inquiry is not whether the party making the representation kn[e]w it to be false, but whether the other party believed it to be true and was misled by it in making the contract; and, whether the misrepresentation is made innocently or knowingly, the effect is the same. It is as conclusive a ground of relief in equity as a willful and false assertion, for it operates as a surprise and imposition on the other party."); 9 Fla. Jur.2d, Cancellation, Rescission, and Reformation of Instruments, Section 16 ("A misrepresentation of material facts, although innocently made, if acted on by the other party to that party's detriment may constitute a sufficient ground for rescission and cancellation in equity, so long as the party making the representation had superior knowledge and thus had reason to know of the falsity.").

27. In the instant case, Petitioner has met his burden of establishing the existence of circumstances warranting the equitable relief he is requesting. He has shown that he received two memoranda from his employer (one dated October 13, 1993, and the other dated January 11, 1994),<sup>3</sup> as well as a blank Ballot/Enrollment Form for Local Agency Employees (Division Form SMS-3), that erroneously suggested that, upon the designation of

his position to the SMSC, he had only two options--remain in the SMSC or withdraw from the FRS entirely and participate in a lifetime annuity program--and he could not continue his membership in the Special Risk Administrative Support Class;<sup>4</sup> Petitioner reasonably relied to his detriment upon this erroneous information (supplied by persons having superior knowledge concerning such matters) in making his decision (reflected on the Ballot/Enrollment Form for Local Agency Employees he filled out and signed) to remain in the SMSC; and had he known he had the choice of continuing his membership in the Special Risk Administrative Support Class, he would have exercised this option instead of the one he selected inasmuch as he wanted to be able to retire with full benefits after 25 (rather than 30) years of service. Moreover, it does not appear that allowing Petitioner to change his election and permitting him to return to the Special Risk Administrative Support Class, retroactive to January 1, 1994 (with a concomitant recalculation of his retirement credits) would be unlawful or contrary to public policy.

28. Under such circumstances, Petitioner should be granted such relief.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Division issue a final order granting

Petitioner the equitable relief described above.

DONE AND ORDERED this 9th day of March, 1999, in  
Tallahassee, Leon County, Florida.

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of March, 1999.

ENDNOTES

<sup>1</sup> See also Rule 60S-1.0057(1)(c), (g), (i), and (j), Florida  
Administrative Code, which provides as follows:

(1) Compulsory Membership -- Membership in  
the Senior Management Service Class shall be  
compulsory, except as provided in subsection  
60S-1.0057(2), for any member of the Florida  
Retirement System or an existing system who  
holds any of the following positions: . . .

(c) Effective January 1, 1990 -- certain  
local agency positions as follows:

1. The president of each community college;
2. The manager of each participating city or  
county;
3. All appointed district school  
superintendents. . . .

(g) Effective January 1, 1994 -- positions  
designated for inclusion in the Senior  
Management Service Class in the offices of  
the state attorney and the public defender in  
each judicial circuit, and in local agencies.  
Such positions may be designated by each



state attorney, public defender, and local agency employer as follows:

1. One nonelective full-time position may be designated for each state attorney's office and each public defender's office and for each local agency employer.

2. Additional nonelective full-time positions in such offices and agencies with 200 or more filled, regularly established positions may be designated, not to exceed 0.5 percent of the filled, regularly established positions in the office or agency.

3. Such designated positions must meet the following requirements:

a. The position must be managerial or policymaking; and

b. The position must be the head of an organizational unit, or responsible for effecting or recommending personnel, budget, expenditure, or policy decisions in its area of responsibility; and

c. The position must be one in which the employee filling the position is not subject to continuing contract and does not have civil service protection, that is, is subject to termination without cause.

4. The employer designating such positions must:

a. Publish in a newspaper of general circulation in the county or counties affected, once a week for 2 consecutive weeks, a notice of intent to designate a position or positions for inclusion in the class; and

b. Complete Form SMSD-1, Senior Management Service Class Designated Position Form, adopted in 60S-9. The position number of the designated position, consisting of from 1 to 10 numeric digits, must be included on the Form SMS-1.

5. Inclusion of the position in the SMSC shall be effective January 1, 1994 or, if Form SMSD-1 is received by the Division after February 20, 1994, the first day of the month following the month in which Form SMSD-1 is received by the Division.

