

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL A. FEWLESS,

Petitioner,

vs.

Case No. 18-5787

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH") in Tallahassee, Florida on April 22 and 23, 2019.

APPEARANCES

For Petitioner: Ryan Joshua Andrews, Esquire
Brian O. Finnerty, Esquire
Johana E. Nieves, Esquire
The Law Offices of Steven R. Andrews, P.A.
822 North Monroe Street
Tallahassee, Florida 32303

For Respondent: Thomas E. Wright, Esquire
Sean W. Gillis, Esquire
Office of the General Counsel
Department of Management Services
Suite 160
4050 Esplanade Way
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STATEMENT OF THE ISSUE

Whether the Department of Management Services, Division of Retirement ("the Department") should be equitably estopped from requiring Michael A. Fewless to return \$541,780.03 of retirement benefits.

PRELIMINARY STATEMENT

The Department issued a letter to Mr. Fewless on August 31, 2018, notifying him that his request to be relieved from repaying benefits received from the Florida Retirement System ("FRS") had been denied. In support thereof, the Department explained that:

As addressed in the letter to you dated August 15, 2018 (enclosed), you were employed with the City of Fruitland Park on August 3, 2015, following your Deferred Retirement Option Program (DROP) termination from the Orange County Sheriff's Office on August 1, 2015. The City of Fruitland Park is an FRS participating employer for police and general employees. Due to your employment with the City of Fruitland Park on August 3, 2015, you never satisfied the FRS termination requirement of ceasing all employment with FRS employers for six calendar months as provided in 121.021(39)(b), Florida Statutes. As a result, your FRS DROP retirement is voided and you are required to repay all retirement benefits, as provided in Rule 60S-4.012, Florida Administrative Code. Your FRS membership will be retroactively established to June 1, 2011, the date you initially began DROP participation.

The Department's August 15, 2018, letter had notified Mr. Fewless that he was required to repay \$541,780.03 to the Department.

On September 25, 2018, Mr. Fewless filed a petition requesting a formal administrative hearing and asserted therein that the Department was equitably estopped from requiring repayment because a Department employee provided incorrect advice over an FRS hotline.

The Department referred the instant case to DOAH on November 1, 2018, and the undersigned scheduled the final hearing to occur on December 21, 2018.

After Mr. Fewless filed an unopposed motion to continue, the undersigned rescheduled the final hearing to occur on February 25, 28, and March 1, 2019. The parties filed a joint motion to continue on January 29, 2019, and the undersigned rescheduled the final hearing for April 22 through 24, 2019.

The final hearing was convened as scheduled on April 22, 2019, and concluded on April 23, 2019. In addition to testifying on his own behalf, Mr. Fewless presented the testimony of Kathy Fabrizio, Todd McCullough, Laurie Fewless, Joyce Morgan, Kathy Gould, and Cara Anderson. Mr. Fewless presented the testimony of Diana Kolcun and Richard Ranize via deposition. During the rebuttal portion of his case, Mr. Fewless presented testimony from himself and David Kent.

The Department presented the testimony of Gary LaVenja, Ms. Morgan, Ms. Anderson, Mr. Kent, and Ms. Gould.

The following exhibits from Mr. Fewless were accepted into evidence: 2, 5 through 8, 15, 22, 49 through 51, 57, 66, 67, and 70. The undersigned reserved ruling on the admissibility of Mr. Fewless's Exhibit 68 and hereby declines to accept it into evidence due to redundancy and a lack of relevant information.

The Department introduced Exhibits 4, 5, and 7 into evidence, and the parties jointly introduced Joint Exhibits 1 through 7 into evidence.

At the close of the final hearing, the undersigned granted an ore tenus motion that the deadline for the parties' proposed recommended orders be extended to 30 days from the filing of the hearing transcript.

The five-volume hearing Transcript was filed with DOAH on May 17, 2019, and the parties' timely filed their proposed recommended orders on June 17, 2019.

FINDINGS OF FACT

The following findings are based on witness testimony, exhibits, and information subject to official recognition.

FRS and the Termination Requirement

1. FRS is a qualified plan under section 401(a) of the Internal Revenue Code and has over 500,000 active pension plan members. The Department administers FRS so that it will maintain its status as a qualified pension plan under the Internal Revenue Code.

2. Section 121.091(13), Florida Statutes (2018),^{1/} describes the benefits available to FRS members through the "Deferred Retirement Option Program ("DROP"):

In general, and subject to this section, the Deferred Retirement Option Program, hereinafter referred to as DROP, is a program under which an eligible member of the Florida Retirement System may elect to participate, deferring receipt of retirement benefits while continuing employment with his or her Florida Retirement System employer. The deferred monthly benefits shall accrue in the Florida Retirement System on behalf of the member, plus interest compounded monthly, for the specified period of the DROP participation, as provided in paragraph (c). Upon termination of employment, the member shall receive the total DROP benefits and begin to receive the previously determined normal retirement benefits.

3. Section 121.091 specifies that "[b]enefits may not be paid under this section unless the member has terminated employment as provided in s. 121.021(39) (a). . . ."

4. Section 121.021(39) (a) generally provides that "termination" occurs when a member ceases all employment relationships with participating employers. However, "if a member is employed by any such employer within the next 6 calendar months, termination shall be deemed not to have occurred." § 121.021(39) (a)2., Fla. Stat.

