STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAROL JOHNS, Petitioner, vs. DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT, Respondent.	)	Case No. 03-2525

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 4, 2003, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

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For Respondent: Larry D. Scott, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner is entitled to participate in the Deferred Retirement Option Plan ("DROP") for 60 months.

PRELIMINARY STATEMENT

In a letter dated January 6, 2003, the Department of Management Services, Division of Retirement ("Division"), notified Carol Johns that her request to be allowed retroactive participation in the DROP for five years beginning October 1, 2001, was denied. On February 4, 2003, Ms. Johns filed with the Division a formal petition for an administrative hearing in which she set forth disputed issues of fact. The Division forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge on July 11, 2003. By notice, the formal hearing was held on September 4, 2003.

At the hearing, Ms. Johns testified in her own behalf, and Petitioner's Exhibits 1 through 4 were offered and received into evidence. The Division presented the testimony of Cathy Smith and Douglas Cherry, and Respondent's Exhibits 1 through 9 were offered and received into evidence. Official recognition was granted to Section 121.021(11), (12), and (22), Florida Statutes (1971); Section 121.051, Florida Statutes (1971); and Florida Administrative Code Rule 22B-6 (1971).

No transcript of the proceedings was filed with the Division of Administrative Hearings. The parties timely filed

proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Division is the state agency charged with providing retirement services to members of the Florida Retirement System ("FRS"). Section 121.1905, Florida Statutes (2002).[1]

2. Ms. Johns was born on May 15, 1942.

3. On October 1, 1971, Ms. Johns began working for the Broward County School Board as a part-time teacher in the adult education program. She taught two nights per week during the 1971-1972 school year and was paid a total salary of $1545.63. She was not under contract with the Broward County School Board, nor did she receive any benefits associated with her employment. The Broward County School Board does not have records documenting the type of salary account from which Ms. Johns was paid for her part-time employment during this period.

4. On February 5, 1972, Ms. Johns completed an FRS Florida Teachers' Retirement System enrollment card showing that October 1, 1971, was the date her service with the Broward County School Board began. The Broward County School Board made

contributions to the FRS on Ms. Johns' behalf during the 1971-1972 school year in the amount of $61.83.

5. Ms. Johns was hired as a full-time teacher by the Broward County School Board in August 1972, and she is currently employed with the Broward County School Board under the DROP as an assistant principal. Ms. Johns was not given any credit by the Broward County School Board for her previous part-time teaching experience, and she began her full-time teaching career in August 1972 as a beginning teacher.

6. In 1997, Ms. Johns requested that the Division send her an estimate of her retirement benefit if she were to retire effective July 1, 1999. The Division prepared an Estimate of Retirement Benefit, Form FRS-40, which showed that, if Ms. Johns were to retire effective July 1, 1999, she would have 27.90 years of service for purposes of calculating her retirement benefits under the FRS. This estimate included 0.9 years of service attributed to Ms. Johns for the 1971-1972 school year.[2]

7. A Summary of the Florida Retirement System Deferred Retirement Option Program was enclosed with the December 29, 1997, Form FRS-40, which included the following information: "Participation Limit: Maximum of 60 months following the date on which the member first reaches normal retirement age or date."

8. The Form FRS-40 was mailed to Ms. Johns on February 3, 1998, at "1131 SW 72nd Ave., Plantation, Florida 33317," which was, and still is, her correct address. The Form FRS-40 was not returned to the Division as undeliverable or undelivered.

9. In 2000, Ms. Johns requested that the Division send her an estimate of her retirement benefit if she were to retire effective July 1, 2002. Two Estimate of Retirement Benefit forms were prepared by the Division pursuant to this request: Estimate #1 was based on the assumption that Ms. Johns would retire on October 1, 2001, which was identified in the comments included on the Estimate of Retirement Benefit form as her earliest date of eligibility for normal retirement and for participation in the DROP; it was noted on the form that the estimate of benefits as of October 1, 2001, was based on 30.08 years of service. Estimate #2 assumed the July 1, 2002, retirement date specified in Ms. Johns' request for an estimate; it was noted on the form that the estimate of benefits as of July 1, 2002, was based on 30.90 years of service.

10. The two Estimate of Retirement Benefit forms were mailed to Ms. Johns at "1131 SW 72nd Ave., Plantation, Florida 33317." Although the exact date the estimates were sent is not shown on the documents, the Division keeps a computer log which shows that Ms. Johns' file was archived on January 1, 2001, and that the two estimates were included in her file when it was

archived. The estimates were not returned to the Division as undeliverable or undelivered.