6. Eligible employees filling designated positions must complete and submit application forms as provided in 60S-1.0057(3). . . .

(i) The effective date of membership shall be the latest of the following dates:

1. Date of inclusion of position in the Senior Management Service Class, or

2. Date of appointment to a Senior Management Service Class position, or

3. For members of existing systems or the Special Risk or Special Risk Administrative Support Classes who are eligible for the options provided in 60S-1.0057(2), the first day of the month during which such member makes application for membership in the Senior Management Service Class, or 90 days after employment begins in a Senior Management Service Class position for such member who fails to elect membership in the Senior Management Service Class within such 90-day period.

(j) Membership in the Senior Management Service Class shall cease when a member terminates employment in a Senior Management Service Class position.

<sup>2</sup> Among the cases cited were Kuge v. Department of Administration, Division of Retirement, 449 So. 2d 389 (Fla. 3d DCA 1984) and Salz v. Department of Administration, 432 So. 2d 1376 (Fla. 3d DCA 1983), two cases in which the Division was deemed to be equitably estopped from denying retirement benefits to employees who relied to their detriment upon inaccurate information provided to them by the Division.

<sup>3</sup> By all appearances, Petitioner's employer was assisting the Division and acting as its agent in disseminating information to FRS members. See Almerico v. RLI Insurance Company, 716 So. 2d

774, 777 (Fla. 1998)("Florida case law provides an insurer may be held accountable for the actions of those whom it cloaks with 'apparent agency.' Further, a review of the case law on agency indicates that evidence of indicia of agency may be demonstrated if the insurer furnishes an insurance agent or agency with 'any blank forms . . . used in soliciting, negotiating, or effecting contracts of insurance.'"); Harris v. Department of Administration, Division of State Employees' Insurance, 577 So. 2d 1363, 1367 (Fla. 1st DCA 1991)("In addressing appellant's estoppel argument, we have no difficulty in agreeing with her contention that Quincoses was acting as the division's agent when she gave advice to appellant. The benefit document clearly refers questions regarding coverage to the various agencies' personnel offices, and, in doing so, the division made Quincoses its agent."); Warren v. Department of Administration, 534 So. 2d 568, 571 (Fla. 5th DCA 1989)("In this case, the insurance policy shows Blue Cross has a clear agency relationship with the Department. The brochure distributed by the Department refers all claim inquiries to Blue Cross and Blue Cross is the administrator of the state insurance plan. Based on these facts and Blue Cross's prior dealings with Warren, we hold Blue Cross had the apparent authority to bind the Department.").

<sup>4</sup> This is not a case involving the mere failure to provide any information to an employee. Contrast with Fiorentino v. Department of Administration, Division of Retirement, 463 So. 2d 338, 341 (Fla. 1st DCA 1985)("Appellant first argues that the School Board had an affirmative duty to inform her of her right to elect continued membership [in the Teachers' Retirement System] and the consequences of a withdrawal of accumulated contributions. Section 238.05(3) contains no such affirmative duty"). Rather, in the instant case, information was provided to Petitioner that was not entirely accurate. Compare with Ramel v. Chasebrook Construction Company, 135 So. 2d 876, 882 (Fla. 2d DCA 1961)("[E]ven though a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, if he undertakes to do so he must disclose the whole truth.").

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.

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<sup>1</sup> See also Rule 60S-1.0057(1)(c), (g), (i), and (j), Florida Administrative Code, which provides as follows:

(1) Compulsory Membership -- Membership in the Senior Management Service Class shall be compulsory, except as provided in subsection 60S-1.0057(2), for any member of the Florida Retirement System or an existing system who holds any of the following positions: . . .

(c) Effective January 1, 1990 -- certain local agency positions as follows:

1. The president of each community college;
2. The manager of each participating city or county;

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3. All appointed district school superintendents. . . .

(g) Effective January 1, 1994 -- positions designated for inclusion in the Senior Management Service Class in the offices of the state attorney and the public defender in each judicial circuit, and in local agencies. Such positions may be designated by each state attorney, public defender, and local agency employer as follows:

1. One nonelective full-time position may be designated for each state attorney's office and each public defender's office and for each local agency employer.

2. Additional nonelective full-time positions in such offices and agencies with 200 or more filled, regularly established positions may be designated, not to exceed 0.5 percent of the filled, regularly established positions in the office or agency.