5. Moreover, the employee and the re-employing FRS agency will be jointly and severally liable for reimbursing any

retirement benefits paid to the employee. § 121.091(9)(c)3., Fla. Stat.^{2/}

6. The termination requirement is essential to the FRS maintaining its status as a qualified plan under IRS regulations. As a qualified plan, taxes on FRS benefits are deferred.^{3/}

7. The Department's position is that after an entity becomes a participating employer, all new hires within covered categories are "compulsory members" of the FRS. If an entity has a local pension plan, then that entity must either close the plan before joining FRS or keep the plan open for members who exercise their right to remain in that plan. However, even if the entity chooses to keep the local plan open for current members, the local plan is closed to new members.

8. The City of Fruitland Park, Florida ("Fruitland Park"), became an FRS employer on February 1, 2015. The mayor and commissioners of Fruitland Park passed a resolution on November 20, 2014, providing in pertinent part, that:

It is hereby declared to be the policy and purpose of the City Commission of Fruitland Park, Florida that all of its General Employees and police officers, except those excluded by law, shall participate in the Florida Retirement System as authorized by Chapter 121, Florida Statutes. All General Employees and police officers shall be compulsory members of the Florida Retirement System as of the effective date of

participation in the Florida Retirement System so stated therein.

(emphasis added).

9. The Department notified Fruitland Park during its enrollment into FRS that all new hires were compulsory members of FRS for covered groups.

Facts Specific to the Instant Case

10. After graduating from the Central Florida Police Academy in 1985, Mr. Fewless began working for the Orange County Sheriff's Office ("OCSO") as a deputy sheriff and patrolled what he describes as "the worst area of Orange County."^{4/}

11. After five years, Mr. Fewless transferred into the detective bureau in OCSO's criminal investigations division. Mr. Fewless received a promotion to corporal two years later and returned to patrolling.^{5/}

12. Mr. Fewless soon received a transfer to OCSO's special investigation's division and worked in the gang enforcement unit.^{6/} It was not long before he was promoted to sergeant and sent "back to the road."

13. After 10 months, OCSO asked Mr. Fewless to take over the gang enforcement unit where he was promoted to lieutenant and ultimately to captain.^{7/} During his tenure as a captain, Mr. Fewless was in charge of OCSO's internal affairs unit for five or six years.

14. Mr. Fewless concluded his nearly 30-year tenure with OCSO as the director of the Fusion Center and the Captain of the criminal intelligence section.^{8/}

15. In sum, Mr. Fewless's service with OCSO was exemplary, and he was never the subject of any disciplinary actions.

16. Mr. Fewless entered the DROP program on June 1, 2011. As a result, he was scheduled to complete his DROP tenure and retire on May 31, 2016. On June 1, 2011, Mr. Fewless signed a standardized FRS document entitled "Notice of Election to Participate in the Deferred Retirement Option Program (DROP) and Resignation of Employment." That document contained the following provisions:

I elect to participate in the DROP in accordance with s. 121.091(13), Florida Statutes (F.S.), as indicated below, and resign my employment on the date I terminate from the DROP. I understand that the earliest date my participation in the DROP can begin is the first date I reach normal retirement date as determined by law and that my DROP participation cannot exceed a maximum of 60 months from the date I reach my normal retirement date, although I may elect to participate for less than 60 months. Participation in the DROP does not guarantee my employment for the DROP period. I understand that I must terminate all employment with FRS employers to receive a monthly retirement benefit and my DROP benefit under Chapter 121, F.S. Termination requirements for elected officers are different as specified in s. 121.091(13)(b)(4), F.S. I cannot add service, change options, change my type of retirement or elect the Investment Plan after

my DROP begin date. I have read and understand the DROP Accrual and Distribution information provided with this form.

17. Mr. Fewless realized by 2015 that he was not ready to leave law enforcement. However, he was scheduled to retire from OCSO by May 31, 2016.

18. Mr. Fewless had several friends who left OCSO as captains and took police chief positions with municipalities in Florida. Therefore, in anticipation of a lengthy job search, he began looking for such a position in approximately March of 2015.

19. Mr. Fewless applied to become Fruitland Park's police chief on March 26, 2015, and was offered the job in June of 2015 by Fruitland Park's city manager, Gary LaVenía.

20. Mr. Fewless learned from Mr. LaVenía that Fruitland Park had joined FRS and told him that he could not work within the FRS system. Mr. LaVenía then erroneously told Mr. Fewless that he would not be violating any FRS conditions (and thus forfeiting his DROP payout) because Fruitland Park had a separate city pension plan into which Mr. Fewless could be enrolled. As noted above, Fruitland Park had passed a resolution mandating that "[a]ll General Employees and police officers shall be compulsory members of the Florida Retirement System as of the effective date of participation in the Florida Retirement System. . . ."

21. While Mr. Fewless was pleased with what Mr. LaVenia told him, he called an FRS hotline on July 9, 2015, in order to verify that he would not be endangering his retirement benefits by accepting the police chief position with Fruitland Park.

22. Mr. Fewless's question was routed to David Kent, and Mr. Fewless described how he was going to work for Fruitland Park and that Fruitland Park was an FRS employer.

