

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACK L. POITINGER, JR.,)
)
 Petitioner,)
)
vs.) Case No. 03-2976
)
DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF)
RETIREMENT,)
)
 Respondent.)

)

RECOMMENDED ORDER

Notice was provided and on January 16, 2004, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2003). The hearing location was the Offices of Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Jack L. Poitinger, Jr., Esquire, pro se
700 Barineau Road
Tallahassee, Florida 32304

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

STATEMENT OF THE ISSUE

Is Petitioner eligible to join the Florida Retirement System (FRS), Deferred Retirement Option Program (DROP)? See § 121.091(13)(a), Fla. Stat. (2001).

PRELIMINARY STATEMENT

On May 14, 2003, Petitioner, as a member of the FRS, wrote to Respondent requesting enrollment in DROP. On May 27, 2003, Respondent replied to Petitioner denying the request to participate in DROP and advising Petitioner of his right to contest that preliminary decision. On June 16, 2003, Petitioner wrote Respondent requesting a hearing to contest the proposed agency action denying him permission to participate in DROP.

On August 19, 2003, the Division of Administrative Hearings (DOAH) received notice of the transmittal of the case from Respondent asking for the assignment of an administrative law judge to address the dispute by entry of a recommended order.

Originally the case was scheduled to be heard on October 28, 2003, before Don W. Davis, Administrative Law Judge. The case was rescheduled to be heard on January 16, 2004, and reassigned to the present administrative law judge for hearing.

At hearing Petitioner testified in his own behalf and presented the testimony of Larry Hunnicutt, Benefits Administrator for Respondent. Joint Exhibits numbered 1 through 6 were admitted as evidence. At Petitioner's request official

recognition was given Chapter 2002-287, Section 899, Laws of Florida.

A hearing transcript was filed on February 6, 2004. The parties timely filed proposed recommended orders on an extended schedule. Those proposed recommended orders have been considered in preparing the recommended order.

FINDINGS OF FACT

1. Petitioner is an active member of the FRS. He is an Assistant State Attorney for the Second Judicial Circuit. Petitioner is 62 years old. Petitioner was born September 17, 1941.

2. On June 30, 1998, Petitioner visited Respondent's offices. He was assisted by Kelly Lafleur, a Benefits Specialist for Respondent. At the time of hearing Ms. Lafleur was no longer employed by Respondent. During the conversation that ensued, some discussion was had concerning Petitioner's military service and the DROP program which was to be implemented in July 1998.

3. According to notes completed in the course of Respondent's routine business with Petitioner, as prepared by Ms. Lafleur, there was a notation in which it can be reasonably inferred that Petitioner " . . . will submit DP-11 & DP-ELE with DD-214." The comment about DP-11 and DP-ELE refers to forms

that must be completed by an FRS member who wishes to participate in the DROP program.

4. The notations made by Ms. Lafleur when Petitioner visited the Respondent included an entry which stated "approx 26.5 years, age 56." This refers to the fact that Petitioner at the time had approximately 26.5 years in credited service in the FRS and was 56 years of age. The notation concerning credited service was exclusive of military service that might be purchased to add to Petitioner's retirement benefits in the FRS.

5. The notations made concerning Petitioner's visit with Ms. Lafleur, also stated, "will be eligible based on 30 years of service when he buys his military." This is interpreted in the context of other notations that day, to mean that Petitioner would be eligible for DROP when he purchased optional military service credit.

6. A notation had been made on the form recording comments about the visit, which stated "could enter up to 30 years or age 62, WHICHEVER IS EARLIEST, & participate for 5 years." These remarks were struck over on the comments portion of the notes maintained by Respondent concerning the conversation between Petitioner and Ms. Lafleur. It is unclear why the notes were lined-out.

7. The written record of the interview is reflected as Joint Exhibit numbered 5. The exhibit also reflects the address

of the Petitioner as 700 Barineau Road, Tallahassee, Florida 32304. According to the written record, that address was established by a telephone call to the member, understood to refer to Petitioner. It was necessary for Respondent to obtain the home address of Petitioner to facilitate further written communication from Respondent to Petitioner.

8. As established by the testimony of Larry Hunnicutt, Benefits Administrator for Respondent, when Petitioner met Ms. Lafleur on June 30, 1998, Petitioner was not eligible to participate in the DROP program which would begin the next day. It would have been necessary to purchase the military service to establish eligibility for DROP. Payments for that service could have been made on or before 90 days from the beginning date of the DROP period.

9. Following the June 30, 1998 meeting between Petitioner and Ms. Lafleur, Petitioner submitted the necessary military papers to assist Respondent in determining the cost to purchase military service to be added to other service earned by Petitioner in the FRS.

10. Joint Exhibit numbered 6 is an estimate of retirement benefits provided to Petitioner by Respondent. It is dated November 24, 1998. It contemplates the payment of \$4,563 to purchase military service time to be added to existing FRS service. The amount of military service described is 3.84

years. That time added to other FRS service credit would have given Petitioner 30.47 years of service as of the moment.