11. Ms. Johns received a Member Annual Statement as of June 30, 2001 from the Division showing that she had 29.90 years of service in the FRS as of that date. The statement included an alternative estimate based on Ms. Johns' continuing her employment until July 1, 2002, and it was noted on the statement that, should she retire on July 1, 2002, her monthly benefit would be based on 30.9 years of creditable service. This annual statement was mailed in the fall of 2001 to Ms. Johns at "1131 SW 72nd Ave., Plantation, Florida 33317."

12. Ms. Johns' Application for Service Retirement and the Deferred Retirement Option Program was received by the Division on May 14, 2002. In her application, Ms. Johns identified her DROP "begin date" as July 1, 2002, and her DROP "termination and resignation date" as June 30, 2007. She acknowledged by signing the form that her "DROP participation cannot exceed a maximum of 60 months from the date I first reach my normal retirement date as determined by the Division of Retirement."

13. Ms. Johns planned her DROP "begin date" based on the information provided by the Broward County School Board that, according to its records, Ms. Johns' first day of employment was August 17, 2002.

14. The Division acknowledged receipt of Ms. Johns' DROP application by letter dated May 17, 2002, confirming that her DROP "begin date" was July 2002 and that her DROP "end date" was June 30, 2007. An Estimate of Retirement Benefit form was enclosed, which showed 30.90 years of service as of July 1, 2002. A DROP Estimated Benefit Accrual Calculation was also enclosed, which showed the monthly-benefit accrual from July 2002 through June 2007.

15. A revised Estimate of Retirement Benefit form was prepared by the Division and mailed to Ms. Johns in August 2002. Ms. Johns was advised in the comments on the revised form that she would be eligible to participate in the DROP for a maximum of 50 months because her normal retirement date was September 1, 2001, and she had not entered the DROP until July 1, 2002.

16. Ms. Johns wrote a letter to the Division questioning the accuracy of the information contained in the revised Estimate of Benefit form. Doug Cherry, the Benefits Administrator for the Division's Bureau of Retirement Calculations, advised Ms. Johns in a letter dated October 9, 2002, that, according to the Division's records, the date on which she first became eligible for normal retirement and the DROP was October 1, 2001. Mr. Cherry also stated in his letter that, because her application for the DROP had been received in May 2002, she would be eligible for the DROP effective May 1,

2002, rather than July 1, 2002, as she had specified in her application.

17. When determining a person's membership in the FRS, the Division looks to the law in effect at the time the service was rendered. When Ms. Johns began her service with the Broward County School Board in October 1971, Section 121.051, Florida Statutes (1971), provided:

> (1) COMPULSORY PARTICIPATION.--
> The provisions of this law [the Florida retirement system act] shall be compulsory as to all officers and employees who are employed on or after December 1, 1970, of an employer other than those referred to in paragraph (2)(b),[3] and each officer or employee, as a condition of employment, shall become a member of the system as of his date of employment.

Section 121.021(11), Florida Statutes (1971), defined "officer or employee" in pertinent part as "any person receiving salary payments for work performed in a regularly established position." Section 121.021(12), Florida Statutes (1971), defined "member" in pertinent part as "any officer or employee who is covered or who becomes covered under this system in accordance with this chapter." "Regularly established position" was defined in the 1971 version of Florida Administrative Code Rule 22B-6(36) as "any position authorized in an employer's approved budget or amendments thereto for which salary funds are specifically appropriated to pay the salary of that position."

Summary

18. The evidence presented is sufficient to establish that Ms. Johns became a member of the FRS effective October 1, 1971, and that her normal retirement date was October 1, 2001, at which time her age was 59 years, five months.

19. The evidence presented is sufficient to establish that, in choosing the date on which she would enter the DROP, Ms. Johns relied on the information received from the Broward County School Board and not on the information provided by the Division.

20. The evidence presented is sufficient to establish that the Estimate of Benefits forms sent to Ms. Johns by the Division in February 1998 and in late December 2000, and the Member Annual Statement as of June 30, 2001, each included a statement of the exact number of years of service calculated by the Division for various dates of retirement. Ms. Johns was on notice, therefore, of an inconsistency between the Division's calculations of her years of service in the FRS and the information provided by the Broward County School Board setting her first date of employment as August 17, 1972.[4]

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

22. Section 121.021(29), Florida Statutes, provides in pertinent part:

> "Normal retirement date" means the first day of any month following the date a member attains one of the following statuses:
>
> (a) If a Regular Class member, the member:
>
> 1. Completes 6 or more years of creditable service and attains age 62; or
>
> 2. Completes 30 years of creditable service, regardless of age, which may include a maximum of 4 years of military service credit as long as such credit is not claimed under any other system.

