STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES C. BREEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-1886
	)	
DEPARTMENT OF BANKING AND FINANCE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on October 19, 1993 in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned hearing officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Douglas D. Sunshine, Esquire
Department of State
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Tallahassee, Florida 3399-0250

For Respondent: Scott C. Wright, Esquire
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STATEMENT OF THE ISSUE

Whether or not Petitioner is indebted to the State of Florida in the amount of $897.01 arising out of his receipt of overtime pay while in an "excluded position" with the Department of State.

PRELIMINARY STATEMENT

By letter dated March 10, 1993, the Department of Banking and Finance notified Petitioner that he owed the State of Florida $897.01.

Petitioner filed a timely request for formal hearing, and the matter was forwarded to the Division of Administrative Hearings for assignment of a hearing officer and the scheduling of the formal hearing.

At formal hearing, Petitioner testified on his own behalf and presented the oral testimony of Diana Maus, Chief, Bureau of Personnel Services, Division of Administrative Services, Department of State; Dot Joyce, Director, Division of Elections, Department of State; and Charlene Wilson, Personnel Services Specialist, Benefits, Division of Administrative Services, Department of State.

Respondent, Department of Banking and Finance, presented the oral testimony of Robert Henley, Labor Relations Specialist, Department of Management Services; and William J. Schmitt, Chief, Bureau of State Payrolls, Department of Banking and Finance.

The parties' joint Prehearing Stipulation executed on September 29, 1993 was admitted as Hearing Officer's Exhibit A.

The parties also stipulated to the admission in evidence of Joint Exhibits A, B, C, D, E, F, and G.

A transcript was filed in due course, and all timely-filed proposed findings of fact have been ruled upon in the appendix to this recommended order pursuant to Section 120.59(2) F.S.

FINDINGS OF FACT

1. Petitioner is currently an employee of the State of Florida, Department of State ("State"). He has been continuously employed by "State" from March 1991 to date.

2. Petitioner has consistently received his regular salary, annual leave, sick leave, special holidays, and retirement contributions as part of his employment package as a state government employee.

3. Petitioner was employed by the Division of Elections of "State" as an Administrative Assistant II until April 1, 1991, at which time, he was promoted to an Administrative Assistant III.

4. Petitioner went from an "included position" to an "excluded position" upon his promotion on April 1, 1991.

5. Employees filling "included positions" may receive overtime compensation.

6. Employees filling "excluded positions" may only receive compensatory leave on an hour-for-hour basis for those hours worked in excess of 40 hours per week. "Compensatory leave" may be withdrawn from an employee's leave accumulation amount and utilized in the same way as annual leave for the employee's rest and relaxation or other personal purposes.

7. Prior to Petitioner's promotion, "State's" Division of Elections had never had an employee move from an Administrative II, included position, to an Administrative III, excluded position. Neither "State's" administrative personnel nor Petitioner had any prior knowledge that upon his promotion Petitioner would/was no longer entitled to be paid money for the overtime he worked in the new position.

8. "State's" March 27, 1991 appointment letter to Petitioner advising him of his promotion did not advise him that the promotion had the effect of moving him from an included to an excluded position for purposes of overtime pay.

9. The April 10, 1991 Report of Personnel Action regarding Petitioner's promotion incorrectly indicated that he had moved from an Administrative II, "excluded," to an Administrative III, "excluded" position.

10. The Department of Management Services (Management Services) is solely responsible for the designation of whether an employee is in an included or excluded position as it relates to a Report of Personnel Action. That agency's personnel were unable to explain why the April 10, 1991 Report of Personnel Action was incorrect.

11. Due to the erroneous Report of Personnel Action, neither "State" nor Petitioner were on actual notice that Petitioner had moved from an included to an excluded position for purposes of overtime pay and that he was no longer entitled to be paid money for the overtime he worked in the excluded promotional position of Administrative Assistant III. However, all concerned had constructive notice by prior documents and designations that the Administrative Assistant II position was an "included" position. No agency deliberately misled the Petitioner concerning his promotion, and there is no evidence that he would have refused the promotion had he known of the change of status from "included" to "excluded."

