

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JAQUELINE IMBERTSON, ON BEHALF )  
OF THE ACCOUNT OF EDWARD )  
IMBERTSON, DECEASED, )  
 )  
Petitioner, ) Case No. 09-5373  
 )  
vs. )  
 )  
DEPARTMENT OF MANAGEMENT )  
SERVICES, DIVISION OF )  
RETIREMENT, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing in this case was held on November 18, 2009, as previously scheduled, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alan M. Aronson, Esquire  
Rosenthal, Levy and Simon  
1645 Palm Beach Lakes Blvd.  
Suite 350  
West Palm Beach, Florida 33401

For Respondent: Larry D. Scott, Esquire  
Department of Management Services  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue is whether the retirement date for Petitioner's late husband should be back-dated from August 1, 2004, to September 6, 1999.

PRELIMINARY STATEMENT

Petitioner Jacqueline Imbertson's late husband suffered a heart attack on September 6, 1999. At the time, he was employed as a heating, ventilating, and air conditioning (HVAC) technician for the Palm Beach County School District (the School District). On October 3, 2002, a judge of compensation claims issued an order finding that Mr. Imbertson had a compensable claim and that he had become totally and permanently disabled on the date he suffered the heart attack, September 6, 1999. On behalf of her husband, Mrs. Imbertson filed an application for in-the-line-of-duty disability retirement benefits on July 1, 2004. The Florida Division of Retirement (the Division) determined that the date of his retirement was August 1, 2004.

Mrs. Imbertson requested the Division back-date her husband's effective retirement date to September 6, 1999. The Division refused and Mrs. Imbertson requested a hearing. The matter was transferred to the Division of Administrative Hearings on October 1, 2009, for the assignment of an administrative law judge to conduct a hearing.

At the final hearing, on November 18, 2009, Petitioner presented the testimony of Mrs. Imbertson. Petitioner's Exhibits 1, 3, and 5 through 10 were admitted into evidence. Respondent presented the testimony of Debra Roberts. Respondent's Exhibits 1 through 17 which were admitted into evidence.

The Transcript of the hearing was received on November 18, 2009. Proposed Recommended Orders were received on December 15, 2009.

#### FINDINGS OF FACT

1. Petitioner's late husband, Edward Imbertson, was employed as a HVAC technician by the School District. As such, he participated in the Florida Retirement System (FRS).

2. Respondent, the Division, is responsible for administering the FRS program for approximately 900 employers and 600,000 members.

3. Mr. Imbertson suffered a heart attack on September 6, 1999. An order, entered by a judge of compensation claims on October 3, 2002, determined that he was entitled to workers' compensation because his condition was work-related, and that he had become totally and permanently disabled on the day of his heart attack.

4. Mr. Imbertson's medical condition continued to deteriorate. He had a heart transplant in 2002, suffered renal failure, and became diabetic and legally blind. Mrs. Imbertson stopped working to care for her husband full time. They spent substantial time away from their home in Jupiter seeking medical care for her husband that included over 75 invasive procedures, many at Jackson Memorial Hospital in Miami. At the same time, Mrs. Imbertson was trying to get benefits for her husband, but primarily she focused on his deteriorating health.

5. Following numerous requests for information and forms from multiple sources, Mrs. Imbertson filed an application dated July 1, 2004, for her husband to receive in-the-line-of-duty disability benefits. On the application form, she reported that the last day he actually worked was 9/3/99, his last day in pay status was 3/21/00, but she left his termination date blank. When she listed the last pay status date as March 21, 2000, Mrs. Imbertson was using the date that her husband received a check for unused leave. She believed, apparently correctly based on subsequent notice from the District, that he was still employed and that his pay status changed because he began receiving workers' compensation benefits.

6. In a letter dated July 14, 2004, the Division requested additional information in support of the application. The

information requested included an explanation of the delay in applying for disability retirement, physicians' reports attesting to total and permanent disability, proof of total and permanent disability when employment terminated or of a Social Security Disability Award notice, and workers' compensation documentation that the injury is compensable and benefits have been approved. Mrs. Imbertson provided some of the additional information.

7. On August 6, 2004, the Division again sent a letter asking for more information, noting that it needed reports from two physicians, and proof of total and permanent disability on the termination date. Mrs. Imbertson sent the second doctor's report on August 7, 2004.

8. Both the July 14, 2004, and August 6, 2004, letters included the following language:

If you are no longer employed and your disability application was not received within thirty days of your termination date, provided you are not due to receive any salary payments or credible service after your application has been received, your effective retirement date will be the first day of the month following the date we received your application.