23. Section 121.091, Florida Statutes, provides in pertinent part:

> 13) DEFERRED RETIREMENT OPTION PROGRAM.--In general, and subject to the provisions of this section, the Deferred Retirement Option Program, hereinafter referred to as the DROP, is a program under which an eligible member of the Florida Retirement System may elect to participate, deferring receipt of retirement benefits while continuing employment with his or her Florida Retirement System employer. The deferred monthly benefits shall accrue in the System Trust Fund on behalf of the participant, plus interest compounded monthly, for the specified period of the DROP participation, as provided in paragraph (c). Upon termination of employment, the participant shall receive the total DROP benefits and begin to receive the previously determined normal retirement benefits. Participation

in the DROP does not guarantee employment for the specified period of DROP.

(a) Eligibility of member to participate in the DROP.--All active Florida Retirement System members in a regularly established position, and all active members of either the Teachers' Retirement System established in chapter 238 or the State and County Officers' and Employees' Retirement System established in chapter 122 which systems are consolidated within the Florida Retirement System under s. 121.011, are eligible to elect participation in the DROP provided that

1. The member is not a renewed member of the Florida Retirement System under s. 121.122, or a member of the State Community College System Optional Retirement Program under s. 121.051, the Senior Management Service Optional Annuity Program under s. 121.055, or the optional retirement program for the State University System under s. 121.35.

2. Except as provided in subparagraph 6., election to participate is made within 12 months immediately following the date on which the member first reaches normal retirement date, or, for a member who reaches normal retirement date based on service before he or she reaches age 62, or age 55 for Special Risk Class members, election to participate may be deferred to the 12 months immediately following the date the member attains 57, or age 52 for Special Risk Class members. For a member who first reached normal retirement date or the deferred eligibility date described above prior to the effective date of this section, election to participate shall be made within 12 months after the effective date of this section. A member who fails to make an election within such 12-month limitation period shall forfeit all rights to participate in the DROP. The member shall

> advise his or her employer and the division in writing of the date on which the DROP shall begin. Such beginning date may be subsequent to the 12-month election period, but must be within the 60-month limitation period as provided in subparagraph (b)1. When establishing eligibility of the member to participate in the DROP for the 60-month maximum participation period, the member may elect to include or exclude any optional service credit purchased by the member from the total service used to establish the normal retirement date. A member with dual normal retirement dates shall be eligible to elect to participate in DROP within 12 months after attaining normal retirement date in either class.
>
> * * *
>
> b) Participation in the DROP.--
> 1. An eligible member may elect to participate in the DROP for a period not to exceed a maximum of 60 calendar months immediately following the date on which the member first reaches his or her normal retirement date or the date to which he or she is eligible to defer his or her election to participate as provided in subparagraph (a)2. However, a member who has reached normal retirement date prior to the effective date of the DROP shall be eligible to participate in the DROP for a period of time not to exceed 60 calendar months immediately following the effective date of the DROP . . . .

24. Ms. Johns has the burden of proving by a preponderance of the evidence that she is entitled to participate in the DROP for the entire 60-month maximum period established in Section 121.091(13)(b)1. See Section 120.57(1)(j), Florida Statutes (2003); Florida Dep't of Transp. v. J.W.C. Co., Inc.,

396 So.2d 778, 788 (Fla. 1st DCA 1981)("In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.' Balino v. Department of Health & Rehabilitative Serv., 348 So. 2d 349 (Fla. 1st DCA 1977)."); accord Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

25. Based on the findings of fact herein, Ms. Johns' normal retirement date was October 1, 2001. Pursuant to the express terms of Section 121.091(13)(b)1., she is entitled to participate in the DROP only through September 30, 2006, or for a total of 53 months, because she did not submit her application for the DROP until May 2002, seven months after she reached her normal retirement date.

26. Ms. Johns asserts, however, that the Division is estopped from denying her the full 60-month maximum participation in the DROP pursuant to the doctrine of equitable estoppel. The doctrine of equitable estoppel is applicable to state agencies, and the elements that must be proven 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. Department of Admin., Div. of Retirement, 449 So. 2d 389, 391 (Fla. 3d DCA 1984)(quoting Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981)).