3. Such designated positions must meet the following requirements:

a. The position must be managerial or policymaking; and

b. The position must be the head of an organizational unit, or responsible for effecting or recommending personnel, budget, expenditure, or policy decisions in its area of responsibility; and

c. The position must be one in which the employee filling the position is not subject to continuing contract and does not have civil service protection, that is, is subject to termination without cause.

4. The employer designating such positions must:

a. Publish in a newspaper of general circulation in the county or counties

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affected, once a week for 2 consecutive weeks, a notice of intent to designate a position or positions for inclusion in the class; and

b. Complete Form SMSD-1, Senior Management Service Class Designated Position Form, adopted in 60S-9. The position number of the designated position, consisting of from 1 to 10 numeric digits, must be included on the Form SMS-1.

5. Inclusion of the position in the SMSC shall be effective January 1, 1994 or, if Form SMSD-1 is received by the Division after February 20, 1994, the first day of the month following the month in which Form SMSD-1 is received by the Division.

6. Eligible employees filling designated positions must complete and submit application forms as provided in 60S-1.0057(3). . . .

(i) The effective date of membership shall be the latest of the following dates:

1. Date of inclusion of position in the Senior Management Service Class, or

2. Date of appointment to a Senior Management Service Class position, or

3. For members of existing systems or the Special Risk or Special Risk Administrative Support Classes who are eligible for the options provided in 60S-1.0057(2), the first day of the month during which such member makes application for membership in the Senior Management Service Class, or 90 days after employment begins in a Senior Management Service Class position for such member who fails to elect membership in the Senior Management Service Class within such 90-day period.

(j) Membership in the Senior Management Service Class shall cease when a member

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terminates employment in a Senior Management Service Class position.

<sup>2</sup> Among the cases cited were Kuge v. Department of Administration, Division of Retirement, 449 So. 2d 389 (Fla. 3d DCA 1984) and Salz v. Department of Administration, 432 So. 2d 1376 (Fla. 3d DCA 1983), two cases in which the Division was deemed to be equitably estopped from denying retirement benefits to employees who relied to their detriment upon inaccurate information provided to them by the Division.

<sup>3</sup> By all appearances, Petitioner's employer was assisting the Division and acting as its agent in disseminating information to FRS members. See Almerico v. RLI Insurance Company, 716 So. 2d 774, 777 (Fla. 1998) ("Florida case law provides an insurer may be held accountable for the actions of those whom it cloaks with 'apparent agency.' Further, a review of the case law on agency indicates that evidence of indicia of agency may be demonstrated if the insurer furnishes an insurance agent or agency with 'any blank forms . . . used in soliciting, negotiating, or effecting contracts of insurance.'"); Harris v. Department of Administration, Division of State Employees' Insurance, 577 So. 2d 1363, 1367 (Fla. 1st DCA 1991) ("In addressing appellant's estoppel argument, we have no difficulty in agreeing with her contention that Quincoses was acting as the division's agent when she gave advice to appellant. The benefit document clearly refers questions regarding coverage to the various agencies' personnel offices, and, in doing so, the division made Quincoses its agent."); Warren v. Department of Administration, 534 So. 2d 568, 571 (Fla. 5th DCA 1989) ("In this case, the insurance policy shows Blue Cross has a clear agency relationship with the Department. The brochure distributed by the Department refers all claim inquiries to Blue Cross and Blue Cross is the administrator of the state insurance plan. Based on these facts and Blue Cross's prior dealings with Warren, we hold Blue Cross had the apparent authority to bind the Department.").

<sup>4</sup> This is not a case involving the mere failure to provide any information to an employee. Contrast with Fiorentino v. Department of Administration, Division of Retirement, 463 So. 2d 338, 341 (Fla. 1st DCA 1985) ("Appellant first argues that the School Board had an affirmative duty to inform her of her right to elect continued membership [in the Teachers' Retirement System] and the consequences of a withdrawal of accumulated contributions. Section 238.05(3) contains no such affirmative duty"). Rather, in the instant case, information was provided to Petitioner that was not entirely accurate. Compare with Ramel v. Chasebrook Construction Company, 135 So. 2d 876, 882 (Fla. 2d DCA 1961) ("[E]ven though a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries

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respecting such facts, if he undertakes to do so he must disclose the whole truth.").