

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GORDON B. WILLIAMS,)
)
 Petitioner,)
)
 vs.) Case No. 08-3326
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On September 15, 2008, a hearing was held in Tavares, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Gordon B. Williams, pro se
19607 North Highway 27
Clermont, Florida 34715

For Respondent: Geoffrey Christian, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue presented in this case is whether Petitioner is entitled to change his retirement to in-line-of-duty disability benefits pursuant to Florida Administrative Code Rule 60S-4.002(4).

PRELIMINARY STATEMENT

This case commenced when the Department of Management Services, Division of Retirement (Department or Division of Retirement) notified Petitioner that his request to change his retirement from early service retirement to disability retirement had been denied. Petitioner timely filed a Petition for Review of Final Agency Action requesting a hearing, and the case was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was duly noticed for hearing August 22, 2008. Because of the travel conditions created by Tropical Storm Fay, the case was rescheduled for September 15, 2008, and proceeded as scheduled. The parties submitted a Joint Stipulation of Facts that, where relevant, have been incorporated into the Findings of Fact below. At hearing, Petitioner testified on his own behalf and Petitioner's Exhibits numbered 1-12, 14-19, 21, 23-25 were admitted into evidence. The Department presented the testimony of Debra Roberts and Respondent's Composite Exhibit 1 was admitted. A Transcript of the hearing was filed with the Division on October 8, 2008, and the parties timely filed Proposed Recommended Orders which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department's Division of Retirement is charged with managing, governing, and administering the Florida Retirement System (FRS) on behalf of the Department.

2. The FRS is a public retirement system as defined by Florida law.

3. On or about January 3, 1983, Gordon B. Williams began his employment as a Vocational Instructor III for the Florida Department of Corrections. By reason of his employment, Mr. Williams became a member of FRS.

4. Over the course of his career, Mr. Williams suffered a number of on-the-job accidents which resulted in various bodily injuries.

5. On or about February 4, 1998, a Form FR-13a, signed by Sherry Rogers, Personnel Technician I, at Lake Correctional Institution was completed on behalf of Mr. Williams. The form indicated "regular" disability.

6. By letter dated August 27, 1998, Mr. Williams tendered his resignation from his employment. His employment with the State of Florida terminated effective on or about September 23, 1998. Mr. Williams resigned because he was unable to continue performing his duties in light of his physical disabilities.

7. Mr. Williams earned approximately 15.75 years of service credit in the FRS.

8. Mr. Williams called the Division of Retirement to discuss his retirement twice: on or about October 22, 1998, and November 4, 1998.

9. On or about December 14, 1999, Mr. Williams completed and filed with the Division an application for FRS early service retirement. His effective retirement date was November 1, 1998. However, the application received by the Department was not signed. On the unsigned form, immediately above where Petitioner should have signed the application, was the following statement:

I understand I must terminate all employment with FRS employers to receive a retirement benefit under Chapter 121, Florida Statutes. I also understand that I **cannot** add additional service, change options, or change my type of retirement (Regular, Disability, and Early) once my retirement becomes final. My retirement becomes final when any benefit payment is cashed or deposited. (Bold in original.)

10. On January 8, 1999, the Division of Retirement notified Petitioner that his application was not signed in the presence of a notary public, and provided another application for him to complete and have properly notarized. This letter also indicated, in all-cap, bold-face type, "Once you retire, you cannot add additional service or change options. Retirement becomes final when any benefit payment is cashed or deposited!"

11. On January 29, 1999, a second Application for Service Retirement was filed with the Division of Retirement, signed by Mr. Williams and notarized on January 18, 1999. This application bore the same statement regarding the applicant's understanding

of the inability to change retirement options or type as that quoted in Finding of Fact 9.

12. A third application was submitted in approximately February 1999, to correct a problem related to the notarization of Petitioner's signature. This third application also contained the same statement identified in Finding of Fact 9.

13. On or about March 24, 1999, Mr. Williams completed and filed with the Department a Health Insurance Subsidy Certificate and a withholding certificate for pension payments.

14. Petitioner began receiving benefit payments in March 1999 and these payments were direct deposited to Petitioner's bank account.

15. Petitioner did not apply for disability retirement prior to applying for service retirement.

16. On or about December 28, 2007, a new Form FR-13a, signed by Luz Veintidos, Personnel Specialist, at the Department of Corrections Region III Personnel Office, was completed on behalf of Mr. Williams. This new Form FR-13a indicated "in-line-of-duty" disability. Attached to the new Form FR-13a was the original Form FR-13a completed in February 1998.

17. On or about January 22, 2008, Mr. Williams completed and filed with the Department an application for in-line-of-duty disability retirement, along with a letter requesting that his type of retirement be changed from service retirement to disability retirement.

18. Respondent's records do not indicate and no competent testimony indicates that Respondent received any documents related to Petitioner's claim for disability retirement prior to January 2008. While Petitioner inquired about disability retirement, no application was filed requesting it until 2008.

19. By letter dated February 8, 2008, the Division of Retirement advised Mr. Williams that a retired member could not change his type of retirement after a benefit payment has been cashed or deposited and therefore the Division of Retirement could not honor his request.

