

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COLLEEN HYLTON-JULIUS,)
)
 Petitioner,)
)
 vs.) Case No. 11-4534
)
 DEPARTMENT OF MANAGEMENT SERVICES,)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 7, 2011, by video teleconference, with the parties appearing in Lauderdale Lakes, Florida, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida, in accordance with the authority set forth in sections 120.569 and 120.57(1), Florida Statutes.

APPEARANCES

For Petitioner: Mark J. Berkowitz, Esquire
1620 W. Oakland Park Boulevard
Suite 300
Ft. Lauderdale, Florida 33311

For Respondent: Kristin M. Klein, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether the Division properly denied Petitioner's request to change Petitioner's retirement in the Florida Retirement System from an early retirement service benefit to disability retirement.

PRELIMINARY STATEMENT

On June 23, 2011, the Department of Management Services, Division of Retirement ("Respondent" or "Division"), issued a denial letter informing Colleen Hylton-Julius ("Petitioner" or "Hylton-Julius"), that the Division was not able to honor her request to change to a disability benefit because she was receiving a service retirement benefit. Petitioner timely requested a formal hearing to contest these allegations, and the matter was referred to the Division of Administrative Hearings on September 8, 2011.

The presiding administrative law judge set the final hearing for December 7, 2011. The case then proceeded as scheduled and both parties appeared at the appointed place and time.

At hearing, Petitioner testified on her own behalf. Petitioner's Exhibits 1 through 5 were offered and received into evidence. The Division presented the testimony of Ira Gaines, Benefits Administrator. The Division's Exhibits 1 through 8 were offered and received into evidence.

At the request of the Division, the undersigned took official recognition of Florida Administrative Code Rule 60S-4.002 and section 121.091, Florida Statutes.

The proceedings were recorded and transcribed. The Transcript was filed at the Division of Administrative Hearings on January 12, 2012. Both parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is charged with managing, governing, and administering the Florida Retirement System ("FRS").
2. Petitioner worked for Miami Dade Transit from August 1990 to March 2004, and was a member of FRS while employed there.
3. Afterwards, Petitioner went to work as an auditor with a private employer, Robert Half, in New York.
4. In 2007, Petitioner sustained an injury while working for Robert Half.
5. In 2008, the Division generated an Estimate of Retirement Benefits for Petitioner detailing what her benefit amounts would be if she decided to retire.
6. In February or March 2009, Petitioner informed the Division by telephone that she could no longer work and wanted

to retire. Subsequently, the Division mailed Petitioner a retirement application.

7. On April 13, 2009, the Division received Petitioner's filled-out application for service retirement.

8. Directly above Petitioner's signature, the application stated:

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.

9. Petitioner's application was incomplete and could not be processed upon receipt.

10. On or about April 17, 2009, the Division sent Petitioner an Acknowledgment of Service Retirement Application requesting that Petitioner send "birth date verification of your joint annuitant" if she chose Option 3 or 4 and "The Option Selection for FRS Members, Form FRS-110" to finalize the application. The acknowledgment stated at the bottom:

ONCE YOU RETIRE, YOU CANNOT ADD SERVICE
CHANGE OPTIONS, CHANGE YOUR RETIREMENT DATE,
CHANGE YOUR TYPE OF RETIREMENT OR ELECT THE
INVESTMENT PLAN. RETIRMENT BECOMES FINAL
WHEN ANY BENEFIT PAYMENT IS CASHED OR
DEPOSITED.

11. In April 2009, the Division generated a second Estimate of Benefits for Petitioner, which she received.

12. On or about May 8, 2009, Petitioner completed her retirement application by providing the Division the option selection form, which notified the Division that she selected Option 2.

13. Directly above Petitioner's signature, the selection form FRS-110 stated:

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.

14. When Petitioner received the estimate and saw the early retirement benefit amount, she called the Division to question what she considered a small amount. It was explained to Petitioner that she lost a certain percentage because she was retiring early and that her retirement was either "being processed, or it was processed."

15. Petitioner's application for retirement was approved by the Division and Petitioner was awarded the Option 2 retirement benefit she requested with the effective date of May 1, 2009.

16. Petitioner's first retirement check was dated April 23, 2010, and was cashed by Petitioner on July 28, 2010.

17. Petitioner's retirement status was final when she cashed her benefit payment.

18. On June 6, 2011, Petitioner contacted the Secretary of Division of Management Services by email and requested that she receive disability retirement for the first time.¹

19. On, June 23, 2011, the Division informed Petitioner by letter that her retirement status was final when she cashed or deposited a benefit payment and that the request to change her retirement from regular service retirement to disability retirement could not be honored.

20. On or about July 19, 2011, Petitioner requested a hearing regarding the issue.

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 (2011).

22. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348

So. 2d 349 (Fla. 1st DCA 1977). Accordingly, Petitioner bears the burden of proof in this proceeding by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

23. Section 121.091(6)(h) sets forth how benefits are payable. This statute provides, in pertinent part:

(6)(h) The option selected or determined for payment of benefits as provided in this section shall be final and irrevocable at the time a benefit payment is cashed or deposited or credited to the Deferred Retirement Option Program as provided in subsection

24. Rule 60S-4.002(4) provides in pertinent part:

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.

25. Petitioner asserts the Division was notified by a
letter dated March 11, 2010, that Hylton-Julius wanted to cancel
her retirement benefits application and pursue a claim for
disability benefits and the Division had an obligation to tell
her where to get information about converting her regular
retirement to disability retirement. The record is void of any
credible evidence that the Division received such notice; thus,
Petitioner failed to prove such an allegation.

26. Petitioner further contends that the doctrine of
equitable estoppel should be applied in this matter because
Respondent provided Petitioner erroneous information that her
application was processed and she relied on that information.
Equitable estoppel is applied against the state only in rare
instances and under exceptional circumstances. To prevail under
estoppel Petitioner has to prove the following elements: (1) a
representation as to 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. Lewis v.

Dep't of HRS, 659 So. 2d 1255, 1256 (Fla. 4th DCA 1995); Nelson Richard Adver. V. Dep't of Transp., 513 So. 2d 181, 182 (Fla. 1st DCA 1987); Assoc. Indus. Ins. Co. v. DOL & Empl. Sec. (Dep't of Fin.), 923 So. 2d 1252, 1255 (Fla. 1st DCA 2006).

27. In this case, Petitioner failed to present sufficient credible evidence that the Division made any statement of fact that misled Petitioner during her application process. Therefore, estoppel is not appropriate in this matter.

28. It is unfortunate that Hylton-Julius suffers from a disability as a result of an injury suffered. However, the record is clear that Petitioner elected by application, to apply for early service retirement without ever requesting disability benefits. Additionally, Petitioner has been cashing and/or depositing early service retirement checks since 2010. Further, Petitioner was informed on at least two documents she signed and submitted to the Division that her retirement was not final until she cashed her retirement benefit. While the end result is harsh under the circumstances, the law mandates that since Petitioner's benefit payment was cashed, her early service retirement benefit cannot be changed under the FRS. The record is void of Petitioner asserting any exceptions to rule 60S-4.002(4).

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 denying Petitioner's request to change her early service retirement benefit to disability retirement.

DONE AND ENTERED this 9th day of February, 2012, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of February, 2012.

ENDNOTE

¹ Petitioner's testimony that she requested disability benefits prior to the June 6, 2011, email is rejected as not being credible.

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.