23. Mr. Kent told Mr. Fewless that he could go to work for Fruitland Park immediately without violating any FRS requirements so long as he was not enrolled into the FRS system. Instead of being an FRS enrollee, Mr. Kent stated that Mr. Fewless could enroll into Fruitland Park's pension plan or enter a third-party contract.^{9/}

24. Mr. Fewless assumed that Mr. Kent was an FRS expert and remembers that Mr. Kent sounded very confident in the information he relayed over the telephone.

25. On July 14, 2015, Mr. Fewless filled out and signed a form entitled "Florida Retirement Systems Pension Plan Deferred Retirement Option Program (DROP) Termination Notification." The form indicates that Mr. Fewless would be ending his employment with OCSO on August 1, 2015. In addition, the form notified Mr. Fewless of the requirements associated with receiving his accumulated DROP and monthly benefits:

According to our records, your DROP termination date is **08/01/2015**. You must terminate all Florida Retirement System (FRS) employment to receive your accumulated DROP benefits and begin your monthly retirement benefits. You and your employer's authorized representative must complete this form certifying your DROP employment termination.

Termination Requirement:

In order to satisfy your employment termination requirement, you must terminate all employment relationships with all participating FRS employers for the first 6 calendar months after your DROP termination date. Termination requirement means you cannot remain employed or become employed with any FRS covered employer in a position covered or noncovered by retirement for the first 6 calendar months following your DROP termination date. This includes but is not limited to: part-time work, temporary work, other personal services (OPS), substitute teaching, adjunct professor or non-Division approved contractual services.

Reemployment Limitation:

You may return to work for a participating FRS employer during the 7th - 12th calendar months following your DROP termination date, but your monthly retirement benefit will be suspended for those months you are employed. There are no reemployment limitations after the 12th calendar month following your DROP termination date.

If you fail to meet the termination requirement, you will void (cancel) your retirement and DROP participation and you must repay all retirement benefits received (including accumulated DROP benefits). If you void your retirement, your employer will be responsible for making retroactive retirement contributions and you will be

awarded service credit for the period during which you were in DROP through your new employment termination date. You must apply to establish a future retirement date. Your eligibility for DROP participation will be determined by your future retirement date and you may lose your eligibility to participate in DROP.^[10/]

(emphasis in original).

Mr. Fewless's Reliance on the Representations Made to Him

26. Mr. Fewless placed complete trust in the representations made during his July 9, 2015, phone call to the FRS hotline and during his discussions with Fruitland Park's city manager.

27. When he left OCSO and accepted the police chief position with Fruitland Park, Mr. Fewless took a \$33,000.00 annual pay cut and stood to receive \$70,000.00 less from his DROP payout. It is highly unlikely he would have accepted those circumstances if he did not have a good faith basis for believing he was utilizing an exception to the termination requirement.

28. In the months preceding his departure from OCSO, Mr. Fewless's wife was being treated for a brain tumor. Following her surgery in May of 2015 and subsequent radiation treatment, Ms. Fewless returned to work for a month or two. However, given that the retirement checks Mr. Fewless had begun to receive were roughly equivalent to what Ms. Fewless had been

earning, she decided to retire in order to spend more time with their grandchildren.

29. During this timeframe, Mr. and Ms. Fewless decided to build their "dream home," and Ms. Fewless designed it. They used a \$318,000.00 lump sum payment from FRS to significantly lower their monthly house payment. Those actions would not have been taken if Mr. Fewless had suspected that there was any uncertainty pertaining to his retirement benefits.

The Department Discovers the Termination Violation

30. In November of 2017, the Department's Office of the Inspector General conducted an audit to assess Fruitland Park's compliance with FRS requirements. This audit was conducted in the regular course of the Department's business and was not initiated because of any suspicion of noncompliance.

31. The resulting audit report contained the following findings: (a) Fruitland Park had failed to report part-time employees since joining FRS; (b) Fruitland Park had failed to report Mr. Fewless as an employee covered by FRS; (c) Mr. Fewless's employment with Fruitland Park amounted to a violation of FRS's reemployment provisions; and (d) Fruitland Park failed to correctly report retirees filling regularly established positions.

32. Because he had failed to satisfy the termination requirement, the Department notified Mr. Fewless via a letter

issued on August 15, 2018, that: (a) his DROP retirement had been voided; (b) his membership in FRS would be retroactively reestablished^{11/}; and (c) he was required to repay \$541,780.03 of benefits.

Mr. Fewless's Reaction to Learning That He Had Violated the Termination Requirement

33. Mr. Fewless learned on June 25, 2018, of the Department's determination that he was in violation of the termination requirement. He responded on July 5, 2018, by writing the following letter to the Department:

On the evening of, June 25, 2018, I was notified by Mr. Gary LaVenia, the City Manager for Fruitland Park, that he was contacted by members of the State of Florida's DMS Inspector General's office regarding a problem with my current retirement plan. No additional information was shared during this initial telephone conversation and we scheduled a meeting for the following day.

On June 26, 2018, I met with Mr. Gary LaVenia, Ms. Diane Kolcan, Human Resource Director and Ms. Jeannine Racine, the Finance Director regarding this matter. I was advised that members of the Department of the Florida Retirement System told them that I was in violation of receiving my current retirement benefits because I failed to take a six month break between my retirement with the Orange County Sheriff's Office and joining the City of Fruitland Park. I explained to them that there must be some mistake because I am not currently enrolled in the Florida Retirement System through the City of Fruitland Park. The City enrolled me in their "City" pension plan. Mr. LaVenia agreed with me and we closed the meeting with

me advising them I would do some additional research on the matter.