20. By letter dated February 25, 2008, Mr. Williams contended that he was "following Division of Retirement instructions when he applied for early service retirement instead of disability retirement" and that his October 1998 telephone conversation with the Division "was, in effect, a denial of application for benefits."

21. He could not, however, identify who he talked to at the Division of Retirement that instructed him regarding his choice to file for early retirement. Nor did he indicate that at any time he understood that an application for retirement could be processed by an individual agency as opposed to the Division of Retirement, or processed by telephone without a written application.

22. By letter dated April 11, 2008, the Division advised Mr. Williams of its final decision to deny his request to change

his type of retirement from service retirement to disability retirement.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

24. The burden of proof in this proceeding is on the party asserting the affirmative of an issue. Wilson v. Department of Administration, Division of Retirement, 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989). That is, Petitioner has the burden of demonstrating that he is entitled to change his retirement status. He must prove his entitlement by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. The issue presented is not whether Petitioner suffers from a disability as a result of an injury suffered while on the job, but whether Petitioner may change the type of retirement he receives once benefits begin.

25. This case is governed by the provisions of Florida Administrative Code Rule 60S-4.002, which states in pertinent part:

- (4) After a retirement benefit payment has been cashed or deposited or after a DROP payment is credited:
 - (a) No additional service, which remained unclaimed at retirement, may be claimed or purchased;
 - (b) The selection of an option may not be changed; and

(c) The type of retirement, i.e., normal, early, or disability, may not be changed, except for the following:

1. When a member recovers from disability and subsequently applies for normal or early retirement as provided in subsections 60S-4.007(7) and (8), F.A.C.
2. When a member begins receiving normal or early service retirement benefits while appealing a denial of his application for disability retirement and such disability application is subsequently approved as provided in paragraph 60S-4.007(3)(g), F.A.C., or
3. When an elected officer requests, prior to July 1, 1990, that his benefit be suspended and recalculated as provided in paragraph 60S-4.012(6)(b), F.A.C. (Emphasis supplied.)

26. With the exception of amendments not relevant to the issues presented in this case, Rule 60S-4.002 has been in force at all times material to the facts presented here.

27. None of the three exceptions enumerated in the rule apply in this case. Petitioner is not applying for normal or early retirement after recovering from a disability. Petitioner is not an elected official seeking recalculation of his benefit pursuant to a request made prior to July 1, 1990. Most importantly, Petitioner did not begin receiving early service retirement while appealing the denial of disability retirement, because he did not file an application seeking disability retirement until 2008.

28. Petitioner asserts that his agency's original completion of the FR-13a form indicating "regular" as opposed to "in-the-line-of-duty" disability constituted a denial of his

application. However, Petitioner has stipulated that the Division of Retirement, as opposed to the Department of Corrections, has the responsibility for managing the FRS. While an individual agency may answer questions relating to retirement and perform certain functions regarding the confirmation of employment, there is no credible evidence to indicate that Petitioner believed any agency other than the Division of Retirement had the authority to approve his retirement application.

29. The Petitioner's argument that the Department should be equitably estopped from denying his request is likewise without merit. To demonstrate the application of equitable estoppel, the Petitioner must demonstrate a) a representation as to a material fact that is contrary to a later-asserted position; b) a reasonable reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. Warren v. Department of Administration, 554 So. 2d 568, 570 (Fla. 5th DCA 1989); Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376 (Fla. 3rd DCA 1983). Estoppel is limited to exceptional and rare cases. Id.

30. In this case, Petitioner relies on the purported statement of an unknown employee at the Department who he claims told him to apply for early retirement until such time as he could apply for in-line-of-duty retirement. He could not

identify who supposedly made the statement, and the statement is not reflected in the call logs of the Department. Petitioner simply has not proven by a preponderance of the evidence that such a statement was made.

31. Even assuming that a Division of Retirement employee made such a statement, reliance on it would not be reasonable where, as here, documents received from the Division of Retirement and some signed by Petitioner, indicated in no uncertain terms that the type of retirement could not be changed once a retirement check was cashed. Petitioner had in front of him the official agency position on Division of Retirement written materials at the time he completed his original application. Further, Florida Administrative Code Rule 60S-4.002 was in effect long before the application in this case was completed. The rule, and the written statements in the forms that are consistent with the rule, are in accord with the Department's current position that Petitioner cannot change his retirement type. Therefore, Petitioner cannot establish the necessary elements of equitable estoppel.

31. Under these circumstances, Petitioner has failed to meet his burden of proof.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered denying Petitioner's request to change his retirement status to in-line-of-duty disability retirement.

DONE AND ENTERED this 30th day of October, 2008, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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 30th day of October, 2008.

COPIES FURNISHED:

Gordon B. Williams
19607 North Highway 27
Clermont, Florida 34715

Geoffrey Christian, Esquire
Department of Management Services
Division of Retirement
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

Sarabeth Snuggs, Director
Department of Management Services
Division of Retirement
Post Office Box 9000
Tallahassee, Florida 32315-9000

John Brenneis, General Counsel
Department of Management Services
4050 Esplanade Way
Tallahassee, Florida 32399-0950

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.