11. There is a stamp affixed to the estimate just described. The stamp has check marks placed in relation to the following categories: OPT-FRS, DROP, PREPARING TO RETIRE, and OTHER. Next to the word "OTHER" are the hand-written entries: DP-11, DP-ELE.

12. The estimate document also included the following language at the bottom:

THE AMOUNT DUE IS THE COSTS TO PURCHASE YOUR 3.84 YEARS OF MILITARY SERVICE. PLEASE COMPLETE AND RETURN THE ENCLOSED FORM, MF-1. THIS ESTIMATE IS PROVIDED FOR DROP PURPOSES AND IS BASED ON A DROP BEGIN DATE OF 11/1/98 (SEE PRINTOUT AND BROCHURE). OPTIONAL SERVICE MAY BE EXCLUDED IN THE DETERMINATION OF YOUR DROP ELIGIBILITY DATE. TO RETAIN A DROP BEGIN DATE OF 11/1/98, YOU MUST COMPLETE AND RETURN THE ENCLOSED FORMS DP-11 AND DP-ELE WITHIN 30 DAYS OF THE DATE THIS ESTIMATE WAS MAILED.

13. The nature of the estimate reminded Petitioner that the estimate was for giving him information for DROP purposes and was premised upon a beginning date for DROP of 11/1/1998, conditioned upon the payment of the \$4,563.24 for military service. The document reminded Petitioner that the optional service (military service) could be excluded in the determination of the DROP eligibility date. The document made clear that retention of the DROP begin date of 11/1/1998 was

contingent upon the completion and return of the DP-11 and DP-ELE forms within 30 days of the date of the mailing of the estimate. These two forms had been referred to in the earlier conversation between Petitioner and Ms. Lafleur that took place on June 30, 1998.

14. The document prepared establishing the estimate for DROP purposes, dated November 24, 1998, refers to a printout and brochure associated with the estimate. While it is clear that Petitioner received the estimate, the single-page document, it is not certain that Petitioner received the printout and brochure that is referred to in the document.

15. Eventually, Petitioner decided to purchase his military service to be added to other service earned for retirement purposes.

16. In November 2001 when Petitioner came to pay for his military service, he met Mr. Hunnicutt. At the same time Petitioner declined to upgrade his service classification for retirement pertaining to the Senior Management Service Class (SMSC). This visit with Mr. Hunnicutt was a short encounter in length of time. Principally, the payment was made for the military service credit. The participants did not engage in a further review of Petitioner's status as an FRS member. Ordinarily, had Petitioner made other inquiries concerning his status, Mr. Hunnicutt would have responded to any questions.

In that context, had Petitioner asked Mr. Hunnicutt questions about DROP eligibility, Mr. Hunnicutt would have provided information about eligibility but not otherwise.

17. On December 17, 2001, Respondent provided Petitioner a statement of his retirement account, Joint Exhibit numbered 3. That statement of account indicated in relevant part:

We audited your retirement account and you have 33.56 years of service through 11/2001.

The amount due for your military service has been paid in full. Per your request, we have removed your SMSC upgrade and the corresponding amount due from your account.

That document made no mention of DROP eligibility.

18. Petitioner came back to Respondent's office in May 2003 and while he was there he spoke to Mr. Hunnicutt. At that time Petitioner made mention that he believed that he was in the DROP program, notwithstanding that he had never submitted the DP-11 and DP-ELE forms that were required to participate in DROP. Petitioner commented that he was not aware of the required forms. Mr. Hunnicutt was introduced into the conversation after Petitioner spoke to some other person in Respondent's office. Petitioner made it obvious in the conversation that he still had an interest in DROP participation, even if Respondent was persuaded that he was not enrolled in DROP from Respondent's point-of-view. As of the date that the discussion was held with Mr. Hunnicutt, apparently

May 14, 2003, Respondent held to the view as expressed by Mr. Hunnicutt, that Petitioner was no longer eligible to participate in DROP, having failed to timely elect that option.

19. On May 14, 2003, Mr. Hunnicutt believed and continues to hold the opinion, that Petitioner's outside date for electing to participate in DROP, excluding military service, expired on March 31, 2003.

20. During the May 14, 2003 meeting between Petitioner and Mr. Hunnicutt, it was explained by Mr. Hunnicutt that Petitioner had rights to appeal a decision denying the right to participate in DROP.

21. Joint Exhibit numbered 4 contains the notations by Mr. Hunnicutt concerning the May 14, 2003, conversation between Mr. Hunnicutt and Petitioner, kept by the Respondent as part of its routine business. It highlights those facts that have been found on this occasion.

22. On May 14, 2003, Petitioner wrote Mr. Hunnicutt to make his case for eligibility to participate in DROP. This correspondence was met by the May 27, 2003, correspondence from Erin B. Sjostrom, State Retirement Director, formally denying Petitioner his right to participate in DROP, while stating the grounds for that denial. The two pieces of correspondence are Joint Exhibits numbered 2 and 1, respectively.