* * *

I then reached out to Mr. Chris Carmody, an attorney with the Gray/Robinson Firm, whom I worked with on legislative issues in the past. . . . I explained to him that according to the Inspector General's report, I needed to have a six month separation between the Orange County Sheriff's Office and the City of Fruitland Park, because both agencies participated in the Florida Retirement System. Mr. Carmody still did not feel that was a violation because I was not enrolled in the FRS Plan with the City of Fruitland Park, but rather their independent City pension plan. I felt the same way; however he wanted to continue to research the issue. A few hours later I received a telephone call from Mr. Carmody indicating the problem appears to be that the "City" participates in the FRS Pension Plan and even though I do not, I would be prohibited from working there for the six month period.

After hearing this news, I immediately contacted Ms. Amy Mercer, the Executive Director of the Florida Police Chief's Association. I explained the dilemma to her and just like the previously mentioned individuals she said "so what did you do wrong, that sounds ok to me. . . ." Ms. Mercer said she would reach out to the two attorneys that support the Florida Police Chief's Association to get their opinion of the situation.

The following morning, Ms. Mercer advised me that according to Attorney Leonard Dietzen my actions were in violation of the Florida Retirement Pension Plan Rules. Mr. Dietzen explained to her that I needed a six month separation from my employment with the Florida Retirement System and the City of

Fruitland Park, because the City participated in the FRS Pension plan.

Therefore, based on the above information [and] the realization that an innocent mistake had been made, please let me explain my actions:

* * *

In either June or July of 2015, I officially interviewed for the position of Police Chief for the City of Fruitland Park. . . . Approximately one week after the interviews, I was offered the position of Police Chief for the City of Fruitland Park.

In July of 2015, I contacted the official FRS Hotline regarding my potential decision to join the Fruitland Park Police Department. I informed them that I was currently employed with the Orange County Sheriff's Office and enrolled in DROP. I advised them that I was considering accepting the position of police chief with the City of Fruitland Park; however I wanted to confirm with them that I would have no issues with my retirement. I explained that the City of Fruitland Park was currently an FRS department; however they also had a separate "City" pension plan which I was going to be placed in. I wanted to confirm that this would not negatively impact my retirement benefits. I was advised that as long as I was enrolled in the "City" pension plan, I would be fine. The FRS employee also added that he heard other "new chiefs" were doing an "independent contract" with the City for a one year period, but he assured me either way would be fine. I concluded my telephone conversation and proceeded forward.

I then began the employee benefits negotiations process with Mr. LaVenia. At the time of the negotiations, I realized I would be receiving my Florida Retirement check on a monthly basis and my wife was also

employed as the vice-president of the Orlando Union Rescue Mission in Orlando, Florida. Therefore money was not my primary concern for this position and I surrendered my much larger salary with the Orange County Sheriff's Office to become the Chief of Police for Fruitland Park for \$70,000 per year.

I officially accepted the position with the City of Fruitland Park, and informed Mr. LaVenia that I could not participate in the Florida Retirement System; however according to the FRS Hotline employee I could be placed in the city pension plan or sign a contract for a one year period. Mr. LaVenia recommended that I be placed in the city pension plan and had the appropriate paperwork completed.

* * *

It is important to recognize that I felt I took all the necessary steps to act within the guidelines of the Florida Retirement System. After all, I had worked for over thirty years with the Orange County Sheriff's Office with an impeccable record and with the intent of securing a retirement package that would protect my wife and family for life.

In conclusion, I feel I have been let down by the system in two very key areas regarding this matter:

1. In July 2015, not only was I preparing for retirement and a new job; but my wife was experiencing serious medical issues that required surgery and radiation treatments for months at Shands Hospital. Although my mind was focused on her condition, I still felt it was extremely important to contact the FRS Hotline regarding my potential new position. My desire was to make sure I did not do anything that would jeopardize the retirement plan I worked for my entire career. The advice I was given by the FRS Hotline

employee/professional apparently was terrible. Not only did he indicate I could go under the "City" pension plan, he further recommended that other chiefs have decided to do a "contract" with the city for a one year period to account for the separation from the FRS system. Clearly had this employee indicated by any means that the position with Fruitland Park would or possibly could jeopardize my retirement, I would have run away from this opportunity . . .

* * *

2. In July and August of 2015, while I was completing the hiring process with the City of Fruitland Park, management and/or staff should have cautioned me about the potential risk to my Florida Retirement Pension if I proceeded with the process.

* * *

Clearly, whoever made the decision to proceed with processing me was unaware of two things. (1) I would be violating the six month separation rule if I stopped my employment with the Orange County Sheriff's Office on August 1, 2015 and began employment with Fruitland Park one day later on August 2, 2015. (2) The only pension plan available to new employees with the City of Fruitland Park had to be the Florida Retirement System.

* * *

I now understand from going through this procedure that there [was] an unintended error in how I officially retired from the Orange County Sheriff's Office and began my employment with the Fruitland Park Police Department. It is important to mention that Sheriff Kevin Beary and Sheriff Jerry Demings chose me to command their Professional Standards Division on two separate occasions because they knew I was a man of integrity and would always "do the right thing." I had

no intent to skirt the system and/or do anything unethical. I can assure you nobody raised a red flag over this position prior to this incident; and I would have immediately stopped my efforts had I been aware of this rule.