12. Petitioner's "State" supervisor who had authorized his April 1, 1991 promotion was without actual knowledge at the time of Petitioner's promotion that Petitioner had moved from an included to an excluded position for purposes of receiving overtime pay and did not advise him of his ineligibility for overtime pay after his promotion.

13. Petitioner was paid $897.01 in overtime payments for overtime worked during April through July 1991, while in an excluded position, despite not being entitled to overtime pay after May 31, 1991 for hours worked in excess of 40 hours per week. (The May 31, 1991 date was stipulated by the parties, see appendix.)

14. Petitioner's "State" supervisor erroneously authorized the overtime payments Petitioner received while in his excluded promotional position.

15. The Respondent, Department of Banking and Finance's (Banking and Finance's) payroll system that is designed to detect errors such as occurred here upon receipt of an employee's authorized request for pay did not detect this error because the system was not on-line during the four months Petitioner worked and submitted authorized requests for overtime pay in the excluded promotional position.

16. The fact that Petitioner had received overtime pay while in an excluded position was neither discovered nor conveyed to him until six months after his April 1, 1991 promotion.

17. Banking and Finance initiated an investigation concerning the overtime payments received by Petitioner while in an excluded position after receiving an anonymous complaint on October 28, 1991. In a March 10, 1993 letter, Banking and Finance asserted that the overtime payments Petitioner received while in an excluded position constituted a monetary debt to the State of Florida which Petitioner must repay in money.

18. Petitioner spent the $897.01 to pay bills associated with the vacation he had taken prior to his promotion.

19. Petitioner would have been able to repay the overpayment in cash had the error been discovered after the first or second erroneous monthly overtime payments, but he was not able to repay that large an amount in cash after the third request was submitted.

20. Petitioner's request for authorization for overtime pay after his promotion was not submitted fraudulently or mendaciously, but was submitted because neither Petitioner nor anyone in his agency ("State") understood that he was not legally entitled to overtime pay.

21. After determining that Petitioner had received overpayments, "State" took steps to recoup the overpayments. "State" sought to work with Petitioner to alleviate this problem for which its personnel felt partially responsible. In fact, "State" permitted him to utilize one of its agency attorneys for purposes of the instant formal proceeding.

22. Petitioner and "State", without consulting Banking and Finance, entered into a negotiated agreement by which Petitioner would remit the $897.01 in overpayments in the form of 78 annual leave hours, and on December 31, 1991, 78 hours were deducted from Petitioner's accrued annual leave balance.

23. In calculating the repayment of the deducted 78 annual leave hours from Petitioner's annual leave balance, "State" multiplied his rate of pay at that time, with the number of annual leave hours necessary to equal the amount of the overpayments, equaling $897.01. Neither Petitioner nor any agency received a cash payment from the deduction of the 78 annual leave hours. "State" merely deducted the hours from Petitioner's annual leave balance.

24. "State" represented to Petitioner that the deduction of an amount of annual leave hours equivalent to the overpayments would satisfy his debt to the State of Florida. However, "State" neither requested nor received written permission from the Department of Banking and Finance to enter into an agreement by which "State" could accept a non-monetary "repayment" from Petitioner.

25. Charlene Wilson, Personnel Services Specialist, Benefits Division of Administrative Services, Department of State, testified that accrued paid leave is a dollar-for-dollar payment since each hour of annual leave represents an hour of active employment and, therefore, are equal. William J. Schmitt, Chief, Bureau of Payrolls, Department of Banking and Finance, testified that an employee is paid for annual leave when authorized by an agency. However, these isolated pieces of evidence are not controlling.

26. Further testimony was provided as to the historical application of the rules of the Department of Banking and Finance and the Department of Management Services. Robert W. Henley, Labor Specialist for Management Services, and William J. Schmitt each testified to the historical application and interpretation of their respective agency rules. Each testified that, as their agencies had interpreted and applied their own rules to date, employees who are continually employed by the State of Florida may not use annual leave to repay a debt in the manner Petitioner and the Department of State chose.

