STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH A. INFANTINO,	)	
	)	
Petitioner,	)	
vs.	)	CASE NO. 88-4905
	)	
DEPARTMENT OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

This matter came on for hearing in Tallahassee, Florida, before the Division of Administrative Hearings by its duly designated Hearing Officer, Diane Cleavinger, on February 16, 1989.

APPEARANCES

For Petitioner: Joseph A. Infantino, pro se
4608 Rommitch Lane
Pensacola, Florida 32504

For Respondent: Larry D. Scott, Esquire
Department of Administration
435 Carlton Building
Tallahassee, Florida 32399-1550

The issue addressed in this proceeding is whether Petitioner is eligible for continuous insurance coverage under 26 U.S.C. 162(K), -(2), -(5)(The COBRA Act).

At the hearing, Petitioner testified in his own behalf and presented the testimony of Mrs. Dorothy Bull. Respondent presented no oral testimony, but introduced two exhibits. Judicial notice was taken of Title X of Public Law 99-272, Consolidated Omnibus Budget Reconciliation Act of 1985 (Cobra); Section 9501 of Public Law 99-509, Ominibus Reconciliation Act of 1986 (COBRA); Technical Corrections to COBRA, included in Section 1895(d) of Public Law 99-514, the Tax Reform Act of 1986; Subchapter XX Section 300bb02 of Title 42, The Public Health and Welfare Act; Section 27.162(K) of the Internal Revenue Code.

Respondent filed its proposed recommended order on February 28, 1989. Petitioner did not submit a proposed recommended order. Respondent's proposed findings of fact have been considered and utilized in the preparation of this Recommended Order except where such proposals were not supported by the weight of the evidence or were immaterial, cumulative or subordinate. Specific rulings of the Respondent's proposed findings of fact are contained in the Appendix to this Recommended Order. 1/

FINDINGS OF FACT

1. Petitioner resigned from State Government on July 23, 1987. At the time of his resignation, Petitioner was covered under the Florida State Group Health Insurance Plan. His wife, who is a diabetic, was also covered under Petitioner's insurance.

2. Upon termination Petitioner was eligible for continuation of coverage benefits under the federal COBRA Act. However, prior to receiving any notice of his COBRA rights, Petitioner elected to continue his State Employees' Insurance for two months from July 1, 1987 and then begin coverage under his new employer's insurance plan. 2/ Petitioner made advance payment on the 2 months additional coverage. The payments carried his State Employees' health insurance through September 1, 1987 when it was terminated. DOA notified Petitioner on August 27, 1987, of his right to elect continuation of coverage under the COBRA Act. This notice complied with the notice requirements under the COBRA Act.

3. COBRA provides continued health insurance coverage for up to (18) months, after a covered employee leaves employment. However, coverage does not continue beyond the time the employee is covered under another group health plan. COBRA simply fills the gap between two different employers group health insurance plans so that an employee's group health insurance does not lapse while the employee changes jobs.

4. Petitioner's new employer's health coverage began around September 1, 1987. After Petitioner had begun coverage under his new insurance plan, he discovered that his wife's preexisting diabetic condition would not be covered. However, no evidence was presented that Petitioner, within 60 days of September 1, 1987 requested the Division of State Employee's Insurance to continue his insurance coverage pursuant to COBRA. Moreover, Petitioner's COBRA rights terminated when he began his coverage under his new employer's health plan.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 120.57(1), F.S.

6. Petitioner requests that Respondent's decision that he is no longer eligible for continuation of coverage under COBRA be reversed and that he be afforded continuation of coverage for eighteen (18) months pursuant to COBRA. Petitioner has the burden to prove by a preponderance of the evidence that he is entitled to such COBRA benefits.

7. The COBRA amendment to the Public Health Service Act enacted on April 7, 1986, requires that state and local governmental group health plans provide "continuation coverage" to certain individuals. Pursuant to the Act, an employee who would lose coverage under the State Employees Group Health Self Insurance Plan as a result of a "qualifying event" occurring on or after July 1, 1986, will be entitled to elect, during the "election period", "continuation coverage" under the State's Plan. 26 USC Section 162 and 42 USC Section 300bb.

8. "Continuation coverage" means coverage that is identical to coverage provided under the State's Plan. "Continuation coverage" must be extended from the date of the qualifying event until the earliest of the following:

> the date which is eighteen (18) months after the date of the qualifying event which results in the loss of coverage;
> the date the employee becomes covered under any other group health insurance plan or entitled to Medicare;
> 26 USC Section 162 and 42 USC Section 300bb.