Mr. Fewless's Current Situation

34. While working as Fruitland Park's police chief, Mr. Fewless's salary and retirement benefits totaled \$12,000.00 a month.

35. In order to avoid accumulating more penalties, Mr. Fewless retired from his police chief position with Fruitland Park on August 31, 2018.

36. Mr. Fewless has not received any FRS benefits since September 1, 2018. There was a three-month period when he was receiving no money.

37. Mr. Fewless has been employed by the Groveland Police Department since March 4, 2019.

38. Mr. Fewless describes his current financial situation as "dire" and says he and his wife are "wiped out." They may need to sell their "dream house," and they borrowed \$30,000.00 from their daughter in order to litigate the instant case.

39. In addition, the contractor who built the Fewless's dream home failed to pay subcontractors for \$93,000.00 of work.

40. While the Department notes that Mr. Fewless stands to receive a higher monthly benefit, he disputes that he is somehow in a better position:

No, I am not in a better position. The \$542,000 that will be taken away from me because of what clearly could have been handled with one phone call from a representative of FRS - the difference in pay between my former retirement salary and my new retirement salary based on the recalculations will go from \$6,000 to \$7,000 a month. That means in order for me to recoup the \$542,000 that the state was referring to, I would have to work 542 months. I don't think I'll live that much longer, No. 1. And No. 2, that doesn't take into consideration interest and everything else that was part of that, if that makes sense.

41. Mr. Fewless has filed a lawsuit against Fruitland Park.

Ultimate Findings of Fact^{12/}

42. Mr. Fewless's testimony about his July 9, 2015, phone call to the FRS hotline is more credible than Mr. Kent's. Mr. Fewless's descriptions of that phone call are very consistent, and the Department has not directed the undersigned to any instances in which an account of that phone call by Mr. Fewless differed from his testimony or his July 5, 2018, letter to the Department.^{13/} This finding is also based on Mr. Fewless's demeanor during the final hearing.

43. Moreover, Mr. Fewless was not attempting to "game the system." Given Mr. Fewless's exceptional record of public

service, it is very unlikely that he would knowingly and intentionally attempt to engage in "double dipping" by violating the termination requirement. It is equally unlikely that Mr. Kent can accurately remember what he told Mr. Fewless during a single phone call on July 9, 2015. Rather than questioning Mr. Kent's veracity, the undersigned is simply questioning his ability to recall the content of a single phone call that appears to have been unremarkable.^{14/}

44. It is also difficult to believe that Mr. Fewless would accept the police chief position with Fruitland Park and build an expensive "dream house" after being told by Mr. Kent that he would be violating the termination requirement.^{15/}

45. Mr. Fewless's reliance on Mr. Kent's statement was entirely reasonable given that the arrangement described by Mr. LaVenita sounded like an imminently plausible exception to the termination requirement. Mr. Fewless's subsequent actions in reliance of that statement were extremely detrimental to himself and his family.

46. Finally, the circumstances of the instant case are analogous to other cases in which appellate courts have held that the enhanced requirements for estopping the government had been satisfied. In other words, Mr. Kent's misrepresentation amounted to more than mere negligence, the Department's proposed action would result in a serious injustice, and the public interest

would not be unduly harmed by Mr. Fewless retaining the retirement benefits he earned through his public service with OCSO.

CONCLUSIONS OF LAW

47. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

48. The burden of proof in this proceeding is on the party asserting the affirmative of an issue. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989). Because Mr. Fewless is asserting that the Department should be equitably estopped from recovering \$541,780.03 of retirement benefits from him, he must prove his case by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

49. The three elements of equitable estoppel are: (a) a representation about a material fact that is contrary to a later-asserted position; (b) reasonable reliance on that representation; and (c) a change in position detrimental to the party claiming estoppel. Equitable estoppel will not be applied against a governmental entity without extraordinary circumstances being present. In addition, a governmental entity will not be estopped for conduct resulting from a mistake of law. Salz v. Dep't of Admin., Div. of Ret., 432 So. 2d 1376, 1378 (Fla. 3d DCA

1983); Warren v. Dep't of Health, 554 So. 2d 568, 571 (Fla. 5th DCA 1989).

50. With regard to the first element, the undersigned found Mr. Fewless's testimony about his July 9, 2015, phone call to the FRS hotline to be more credible than Mr. Kent's. Mr. Fewless's descriptions about what Mr. Kent told him have been very consistent, and the Department has not identified an instance in which Mr. Fewless has materially contradicted himself. Therefore, Mr. Fewless proved by a preponderance of the evidence that the Department made a misrepresentation that was contrary to a later asserted position.