27. Prior to the December 31, 1991 deduction of the annual leave hours, Petitioner had "banked" 109.097 annual leave hours. After the deduction of 78 hours to satisfy his agreement with "State," he had only 31.097 hours remaining. It took Petitioner 12 months to build his annual leave balance back to where it was prior to the December 31, 1991 deduction.

28. During the 1991 year, but prior to the deduction of the 78 annual leave hours, Petitioner had taken a vacation to Innsbruck, Austria utilizing his annual leave accrued to that point in time and being paid his regular salary while he was on vacation. Petitioner did not take a vacation in 1992, the year

following the deduction of the 78 annual leave hours, because of the lack of sufficient accrued annual leave hours left in his balance to take the length of vacation he wanted to take. In 1992 there were still low air-fare prices for trips abroad.

29. In 1991, Petitioner utilized 80 annual leave hours while receiving regular pay.

30. In 1992, Petitioner utilized 18.25 annual leave hours while receiving regular pay.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause pursuant to Section 120.57(1), F.S.

32. At formal hearing, Petitioner agreed to go forward with the presentment of evidence, however it is clear that regardless of how the parties elected to proceed, the Respondent Department of Banking and Finance may not collect the alleged overpayment unless it has been proven to be an overpayment and due, in exact amount, from Petitioner to the State of Florida.

33. Rule 3A-31.309(1)(e) F.A.C., provides:

> In accordance with s. 17.04, F.S. only the Department of Banking and Finance shall establish the amount of the refund due the State and the manner of its recovery. No other department may enter into any agreement by which the overpaid individual refunds to the State a sum less than the exact amount due unless that department has received written permission from the Department of Banking and Finance. (Emphasis supplied)

34. The Petitioner entered into an agreement with his employer, the Department of State, whereby 78 annual leave hours were deducted from his accrued balance, but that agreement was entered into without written permission from the Department of Banking and Finance. The Department of State neither requested nor received written permission from the Department of Banking and Finance to enter into an agreement by which the Department of State could accept a non-monetary "repayment" from Petitioner.

35. The Department of State is responsible for making a diligent effort to recover the exact total amount of the overpayment to Petitioner. See, Rule 31.309(1)(b) F.A.C. However, pursuant to Rule 3A-31.309(1)(e), F.A.C., the Department of State may not enter into an agreement by which an employee repays less than the exact amount due as determined by the Department of Banking and Finance or makes no cognizable repayment without written permission from the Department of Banking and Finance.

36. Rule 3A-31.309(1)(f), F.A.C. is also applicable to this case. It provides, in relevant part:

> The exact amount of a refund may be a gross amount, net amount, or some combination of employer expense and employee salary . . . .

However, Petitioner's assertion that the providing of paid annual leave to an employee for purposes of vacation or simply time away from the office is an employer expense so that the Department of State may unilaterally quantify the value of annual leave hours and compute them into a money bank account of some kind is an erroneous and tortured interpretation that flies in the face of other existing rules and of the standard operating procedures of the several agencies.

37. An agency's interpretation of its own rules is entitled to great weight. See, Woodley v. Department of Health and Rehabilitative Services, 505 So. 2d 676 (Fla. 1st DCA 1987). The same is true of statutory construction by an agency. An administrative construction of a statute by an agency responsible for its administration is entitled to great weight and should not be overturned unless clearly erroneous. See, e.g., Shell Harbor Group, Inc. v. Department of Business Regulation, 487 So. 2d 1141, 1142 (1 DCA Fla. 1986). Even so, the statutory construction must be a permissible one and not "any conceivable construction of a statute . . . irrespective of how strained or ingeniously reliant on implied authority it might be". See, State of Florida, Board of Optometry, et al v. Florida Society of Ophthalmology, 538 So 2d 878 (Fla. 1st DCA 1988). Herein, the construction of the statute and rules which was advanced by the Respondent Department of Banking and Finance and by the Department of Management Services is reasonable. While this interpretation may not be the only one that could be made or the most desirable, it is a straightforward, permissible construction, and not "clearly erroneous." "State" is not charged with the ultimate administration of these rules. "State" personnel who testified clearly are not knowledgeable in these areas. The credible competent testimony and a clear reading of the rules establishes that leave may be traded for leave, but leave may not be traded for money except subsequent to termination.