9. "Qualifying Event" means any event which would result in the loss of coverage under the State's Plan for an insured and includes the termination of the employee's employment (other than by reason of gross misconduct). In this case, Petitioner's "qua1ifying event" occurred on July 23, 1987, when his employment with the State was terminated. He was, therefore, entitled to elect COBRA continuation coverage during the relevant election period.

10. "Election Period" means a period of at least sixty (60) days which begins on the date coverage terminates by reason of a qualifying event and ends the later of:

> sixty (60) days after the termination date of coverage; or
> sixty (60) days after the date of notice to an insured of the insured's right to continuation coverage.
> 26 USC Section 162 and 42 USC Section 300bb.

Petitioner's "election period" began September 1, 1987, and would have continued for 60 days. However, because Petitioner had simultaneously started his new insurance coverage under his new employer's health plan his continuation benefits, by definition, only extended to the date his new coverage began.

11. The key question then is whether Petitioner can prove by a preponderance of the evidence that he acted justifiably in reliance upon the representations allegedly made by officials of the Department of Health and Rehabilitative Services, thereby estopping a different agency (DOA) from denying him COBRA benefits.

12. Although Petitioner and the witness for the Petitioner testified concerning the alleged advice received from officials of the Department of Health and Rehabilitative Services, that testimony was hearsay. Such uncorroborated hearsay cannot be used to form the basis for a finding of fact. Section 120.58(1)(a), Fla. Stat. (1987).

13. Moreover, estoppel may be applied against the state only in exceptional circumstances when the following elements are shown: 1) a representation as to a material fact is made that is contrary to a later-asserted position; 2) justifiable reliance on the representation; and 3) a change in position detrimental to Petitioners cause by the representation and the reliance thereon. See, e.g., Tri-State Systems, Inc. v. Department of Transportation, 500 So.2d 212 (Fla. 1st DCA 1986); Nelson Richard Advertising v. Department of Transportation, 513 So.2d 181 (Fla. 1st DCA 1987). In this case, Petitioner's evidence only demonstrates his interpretation of the conversation. Without both sides of the conversation it is impossible to determine if

Petitioner's reliance or interpretation of HRS' remarks was justified. Additionally, the evidence showed that Petitioner suspected HRS' advice was wrong. Such suspicion prohibits a conclusion that Petitioner's reliance on HRS'advice was justified.

14. Even assuming arguendo that Petitioner did introduce sufficient, competent evidence to support his claim of misrepresentation by HRS, such a misrepresentation could not be extended to another administrative agency not involved in the misrepresentation. Put simply, administrative officers of the state cannot estop the state through mistaken statements of law. Austin v. Austin 350 So.2d 102, 105 (Fla. 1 DCA 1987). The above rule is especially true where, as here, DOA performed its duties under the COBRA Act, as well as correctly instructing HRS as to the availability of COBRA benefits.

RECOMMENDATION

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

RECOMMENDED that the Department of Administration enter a Final Order denying Petitioner's request for continuation of coverage under COBRA.

DONE and ENTERED this 5th day of April, 1989, in Tallahassee, Florida.

DIANE CLEAVINGER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April, 1989.

ENDNOTES

1/ Petitioner did submit a letter which cannot be deemed a proposed recommended order pursuant to the instructions given Petitioner at the hearing. In essence the Petitioner's letter requested the Hearing Officer to obtain additional evidence on his behalf. No findings of fact were contained in Petitioner's letter.

2/ Petitioner took this course of action on alleged misinformation given him by an employee in the HRS personnel office. He suspected the information was incorrect and had Ms. Bull, Petitioner's secretary, check on his continuation benefits. Ms. Bull received the same information from another personnel employee. However, this testimony is hearsay although it was not offered for the truth of the facts stated therein but for their untruth. In this case, this hearsay can not constitute a party's admission of a misrepresentation since HRS is not a party to this proceeding. Moreover, the statement by itself does not support the findings required to establish estoppel against another State agency not involved in the alleged misrepresentation. In essence, these facts fail to establish a reasonable reliance on HRS' misrepresentation since the entire

conversation on both sides was not shown by the evidence. Finally, the evidence was clear that DOA had properly advised HRS of an employee's COBRA rights in a memo to HRS dated July 16, 1986. DOA was therefore in no way responsible for HRS' mistake and in fact performed its duties under COBRA.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 88-4905

The findings of fact contained in paragraphs 1-4 of Respondent's Proposed Findings of Fact are adopted in substance, insofar as material.

COPIES FURNISHED:

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