51. Mr. Fewless was told that he could immediately go to work as Fruitland Park's police chief without jeopardizing his retirement benefits. The Department argues that even if Mr. Fewless accurately described what was relayed to him during that July 9, 2015, phone call, the misrepresentation was one of law rather than one of fact. However, appellate decisions have concluded that analogous misrepresentations were factual in nature. Therefore, Mr. Fewless prevails on this point. See Salz, 432 So. 2d at 1378 (holding the appellant was entitled to the benefit of equitable estoppel "[w]hen Mrs. Salz asked TRA in 1966 whether she could purchase credit for the eight years she had taught at the Central Institute for the Deaf, [and] TRA received information that the Central Institute was not a public

school. It nevertheless allowed Mrs. Salz to purchase eight years of credit. TRS's mistaken belief that the Central Institute for the Deaf was a public school constituted a mistake of fact, not of law."); Kuge v. Dep't of Admin., Div. of Ret., 449 So. 2d 389, 391 (Fla. 3rd DCA 1984) (stating "[w]e reject DOR's contention that the representations made in this case were representations of law rather than fact. Ms. Kuge was informed in the January 25, 1983, memo that she had 9.58 years of creditable state retirement service as of the date of the memo and would have ten years of creditable state retirement service as of March 31, 1983, so long as she continued to work at the rate of pay below that of her current salary. These were representations of fact, not of law. It is true that such representations were based on a misunderstanding of the law applicable to her case, but this does not convert the factual representations into legal representations. Ms. Kuge was told, as a matter of fact, how many years of creditable state retirement service she had, and how many such years she would have if she continued working through March 31, 1983; she was in no way advised as to the status of Florida law."); Harris v. Dep't of Admin., Div. of State Employees' Ins., 577 So. 2d 1363, n.1 (Fla. 1st DCA 1991) (stating that "[a]llthough Quincoses' representation was based on a misunderstanding of the applicable law, her statement was nonetheless a factual misrepresentation

regarding what acts were necessary to effectuate conversion to family coverage.”).

52. The Department also argues that any reliance by Mr. Fewless on a misrepresentation was unreasonable given the written warnings on the forms he signed on June 1, 2011, and July 14, 2015. However, Mr. LaVenia’s assertion that Mr. Fewless could be enrolled into a separate city pension plan without violating any FRS requirements was a very plausible sounding exception to the termination requirement. Because Mr. Kent subsequently corroborated that assertion, Mr. Fewless’s reliance was imminently reasonable.

53. The Department additionally argues that: (a) equitable estoppel does not apply to transactions forbidden by statute; and (b) Mr. Kent’s conduct was merely negligent and does not rise to the level at which the government will be estopped from taking action. See Fraga v. Dep’t of HRS, 464 So. 2d 144, 146 (Fla. 3d DCA 1984) (noting “[t]he doctrine of equitable estoppel is not applicable in transactions which are forbidden by statute or which are contrary to public policy.”); Council Bros. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994) (explaining that “[o]ne seeking to invoke the doctrine of equitable estoppel against the government must first establish the usual elements

of estoppel, and then must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence. . . .”

54. The cases cited in paragraph 51 above indicate that those two elements of maintaining an equitable estoppel claim against the government have not persuaded appellate courts to rule against parties seeking to invoke the doctrine under analogous circumstances. See Salz, 432 So. 2d at 1378; Kuge, 449 So. 2d at 391; Harris, 577 So. 2d at 1363 n.1.

55. Finally, the Department argues that its proposed action does not amount to a serious injustice. See Council Bros., 634 So. 2d at 266 (noting that a party seeking to assert equitable estoppel against the government “must show that the governmental conduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest.”). Mr. Fewless can pursue a legal action against Fruitland Park.

56. Despite the Department’s assertions to the contrary, its proposed action does amount to an exceptional circumstance, it would result in a serious injustice, and it would unduly harm the public interest. As described in the Findings of Fact, Mr. Fewless has been an exceptional public servant for well over 30 years. He reasonably relied on a statement from an FRS employee to quit his job with OCSO, take a lower paying position

with Fruitland Park, and to build a dream home. Now, his assets have been depleted, and he faces the prospect of having to repay \$541,780.03 to the Department. This situation clearly amounts to an exceptional circumstance and amounts to a serious injustice. While the Department asserts that Mr. Fewless can pursue a legal action against Fruitland Park, the Department itself could have sought to recover the retirement benefits at issue from Fruitland Park given that section 121.091(9)(c)3. renders Mr. Fewless and Fruitland Park jointly and severally liable. Moreover, the Department's proposed action against an exceptional public servant would unduly harm the public interest. See generally Hollywood Beach Hotel Co. v. Hollywood, 329 So. 2d 10, 18 (Fla. 1976) (noting that "[e]very citizen has the right to expect that he will be dealt with fairly by his government" and that "[w]hile a City Commission certainly possesses the prerogative of deciding to defer action on such a proposal over a long period of time, it must assume the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing.").

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 rescinding

its proposed action that Michael A. Fewless's FRS DROP retirement be voided and that he be required to repay all retirement benefits as provided in Florida Administrative Code Rule 60S-4.012.

DONE AND ENTERED this 18th day of July, 2019, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of July, 2019.

ENDNOTES

^{1/} Unless indicated otherwise, all statutory references will be to the 2018 version of the Florida Statutes.

^{2/} Kathy Gould, the Department's Bureau Chief of Retirement Calculations, explained that "[t]he termination requirement is that a member has to terminate employment and not have employment with any participating FRS employer for the first through six calendar months. In the 7th through 12th, if they are employed, they would need to suspend their retirement benefit, and in the 12th month they could work for a participating employer and collect their retirement.

Ms. Gould also explained that the termination requirement used to be one month. The Florida Legislature increased the

termination requirement to six months in order to combat "double dipping":

Q: Do you have any idea why the legislature made that change?

A: I think some of it stemmed from the fact that people were retiring and then sitting out for one month, agencies may be holding the positions for them because they did a good job while they were there? Some people call [] the term double-dipping. So they were collecting their benefits and then immediately going back to a job to continue other benefits.

