

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY G. GOHLKE,)
)
 Petitioner,)
)
 vs.) Case No. 03-3103
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the above-styled case was heard on November 14, 2003, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida.

APPEARANCES

For Petitioner: Henry G. Gohlke, pro se
3140 Dowling Drive
Tallahassee, Florida 32308

For Respondent: Robert R. Button, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 260
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STATEMENT OF THE ISSUE

Whether the Petitioner may withdraw from participation in the Deferred Retirement Option Plan (DROP)?

PRELIMINARY STATEMENT

This case arose when the Petitioner sought to withdraw from the DROP. The Respondent, Division of Retirement, Department of Management Services, determined that the Petitioner, having elected to participate in the DROP, could not withdraw. The Respondent advised the Petitioner in writing of its decision, and the Petitioner requested a formal hearing on the issue. The Respondent referred the case to the Division of Administrative Hearings, where the case was noticed for formal hearing on November 14, 2003. The case was heard as noticed.

The Petitioner testified in his own behalf, and called Eddie Tanner, a former employee of the Respondent, and Larry Scott, an attorney currently employed by the Respondent, to testify. The Respondent also called Larry Scott to testify. The Respondent introduced Respondent's Exhibits J-1 through J-10.

The Petitioner and the Respondent filed post-hearing briefs which were read and considered.

FINDINGS OF FACT

1. The Petitioner, Henry Gohlke, is a member of the Florida Retirement System (FRS), which is governed by Chapter 121, Florida Statutes (2003). The Petitioner is employed by the Department of Agriculture and Consumer Services.

2. The Petitioner divorced his former spouse, Joanne Marie Gohlke, on October 29, 1997, and a Qualified Domestic Relations Order (QDRO) was entered which provided that Joanne Marie Gohlke was the alternate payee of the Petitioner's retirement benefits. See Exhibit J-10.

3. Under the terms of the QDRO, when the Petitioner retired, his future retirement benefits would be incorporated into alimony payable to Joanne Marie Gohlke, beginning with the first monthly retirement benefit payment made to the Petitioner. The payment was fixed based upon the value of the Petitioner's pension at the time, and Joanne Marie Gohlke would receive \$552.05 per month.

4. DROP is a program which permits an employee, who has qualified for retirement, to retire; draw his retirement benefit based upon the retirement option he selected; and have the money paid into a non-taxed, interest-drawing account for up to five years while the employee continues to work. At the end of the five years or such other shorter time the employee elects, the employee may cease working and receive all or a part of the money in a lump payment paying the income taxes due on the amount, or roll the money over into an Individual Retirement Account (IRA) or similar program without paying income taxes until the money is withdrawn from that account.

5. The Petitioner testified that he queried Eddie Tanner, who at that time was a paralegal working with the Division of Retirement, about the effect of the QDRO on his DROP deposits. There is conflicting testimony about what the Petitioner was told; however, Tanner testified concerning his customary advice to persons subject to QDROs. The Petitioner was advised to seek clarification from the domestic relations court to be certain.

6. The Petitioner elected to participate in the DROP program in March of 2003. He may continue to participate in DROP until March 28, 2008. See Exhibit J-7.

7. When he began to receive retirement benefits, a letter was sent to him on June 25, 1998, advising him that Joanne Marie Gohlke would qualify for a \$552.05 per month share of the Petitioner's accrued DROP benefit as provided in the QDRO. The letter also advised that, upon the Petitioner's ceasing to work, the moneys due Joanne Marie Gohlke would be paid to her together with the accrued interest. This letter was sent to the Petitioner's old address, and he did not receive the letter.

8. Eventually, the Petitioner learned that his DROP payments would be subject to the allocation of \$552.05 each month to his ex-wife pursuant to the QDRO. This money would be payable to his ex-wife at the same time the Petitioner accessed his DROP money. The Petitioner questioned this payment to his ex-wife.

9. The status of DROP benefits has been litigated, and the courts have determined that DROP benefits are retirement benefits and subject to QDROs. See Ganzel v. Ganzel, 770 So. 2d 304, 306 (Fla 4th DCA 2000).

10. Based upon this precedent, the Respondent denied the Petitioner's request not to pay the proceeds from DROP to Joanne Marie Gohlke. Upon learning that his ex-wife would receive a portion of his DROP account, the Petitioner sought to withdraw from his participation in the DROP.

11. Although an employee may elect to continue to work at the end of five years with the permission and written concurrence of his employer, he or she would automatically lose his or her DROP moneys by continuing to work past the five-year mark.^{1/}

12. There is no administrative mechanism for withdrawing from DROP which would be analogous to "un-retiring." The Respondent properly denied the Petitioner's request to withdraw from DROP.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Chapters 120 and 121, Florida Statutes.

14. The burden of going forward and the burden of persuasion are on the party asserting the affirmative of the

issue. See Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 349 (Fla. 1st DCA 349 1977). The Petitioner seeks to withdraw from DROP and seeks to establish that right. He has the burden. The burden of proof is by a preponderance of the evidence. See Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1979, cert. Den. 376 So. 2d 74).

15. The courts, as stated in the facts above, have determined that DROP contributions are retirement benefits, and a subject to QDROs. See Ganzel, supra.

16. The Petitioner argues that he received bad advice and, therefore, should be permitted to withdraw from the DROP. It may be that Mr. Tanner advised the Petitioner that he had some merit in arguing that the QDRO proceeded his entry into DROP, but it is more likely that Mr. Tanner also followed his regular practice of advising the Petitioner, as a person subject to a QDRO, to seek a ruling from the domestic relations court.

17. Assuming for a moment that it had been shown that Mr. Tanner provided inaccurate advice to the Petitioner, the Petitioner must show not only the regular elements of estoppel, but must also demonstrate conduct which goes beyond mere negligence, showing that the government's conduct will cause serious injustice and that application of the doctrine will not

unduly harm the public interest. See Alachua County v. Cheshire, 603 So. 2d 1334, 1337 (Fla 1st DCA 1992).

18. There is no injustice in requiring retirement payments to the Petitioner's DROP account to be apportioned in accordance to the court's QDRO providing that \$552.05 be paid to his former spouse from his retirement benefits. It is certainly no more a windfall to her, as it is to him.

19. The Petitioner has failed to establish a factual predicate for estopping the Respondent; the Petitioner has not established a legal right to withdraw from DROP; and, therefore, the Petitioner has not met his burden of proof.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that Petitioner's Petition be dismissed.

DONE AND ENTERED this 27th day of January, 2004, in Tallahassee, Leon County, Florida.



STEPHEN F. DEAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2004.

ENDNOTE

^{1/} Because the employer does not have to make retirement contributions after the employee goes into DROP, the employer, by agreeing to continue to employ the former DROP participant, also agrees to make five years' worth of retirement contributions for the employee.

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.