9. When Mrs. Imbertson responded to those letters, she was focused on providing the additional personal and medical information for her husband, not on challenging the effective retirement date. By certified mail from the Division dated

September 17, 2004, Mr. Imbertson was notified that he was approved to receive regular disability retirement benefits, but that his application for in-line-of-duty disability benefits was denied.

10. Mr. Imbertson died on January 10, 2006. After an appeal to the State Retirement Commission, on June 6, 2006, Mr. Imbertson was found eligible for in-line-of-duty-retirement benefits from the retroactive effective retirement date of August 1, 2004.

11. Mrs. Imbertson requested that the Division determine that her late husband's effective retirement date was September 6, 1999. On January 6, 2009, the Division denied the request, relying on Florida Administrative Code Rule 60S-4.0035, that sets the date as the first day of the month following the month in which the application was received.

12. At the hearing, the Division also relied on essentially the same language that was included in the July 14, 2004, and August 6, 2004, letters sent to Mr. Imbertson. It also relied on a letter dated November 10, 2004, in which the District notified the Division that Mr. Imbertson's employment was terminated on September 7, 2000. Mr. Imbertson was not copied on the letter and Mrs. Imbertson did not know the official date of termination, as indicated by her having left the date blank on the application for disability retirement.

Based on the lack of notice from the District of her husband's termination date, his inability to handle his personal matters, and her difficulty in getting benefits while taking care of him, Mrs. Imbertson believes she is entitled to have her husband's effective retirement date back-dated.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2009).

14. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceedings. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

15. Petitioner, therefore, has the burden to demonstrate by a preponderance of the evidence that the Division erred in determining the effective retirement date.

16. Section 121.091, Florida Statutes (2009), provides that FRS "[b]enefits may not be paid unless the member has terminated employment . . . and a proper application has been filed in the manner prescribed by the department."

17. Subsection 121.091(4)(a)1.a., Florida Statutes (2009), related to disability benefits, is as follows:

A member who becomes totally and permanently disabled, as defined in paragraph (b), after completing 5 years of creditable service, or a member who becomes totally and permanently disabled in the line of duty regardless of service, shall be entitled to a monthly disability benefit. . . .

18. Florida Administrative Code Rule 60S-4.0035 provides, in relevant part, that:

60S-4.0035 Retirement Application and Effective Retirement Date.

(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. A member may apply for retirement benefits within 6 months prior to his date of termination of employment. If a member terminates his employment and elects to defer his retirement to some future date, he may apply for deferred benefits up to 6 months prior to the date he desires his retirement to become effective.

\* \* \*

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

\* \* \*

(b) For a member who makes application for and is approved for disability retirement in accordance with Rule 60S-4.007, F.A.C., and for whom the Division has received from the employer the required documentation of the member's termination of employment, the effective retirement date shall be:

\* \* \*



3. The first day of the month following the Division's receipt of the Form FR-13 when receipt is more than 30 calendar days after the documented termination date . . . .

19. In Heim v. Division of Retirement, DOAH Case No. 03-0625 (R.O. 12/19/03, F.O. 1/28/04), the petitioner applied for an earlier effective retirement date asserting that the agency failed to inform her of an early retirement option. The elements of equitable estoppel against a governmental entity were applied, as 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 The 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).

20. In Hoffman v. State of Florida, Department of Management Services, Division of Retirement, 964 So. 2d 163 (Fla. 1st DCA 2007), the court held that an appellant who did not establish that the Division misrepresented a material fact,

either by omission or failure to disclose, had not shown that the Division was estopped from denying her retroactive benefits.

21. Petitioner has not shown that there was any misrepresentation of a fact, errors or omissions by the Division.

22. The failure of the District to give notice of his official termination date to the Petitioner's husband is also not a basis to invoke the doctrine of estoppel. The mere failure to act does not constitute a "positive act" upon which an estoppel against a governmental agency can be based. See Monroe County v. Hemisphere Equity Realty, Inc., 634 So. 2d 745, 747-48 (Fla. 3d DCA 1994).

#### RECOMMENDATION

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

RECOMMENDED that the Department of Management Services enter a final order affirming the establishment of August 1, 2004, as the effective retirement date for Edward Imbertson.

DONE AND ENTERED this 29th day of December, 2009, in  
Tallahassee, Leon County, Florida.



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ELEANOR M. HUNTER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of December, 2009.

COPIES FURNISHED:

Alan M. Aronson, Esquire  
Rosenthal & Levy, P.A.  
1645 Palm Beach Lakes Boulevard, Suite 350  
West Palm Beach, Florida 33401

Larry D. Scott, Esquire  
Department of Management Services  
Division of Retirement  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32399

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

Sarabeth Snuggs, Director  
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.