Q: Is it fair to say that in that circumstance, they really weren't terminating?

A: Yes, it is fair to say. A lot of them left their stuff at their desk and just took a month off.

^{3/} Ms. Gould explained the connection between continuation of the FRS's qualified plan status and the termination requirement:

Q: Does the IRS - first of all, is FRS a qualified plan under the IRS regs?

A: We are a qualified plan under Internal Revenue Code for 401(a)'s

Q: And is that for government plans?

A: Yes, it is.

Q: Does that - and with that qualification, does that [result in] the tax deferment of the benefits?

A: It does. So in order to remain qualified, we must satisfy termination. A termination must be satisfied. [The] legislature has determined termination to be the first through six calendar months. So we as the administrator of the pension plan are

required to administer it based on [the requirement that] individuals under our plan must satisfy the first through six calendar month termination for us to keep our qualified status.

Q: Okay. Now, does the IRS require a bona fide termination?

A: Yes, they do.

^{4/} Mr. Fewless's attorney asked him to describe his first assignment with OCSO:

A: I was assigned to the worst area in Orange County actually. It was Sector 4, it's the Orange Blossom Trail area. They probably have the most shootings, the most homicides, the most robberies, the most sexual batteries. It's just a violent area of Orange County.

Q: Was that like your first choice or your preference, or did you - were you hoping to transfer out of there as quickly as possible?

A: I loved the area.

Q: Can you explain why?

A: Because it's - you get into law enforcement because you want to be busy, you want to be active, and you want to make an impact on people's lives, and who better to make an impact on than the people that are actually being victimized by crimes?

^{5/} With regard to that promotion, the following exchange occurred between Mr. Fewless and his attorney:

Q: When you were promoted out as a corporal, do you mean like you were promoted out of criminal investigations?

A: Yeah, the sheriffs are pretty consistent with that, that when you get promoted, they like you to go back to the road and serve a

little bit of time on the road before you go into another specialized unit.

Q: Did you - were you averse to going back out on the road?

A: Not at all.

Q: That was like what you enjoyed?

A: It was, and I got to go back to Sector 4, so it was even better.

Q: Was that by choice or just the way it worked out?

A: They had openings, so it was kind of by choice because I was able to choose which one I wanted to go to.

^{6/} The following questioning took place about Mr. Fewless's assignment to gang enforcement:

Q: And I'm sure it sounds intuitive to some, but what kind of stuff were you doing in the Gang Enforcement Unit?

A: Gang enforcement, I mean, obviously we're doing a lot of intelligence on the individuals, we're - we're identifying who [] gang members are, we're looking where the graffiti is showing up, we're interpreting the graffiti, we're trying to make sure we have no turf wars and stuff like that. We're actually just focused on that particular segment.

Q: During that time period, did Orlando have [] pretty excessive or substantial gang turf wars and population, so to speak?

A: It did, and, actually, back when I was a corporal in there - I'm sure most of y'all have heard of Sur 13 recently. The president talks about it quite a bit. That was in the infancy stages back then. We had quite a

little group in Orange County that was claiming Sur 13 back then.

Q: You say Sur 13. Is that MS 13?

A: Yes, same thing.

^{7/} The following exchange pertained to Mr. Fewless's tenure in charge of the gang enforcement unit:

Q: During this time period when you were sergeant in the Gang Enforcement Unit, were there any programs you implemented as a sergeant for gang enforcement and juvenile offenders?

* * *

A: The sheriff has - he received [a] \$234,000 grant from the Department of Juvenile Justice for our agency to do some type of program with them. The sheriff heard of a program in Boston. It was called either Lights Out or Nights Out. It dealt with the agency removing firearms from gang members. So the sheriff sent me up to Boston to look at their program, kind of review it and see if it would work in our area. I looked at the program. It was not going to work in our area. So I came back and told the sheriff, I says, "No, I don't like the program. It's not for us." But I asked him for permission to begin a unit dealing with the worst of the worst juveniles that were on probation, figuring that if we could make a difference with them, we may be able to turn some of them from the criminal behavior and actually get them on the right path. So we started the unit called the Juvenile Arresting Monitor Unit. It's known as the JAM Unit.

Q: And was that - for that unit, can - was the unit successful, the plan you implemented - or helped implement, I should say?

A: Yeah, it was actually only supposed to be a six-month program, but we were having so

much success with it, the sheriff continued it on. After the first year, these worst of the worst juvenile violators - I'm talking the ones that have done your home invasions, your car jackings, your robberies, your sex offenses, heavy narcotics dealing, aggravated batteries, these are violent individuals - we had an 87 percent success rate for them not committing any violations of their probations and/or being re - reoffending with any criminal offenses.

Q: And that program's still in effect today, best of your knowledge?

A: It is in effect today and the program was actually recognized nationally. We won the Herman Goldstein Award, which is a program in the problem-oriented police area, and they flew me out to San Diego to speak at their national conference regarding the program.

^{8/} The following testimony pertained to Mr. Fewless's tenure in charge of the Fusion Center and the criminal intelligence section:

Q: Would it be fair to say your - the next and last job you held with OCSO was your favorite?

A: Absolutely.

Q: And what was that?

A: That was being the director over the fusion center and the captain over the criminal intelligence section. I don't know - are you familiar with the fusion center?

