

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANTANA HEIM,)
)
 Petitioner,)
)
 vs.) Case No. 03-0625
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 1, 2003, in Tallahassee, Florida, before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mantana Heim, pro se
2664 Radford Church Road
Moneta, Virginia 24121-4496

For Respondent: Robert B. Button, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether the effective retirement date of Petitioner as determined by Respondent is correct.

PRELIMINARY STATEMENT

Petitioner, Mantana Heim, requested Respondent, Division of Retirement (Division), to change her effective retirement date from May 1, 2002 to August 1, 1999. By letter dated November 4, 2002, the Division denied Petitioner's request to change her effective retirement date. On November 26, 2002, Petitioner requested a formal administrative hearing on the Division's denial. The matter was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in her own behalf. She did not offer any exhibits into evidence. Respondent presented the testimony of one witness, but did not offer any exhibits into evidence.

After the hearing, Petitioner and Respondent filed Proposed Recommended Orders on November 3 and October 30, 2003, respectively.

FINDINGS OF FACT

1. Ms. Heim was employed by the Department of Corrections.
2. She was a regular member of the Florida Retirement System (FRS) with 16.34 years of creditable service. Her date of birth is September 5, 1945.
3. Ms. Heim terminated employment from the Department of Corrections in July 1999, at the age of 53. At the time of her separation from employment, Ms. Heim did not receive

instructions on her eligibility to apply for early retirement from the Department of Corrections or from the Division of Retirement. She did not receive any misinformation or erroneous information regarding her retirement from either the Division of Retirement or the Department of Corrections. Had Ms. Heim known about early retirement, she would have elected to retire in 1999, and her retirement (assuming she timely filed her application) would have been August 1999. Had she retired in 1999, her benefits would have been statutorily reduced by five percent for each year she was under the age of 62, resulting in approximately a 30 percent reduction in the current amount of her benefit.

4. There are approximately 800 employers participating in FRS with approximately 600,000 active members of FRS and 200,000 retirees. When a member terminates employment, the Division is not informed by the member's employer. It is the responsibility of the member to inform the Division of his or her retirement since leaving state employment does not necessarily mean the person is retiring or desires to receive his or her retirement benefits.

5. The Division periodically sent benefit estimates to Ms. Heim after her termination. However, the estimates were sent to the wrong address and were not received by Petitioner until April 2002. At that point, the Division learned of her

termination and sent her a letter advising her of her ability to elect early retirement. When Ms. Heim learned of her early retirement option, she contacted the Division.

6. The Department of Management Services, Division of Retirement, sent Ms. Heim an application for retirement in April 2002. The Petitioner, upon receiving the application for retirement, submitted the required paperwork on July 2, 2002.

7. The Division, pursuant to its statutes and rules, determined that Ms. Heim's effective date of retirement was May 1, 2002, and has offered her benefits based on that date. There was no evidence which demonstrated that the May 1 date was incorrect. Ms. Heim believes her retirement date should be August 1, 1999, because she was not at fault for not applying for retirement in 1999. However, as indicated, it is the member's responsibility to notify the Division about that member's retirement. In this case, the Division complied with the statutes and rules governing the Florida retirement system.

8. Finally, Ms. Heim believes that, should her effective retirement date be changed, her benefit should not be reduced as the Division's statutes and rules require. She objects to her benefit being reduced because of her desire "to punish the Division of Retirement" for not giving her clear information about early retirement or being aware of her correct address. The problem with Petitioner's argument is that the agency

responsible for Ms. Heim's employment and retirement was the Department of Corrections and not the Division. The other problem is that there is no factual or legal bases in law or equity to grant such relief.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Chapter 120, Fla. Stat. (2003).

10. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of an issue. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Accordingly, it is Petitioner's burden to demonstrate entitlement to an alternative effective retirement date.

11. Section 121.091, Florida Statutes, provides that "benefits may not be paid under this section unless the member has terminated employment and a proper application has been filed in the manner prescribed by the department."

12. Florida Administrative Code Rule 60S-4.0035, provides in pertinent part that

(1) It shall be the responsibility of the member, or the beneficiary in the event of the member's death, to make proper application to the Division for retirement benefits.

* * *

(3) The Division shall establish the member's effective retirement date as follows:

(a) For a member who makes application for a normal or early retirement benefit as provided in Florida Administrative Code Rule 60S-4.004 or 4.005, the effective retirement date shall be the first day of the month following the month in which the member's termination occurs, provided the Division receives such member's application for retirement no later than 30 calendar days after such termination. If a member fails to apply for retirement within 30 calendar days after termination or if the member chooses to defer his retirement to a later date, the effective retirement date shall be the first day of the month following the month in which the Division receives the member's application, or the first day of a later month specified by the member.

The statutes and rules also provide for early retirement and the calculations of benefits under regular and early retirement.

These statutes and rules put a member on notice as to the member's responsibilities and early retirement options.

Tamburro v. Department of Management Services, Division of Retirement, DOAH Case No. 03-1347 (RO July 15, 2003).

13. Petitioner argues that the Division had a duty to inform her when she might be eligible for retirement benefits. By failing to do so, she seems to imply the Division is obligated to establish her effective retirement date as August 1, 1999. She has cited no statute or other authority imposing such a duty on the Division and there is no such

statute or other authority. Rather, she seems to base her claim on something akin to the doctrine of equitable estoppel.