38. The permissible methods of repaying a salary overpayment are described in Rule 3A-31.309(1)(i), F.A.C. The "agreement" between Petitioner and his employing agency by which annual leave hours were deducted from Petitioner's balance is not an authorized repayment of the employee's debt. Put another way, any purported repayment in annual leave hours is less than the exact amount due because no authority has been provided for this use of annual leave. Thus, while clearly well-intentioned, the Department of State lacked authority to enter into the "agreement" without the Department of Banking and Finance's written permission.

39. Pursuant to Rule 60K-5.010(1)(g) and (2)(a) [formerly 22A-8.010(1)(g) and (2)(a)], F.A.C., annual leave may be used only for leave purposes (i.e., rest and relaxation). No authority has been cited permitting Petitioner to use annual leave to repay a money debt to the state.

40. Pursuant to Rule 60K-5.010(4)(a) F.A.C., the only circumstance under which Petitioner can receive an "annual leave payment" is upon terminal separation from state government employment. Because Petitioner never terminated state government employment, the Department of State lacked authority to enter into an "agreement" under which Petitioner was directly or indirectly paid money value for any accrued annual leave.

41. The payments to Petitioner were also prohibited by Rule 3A-31.219(2) F.A.C. which requires that requests for "annual leave payment" be submitted after the employee's last day of actual work, that is, after termination from state government employment. Accordingly, since Petitioner did not terminate state government employment during the relevant period, the Department of State had no authority to convert Petitioner's annual leave hours into cash money by direct or indirect means.

42. Section 17.04 F.S. gives the Department of Banking and Finance the sole authority to audit and adjust money accounts. Rule 3A-31.309(1)(e) F.A.C. sets out how that is to be done. The lack of authority in the Department of State for the purported settlement means that there is no lawful basis for Petitioner to allege that he has made repayment for his salary overpayment.

43. Petitioner's reliance on New v. Department of Banking and Finance, 554 So. 2d 1203 (Fla. 1st DCA 1989), is appropriate to the degree it establishes that the Division of Administrative Hearings is the correct forum to resolve this issue and that in order to be heard, the Department of Banking and Finance must be a full party to the proceedings in this forum. See, also, Department of Corrections v. Career Service Commission 429 So. 2d 1244 (Fla. 1st DCA 1983). However, nothing in New supports Petitioner's assertion that repayment of a cash amount can be made in annual leave hours pursuant to a settlement agreement unauthorized by the appropriate agency, the Department of Banking and Finance. New involved a repayment of cash in the exact amount owed and whether or not the employing agency's funds could be utilized in the settlement.

44. Petitioner also cited Green v. Galvin, 114 So. 2d 187 (Fla. 1st DCA 1959), which addresses conversion of annual leave to money for estate purposes after termination of state government employment by the employee's death. Green does not provide authority for the innovative use of trading annual leave for cash as we have seen it used here during this Petitioner's continued state government employment. Green also does not expand the definition of "compensation" as that term is used in the current Department of Banking and Finance rules.

45. Petitioner has made a case that shows the Department of State notified Petitioner in writing of the error and how it occurred, made arrangements with the employee with the intent of reclaiming the overpayment, and effectuated a payroll change to correct the employee's salary to the correct amount for future pay periods. In so doing, "State" had to coordinate with the Department of Management Services. To properly recoup the overpayment from the employee, the Department of State was also required to coordinate with the Department of Banking and Finance. It did not. The result is that the Department of Banking and Finance may recover the cash payments.