ALJ: No.

A: Let me briefly explain that to you.

The fusion centers were created by President George W. Bush after the 9/11 attacks, and it was his opinion that the federal government

and local government were not sharing intelligence well enough, and he wanted to put a local agency in charge of a bunch of federal areas to where we could share intelligence more dealing with domestic and international terrorism.

The particular job, it was amazing some of the things that you just know about what's going on around [the] country. You had people that were actually dealing with Taliban and stuff like that. It was - that were working out of my office. And the most impressive thing about that unit - well, first, our fusion center was not as big as most of them around the United States, and in 2014 we were nominated for Fusion Center of the Year, we finished No. 2, so we still won an award. But nine times a criminal intelligence bulletin went from my desk to the presidential briefing, right from my desk to his desk. That normally doesn't happen. Usually intelligence briefings are either given to the President through the CIA, the Department of Homeland Security, or the FBI. So it was pretty impressive, some of the work that was being done out of that building.

^{9/} Mr. Fewless testified that "[w]hoever I spoke to clearly gave me those options of city pension plan, third-party contract, but make sure you stay out of the FRS system." In contrast, Mr. Kent testified that he told Mr. Fewless that "all new hires to an FRS employer would be compulsory FRS members and that he had to fulfill the definition of 'termination' in order to make sure that his retirement was safe." Mr. Kent also testified that he told Mr. Fewless that he would be violating FRS requirements by immediately going to work for Fruitland Park. For reasons addressed in the ultimate findings of fact, the undersigned finds Mr. Fewless's testimony more credible.

^{10/} When questioned during the final hearing about whether he had read this and other warnings about the consequences of violating the termination requirement, Mr. Fewless testified as follows:

"Mr. Wright, I think I've answered this so many times throughout my depositions and here in the court, that when I was processing out

of the County of Orange, it's kind of like you're going through a sale of a home and you have people that are describing those forms to you. I [didn't] sit there and read each and every form. I take what they say as accurate because that's their job, they know what's on those forms. So when they tell me I cannot be reenrolled in the FRS system, I take that [to] heart. Thirty and a half years with Orange County, [they had] never given me bad advice."

"When I went over to the City of Fruitland Park and the city manager said - I told him I could not enter the FRS system, he said, 'No worries.' He says, 'We've got a separate city pension plan.' I took that [to] heart that I could enter that plan."

"I then reached out for further confirmation to the Florida Retirement System hotline and I spoke to an employee on that hotline. I said that I was in DROP, leaving the Orange County Sheriff's Office, I'm thinking of taking a chief of police position with the City of Fruitland Park, they have a separate city pension plan that they said they can put me in. Will that violate my retirement? The answer to that question was, 'No, as long as you're placed in the city pension plan, you're okay. Or what other chief of police are doing they're entering a third-party contract with - with whatever vendors those are.' He said, 'Just make sure you're not reenrolled in the FRS system.'"

^{11/} A Department witness explained the consequences of retroactively reestablishing Mr. Fewless's FRS membership:

What happens when a member violates termination is effectively we deem them not retired. So in this instance, with him being a participant in the DROP program, when he left DROP will be back - added back to his initial years of service, his benefit will be recalculated. In this case, the agency neglected to report him as well, so they will

need to report that time period from August 2015 until he terminated employment in order to insure that he [will] get full service credit for now his entire period. He will repay benefits received, such as the DROP and any monthly pension benefits.

Another [consequence] is the agency [Fruitland Park] is going to be responsible for any additional contributions due for the period they did not report him when he was in a compulsory position, as well as the contributions during the DROP period. He was reported at the DP, which is the DROP contributions rate, which is less than the special risk class rate associated with his position. So they're also responsible for those monies.

^{12/} In the Joint Pre-hearing Stipulation, Mr. Fewless identified the following as the factual issues remaining to be litigated: (a) whether Mr. Fewless went to work for Fruitland Park knowing that doing so would violate the termination requirement; (b) whether Mr. Fewless knew he would lose his retirement benefits by going to work for Fruitland Park; (c) whether Mr. Fewless acted in good faith by calling FRS and by inquiring as to whether he could work for Fruitland Park without violating the termination requirement; and (d) whether equitable estoppel applies to the instant case. The Department identified the factual issues as follows: (a) whether Mr. Fewless satisfied the termination requirement set forth in section 121.021(39), Florida Statutes; and (b) whether Mr. Fewless must return the retirement benefits he received.

There was no argument by Mr. Fewless that he had satisfied the termination requirement or that the Department was misconstruing the statutes and/or rules governing the DROP program. In short, Mr. Fewless's case was limited to arguing that the Department should be estopped from requiring him to return the retirement benefits at issue.

^{13/} The deposition of a former Fruitland Park city commissioner indicates that Mr. Fewless relayed the same account of what he was told by Mr. LaVenia and Mr. Kent during a city commission meeting.

14/ The Department's witnesses were not entirely consistent as to the circumstances under which someone would be in violation of the termination requirement. Therefore, it is possible that Mr. Kent expressed an opinion to Mr. Fewless that turned out to not be shared by his superiors.

15/ There was extensive argument at the final hearing about the fact that the Department had not preserved a recording of Mr. Fewless's phone call with Mr. Kent. Because the undersigned has credited Mr. Fewless's version of that phone call, there is no need to consider whether a negative inference should be drawn against the Department.

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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.