23. Petitioner in his testimony stated his belief, that at the point in time where he paid for his military service to be added to his other FRS service time, that he was automatically in DROP without having to take further action to enroll. Petitioner in his testimony explains his impression of events by commenting that he was told about DROP benefits when he was not already eligible to participate in the DROP program (having not paid for military service), and he was not told of his right to participate in the DROP program when he was eligible (having paid for military service).

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the subject matter and the parties, in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2003).

25. Respondent has requested the right to participate in the DROP program and bears the burden to prove his eligibility for participation. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The facts entitling Petitioner to participation in the DROP program must be established by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. (2003).

26. Concerning Petitioner's right to participate in the DROP program, his eligibility is determined consistent with

Section 121.091(13), Florida Statutes (2001), which states in pertinent part:

(13) DEFERRED RETIREMENT OPTION PROGRAM.--
(a) *Eligibility of member to participate in the DROP.*

* * *

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 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 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. . . (Emphasis added)

* * *

2. Upon deciding to participate in the DROP, the member shall submit, on forms required by the division:
 - a. A written election to participate in the DROP;
 - b. Selection of the DROP participation and termination dates, which satisfy the limitations stated in paragraph (a) and subparagraph 1. Such termination date shall be in a binding letter of resignation with the employer, establishing a deferred termination date. The member may change the termination date within the limitations of subparagraph 1., but only with the written approval of his or her employer;
 - c. A properly completed DROP application for service retirement as provided in this section; and
 - d. Any other information required by the division.

27. The facts reveal that Petitioner became eligible to participate in DROP in March 2002 at a time when he had reached normal retirement, as a person with 30 years' service, exclusive of optional service credit for his military time, and as a person more than 57 years of age. This meant that he could have elected to participate in DROP between April 1, 2002, and March 31, 2003, upon the submission of a written election and properly completed DROP application. Petitioner failed to provide the necessary written election and application within the time allowed. He is not entitled to participate in DROP.

28. Petitioner alludes to the possibility that Respondent should be equitably estopped from denying his eligibility to participate in DROP. Petitioner has not proven that anything in

Respondent's conduct would call for the enforcement of the doctrine of equitable estoppel. See Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264 (Fla. 1st DCA 1994).

29. Respondent did not represent a material fact that was contrary to some later asserted position, which Petitioner relied upon and changed his position to his detriment. To the contrary, information provided by Respondent reminded Petitioner that it was unreasonable to assume that he was automatically in the DROP program upon paying for his military time to be added to his other FRS service. Instead, Petitioner was told by Respondent that certain forms needed to be completed and returned to support the request for participation in DROP. Finally, reading of the statute by a reasonable person, in particular one who is law-trained, would lead him or her to understand that paying for the military service credit alone would not establish eligibility to participate in DROP.

30. Petitioner points out the language contained in Chapter 2002-387, Section 899, Laws of Florida, effective May 16, 2002, which states:

Section 121.091(13)(a)2.

* * *

. . . 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.

. . .

This language would allow additional time to elect to participate in the DROP program, according to Petitioner.

31. Reference to Chapter 2002-387, Section 899 Laws of Florida is inapplicable. It is a law that became effective beyond the time line for establishing eligibility to participate in the DROP program. It is Section 121.091(13)(a)2., Florida Statutes (2001), containing the same language cited by Petitioner that pertains to Petitioner's case. The subject language in the 2001 law is the same as originally enacted in Chapter 1998-18, Section 1, at 121.091(13)(a)2., Laws of Florida, effective April 22, 1998. It is Chapter 1998-18, Laws of Florida, which created the limited opportunity for members who reached the normal retirement date, or the deferred eligibility date, prior to April 22, 1998, to be allowed to make their election to participate in DROP within 12 months of April 22, 1998. The fact that the language did not change, up to and including, the point in time at which Petitioner became eligible to participate in DROP, did not create opportunities for him, that the earlier members had enjoyed under terms set forth in Chapter 98-18, Laws of Florida.

32. Finally, Petitioner argues that fairness demands, that it would be equitable for Respondent to depart from the absolute requirements of law and allow his participation in the DROP program, given that he was only 44 days from the deadline to elect participation in DROP when told that he was not enrolled. Respondent cannot depart from the requirements of the statute in its exercise of jurisdiction, wherein it has properly denied the request for participation. See State of Florida ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628, (Fla. 1st DCA 1974), rehearing denied August 6, 1974.

RECOMMENDATION

Upon consideration of the facts found and Conclusions of Law reached, it is

RECOMMENDED:

That a Final Order be entered denying Petitioner's right to participate in the DROP program.

DONE AND ENTERED this 13th day of April, 2004, in
Tallahassee, Leon County, Florida.



CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of April, 2004.

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.