46. This is an innocent and unintended error by the Department of State, but it is not an estoppel situation as applies to the Department of Banking and Finance. The three elements necessary for an estoppel have not been adequately demonstrated, and the State of Florida is not estopped by conduct resulting from a mistake of law. Estoppel does not arise against the state by the unauthorized acts or representations of its officers. See, Kuge v. Department of Administration, 449 So. 2d 389 (Fla. 3d DCA 1984); Salz v. Department of Administration, 432 So. 2d 1376 (Fla. 3d DCA 1983); Greenhut Construction Co. v. Henry A. Knott, Inc. 247 So. 2d 517 (Fla. 1st DCA 1971). Moreover, in Warren v. Department of Administration, 554 So. 2d 568 (Fla. 5th DCA 1990), the test of imposing estoppel against the state was held to be higher than for other legal

persons. In order to apply estoppel against the state, "rare and exceptional circumstances" must be shown. The Petitioner's desire to take a 1992 vacation and his speculative ability to do so do not qualify. Petitioner used some leave in 1992 without going on vacation. This also depleted his annual leave balance. If he had repaid the overpayment in cash, there is no guarantee he would have been financially able to take advantage of 1992's low airfares. The Department of State's apparent authority to make the representations it did in this instance is also not as clearly apparent as in the situation related in Warren.

47. An appropriate and fair resolution of this cause would be the entry of a final order requiring Petitioner to repay $897.01 to the Department of Banking and Finance in reasonable increments and further requiring the Department of State and Department of Management Services to coordinate whatever procedures are necessary to reinstate Petitioner's 78 annual leave hours and appropriately recompute his accrued compensatory leave hours earned after his promotional date, but the latter two agencies technically are not parties to this action. Therefore, this paragraph and any final order can be only advisory as to them.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the Department of Banking and Finance enter a final order providing as follows:

(1) That Petitioner is indebted for salary overpayments to the Department of Banking and Finance for the amount of $897.01;

(2) That Petitioner shall repay the aforesaid amount within one year from date of this order in payment amounts of not less than $100.00 each or the total remaining balance of the debt in any single payment and that failure of Petitioner to repay the full amount in the year provided shall result in the Department of Banking and Finance debiting his salary for the unpaid balance at the end of the year's grace period, and

(3) That once full payment is completed, the Department of Banking and Finance shall coordinate, to the degree possible, with all other agencies the restoration of 78 hours annual leave to Petitioner's annual leave account balance and the crediting of Petitioner with the appropriate compensatory leave hours earned after his promotional date.

RECOMMENDED this 28th day of February, 1994, at Tallahassee, Florida.

ELLA JANE P. DAVIS, Hearing Officer
Division of Administrative Hearings
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Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 1994.

APPENDIX TO RECOMMENDED ORDER 93-1886

The following constitute specific rulings, pursuant to S120.59(2), F.S., upon the parties' respective proposed findings of fact (PFOF).

Petitioner's PFOF:

1-5 Accepted in substance, but not adopted verbatim.
7-11 Accepted in substance, but not adopted verbatim.
6,12 Rejected as stated due to the legal words of art employed. See FOF 2 and 11 which more accurately conform to the record as a whole.
13-32 Not adopted verbatim. Accepted in substance except for unnecessary, subordinate or cumulative material. It is noted that PFOF 21 and 22 seem to be contradictory but were in fact stipulated as fact by the parties. Although a date of March 31 makes better sense, the hearing officer assumes that the parties' use of the May 31 date accounts for pre-earned payments of overtime delayed into a following pay period. This is not a dispositive issue and the parties' stipulation has been honored in FOF 13.
33-34 Rejected because these proposals are misleading as stated and are not dispositive. Covered in FOF 25-26.
35-36 Not adopted verbatim. Accepted in substance except for unnecessary, subordinate, or cumulative material.
37 Rejected as stated because it contains words of art and represents a proposed conclusion of law. See Conclusions of Law.
38 Covered only as necessary in FOF 21-23. Otherwise rejected as a proposed conclusion of law or as cumulative to the facts as found.
39-40 Rejected as conclusions of law or legal argument and as unnecessary and non-dispositive. See FOF 21-23 and Conclusions of Law.
41-49 The interspersed conclusions of law, including but not limited to the "payment" of leave hours, are rejected as such. The interspersed and footnoted legal arguments also are rejected. See FOF 28-30 Conclusions of Law. Otherwise, the proposals are accepted in substance but not adopted verbatim to avoid subordinate, cumulative and verbose material.
50 Accepted.

Respondent's PFOF:

1-2 Accepted, but some unnecessary, subordinate and cumulative material has been excised.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.