27. Based on the findings of fact herein, Ms. Johns has failed to establish that the Division changed its position with respect to her years of service in the FRS or that she relied to her detriment on any information provided by the Division.

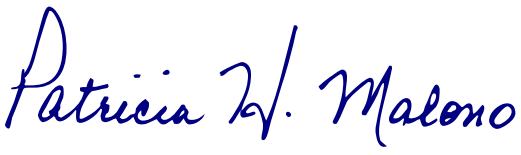
28. Rather, Ms. Johns relied on information provided by the Broward County School Board in calculating that her normal retirement date was July 1, 2002, and not on information provided by the Division. Even assuming that Ms. Johns received only the Member Annual Statement sent her by the Division in the fall of 2001, that statement clearly stated that, as of June 30, 2001, she had accumulated 29.90 years of service in the FRS. And, although the Division accepted Ms. Johns' DROP application in May 2002, provided her with an Estimate of Benefit form including a calculation of DROP benefits from July 2002 through June 2006, began paying her DROP benefits effective July 2002, and did not notify her until August 2002 that she was not entitled to participate in the DROP for the full 60 months, Ms. Johns did not change her position in reliance on the Division's actions because they took place after she had submitted her application for DROP.

29. Ms. Johns also claims that the doctrine of equitable tolling set forth in Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988), is applicable to her case to excuse her application for the DROP seven months after her first date of eligibility. Based on the findings of fact herein, Ms. Johns has not established that the Division "lulled her into inaction" or otherwise caused her to delay filing her application. Id. at 1134.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order finding that Carol Johns is entitled to participate in the DROP for the period extending from May 1, 2002, through September 30, 2006.

DONE AND ENTERED this 25th day of September, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 2003.

ENDNOTES

[1]/ References to Florida Statutes are to the 2002 edition unless otherwise noted.

[2]/ A normal 10-month school year for instructional and administrative personnel employed by the school boards in Florida is considered one year of service. Because Ms. Johns worked only 9 months during the 1971-1972 school year, she was credited with 0.9 years of service.

[3]/ This exclusion does not apply to the Broward County School Board.

[4]/ Ms. Johns testified that she kept everything sent to her by the Division and that she did not receive the Estimate of Retirement Benefit forms sent in February 1998 and in late December 2000, in response to her requests. She testified that she did, however, receive the June 2001 Member Annual Statement, as well as the Division's acknowledgement that it had received her DROP application; the revised Estimate of Retirement Benefit form sent in August 2002; the letter of October 9, 2002, from Doug Cherry; and the January 6, 2003, letter notifying her of the Division's decision to deny her request for retroactive participation in the DROP. The documents that Ms. Johns denies receiving carry the same address as the documents that Ms. Johns acknowledges receiving.

Ms. Johns referred in her testimony to the incorrect address shown on a letter sent to her by Ms. Smith dated on May 15, 2003, and on a letter sent to her by counsel for the Division in June 2003. See Respondent's Exhibit 8 and Petitioner's Exhibit 4. She suggested that the Estimate of Retirement Benefit forms could also have been sent to an incorrect address. This suggestion is rejected for three reasons: First, unlike the May and June 2003 letters, the address on the fact of all of these other materials sent from the Division was Ms. Johns' correct address; second, Ms. Johns testified that she eventually received both the letter from Ms. Smith and the letter from the Division's counsel; third, the Estimate of Benefit forms were not returned to the Division.

Consideration has been given to all of the evidence presented with respect to this issue, and it is concluded that Ms. Johns' testimony that she did not receive two crucial documents that she requested from the Division is not sufficient to overcome the presumption of mailing described by the Florida Supreme Court in Brown v. Giffen Industries, Inc., 281 So. 2d 897, 900 (Fla. 1973)(on rehearing):

> Recognizing that a requirement of proof on such an issue [the act of mailing a particular letter] would place an impossible burden on any business, a general presumption has arisen in the courts that the ordinary course of business or conduct was followed in a particular case absent a contrary showing. . . . It follows, by another equally broad presumption, that mail properly addressed, stamped, and mailed was received by the addressee . . . , and proof of general office practice satisfied the requirement of showing due mailing.

(Citations omitted.) See also Section 90.406, Florida Statutes; Camerota v. Kaufman, 666 So. 2d 1042, 1045 (Fla. 4th DCA 1996)(explaining that "[w]hen documents are mailed to an addressee, there is a presumption of receipt" that may be rebutted by evidence presented at a hearing).

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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.