14. The elements that must be established for the doctrine of equitable estoppel to apply against a governmental agency are set forth in Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994):

The elements which must be present for application of estoppel 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.' State Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). See also Dolphin Outdoor Advertising v. Department of Transportation, 582 So. 2d 709, 710 (Fla. 1st DCA 1991); Harris v. State, Department of Administration, Division of Employees' Insurance, 577 So. 2d 1363, 1366 (Fla. 1st DCA 1991); Warren v. Department of Administration, 554 So. 2d 568 (Fla. 5th DCA 1990). As a general rule, estoppel will not apply to mistaken statements of the law, see Anderson, 403 So. 2d at 400, but may be applied to erroneous representations of fact. Dolphin Outdoor Advertising, 582 So. 2d at 711; Harris, 577 So. 2d at 1366; Warren, 554 So. 2d at 571; City of Coral Springs v. Broward County, 387 So. 2d 389, 390 (Fla. 4th DCA 1980).

* * *

One seeking to invoke the doctrine of estoppel against the government first must establish the usual elements of estoppel, and then must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence, must show that

the governmental conduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest. Alachua County v. Cheshire, 603 So. 2d 1334, 1337 (Fla. 1st DCA 1992).

15. "Although equitable estoppel can apply against the state . . . , such claims can be pursued only in rare instances where there are exceptional circumstances." McNamara v. Kissimmee River Valley Sportsmans' Association, 648 So. 2d 155, 162-63 (Fla. 2d DCA 1994). "Among the elements that must be proven is a positive act by an authorized official, upon which reliance is based." Id.; see also Bishop v. State, Division of Retirement, 413 So. 2d 776, 779 (Fla. 1st DCA 1982)("There is no evidence that the state or its agents have committed an affirmative act by which an equitable estoppel could be declared against the State."); Department of Administration, Division of Retirement v. Flowers, 356 So. 2d 14, 15 (Fla. 1st DCA 1978)("The authorities are clear that estoppel cannot be raised against the State unless there are exceptional circumstances and some positive act on the part of a state officer."); and Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So. 2d 517, 524 (Fla. 1st DCA 1971)("The causal and offhand manner in which the bureau chief indicated that he thought it would be satisfactory for Knott to submit a bid cannot be said to constitute such an affirmative and positive representation of

fact as to justify reliance thereon by Knott in determining whether it should submit a bid for construction of the project."). The mere failure to act does not constitute a "positive act" upon which an estoppel against a state agency can be based. See Monroe County v. Hemisphere Equity Realty, Inc., 634 So. 2d 745, 747-48 (Fla. 3d DCA 1994)("Here, the trial court misconstrued the legal doctrine of equitable estoppel when it ruled that Texas Largo was entitled to proceed with its development based upon the County's failure to act against third parties. The trial court further erred when it found that the Planning Director's 1987 letter to Tamarind, the original developer, was an additional basis for estopping the County from enforcing its regulation against Texas Largo. . . . [T]he letter does not, under any conceivable standard, rise to the level of a 'positive act' sufficient to create estoppel. Simply put, the letter says nothing, and suggests nothing by omission, regarding the two-year limitation."); State v. Hadden, 370 So. 2d 849, 852 (Fla. 3d DCA 1979)("[E]stoppel will not be applied against the State for an omission to act. . . ."); and U. S. Immigration and Naturalization Service v. Hibi, 94 S. Ct. 19, 21-22 (1973)("Here the petitioner has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in respondent's class and established a cutoff date for the claiming of such benefits.

Petitioner, in enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, is enforcing the public policy established by Congress. While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in Montana v. Kennedy, 366 U.S. 308, 314, 315, 81 S. Ct. 1336, 6 L. Ed. 2d 313 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government."). Accordingly, even if the Division had had an obligation to provide Petitioner a 1999 notification regarding "early retirement benefits," and the Division had made no attempt to meet this obligation, the Division's inaction would not have estopped it from applying, as it did, the provisions of the Act and its implementing rules to establish an effective retirement date of May 1, 2002, for Petitioner. Neither would estoppel lie against the Division if it had engaged in the "positive act" of misinforming Petitioner about the provisions of the Act and the Division's rules regarding "early retirement benefits," inasmuch as agencies of "the state cannot be estopped

through mistaken statements of the law." State Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981); see also Austin v. Austin, 350 So. 2d 102, 105 (Fla. 1st DCA 1977)("Administrative officers of the state cannot estop the state through mistaken statements of the law.").

16. Based on the findings of fact herein, Petitioner has not established that the Division made a representation of fact to her that it later contradicted or that the Division committed an affirmative act going beyond mere negligence which resulted in her failure to apply for benefits sooner than she did. See Mary Mosser v. Division of Retirement, DOAH Case No. 01-2648 (RO November 20, 2001). The Division received Petitioner's application on July 2, 2002. In accordance with Section 121.091, Florida Statutes, the Division liberally construed the statute in favor of the member by providing a grace period for mailing, and established Petitioner's effective retirement date as May 1, 2002. Petitioner has not demonstrated that the Division's action was erroneous. Annie L. Gibbs v. Division of Retirement, DOAH Case No. 02-2314 (RO September 18, 2002); Tamburro, supra; Hardy v. Dept. of Management Services, Case No. DMS-02-0028. Therefore, Petitioner's effective retirement date should not be changed, nor her benefit adjusted.

RECOMMENDATION

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

RECOMMENDED:

That Respondent enter a final order confirming Petitioner's retirement date as May 1, 2002.

DONE AND ENTERED this 19th day of December, 2003, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of December, 2003.

COPIES FURNISHED:

Robert B. Button, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399

Mantana Heim
2664 Radford Church Road
Moneta, Virginia 24121-4496

Alberto Dominguez, Esquire
General Counsel
Department of Management Services
4050 Esplanade Way
Tallahassee, Florida 32399-1560

Sarabeth Snuggs, Interim Director
Division of Retirement
Department of Management Services
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

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.