

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Petitioner,)
vs.) CASE NO. 93-3377
)
DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF RETIREMENT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Hearing Officer, Joyous D. Parrish, held a formal hearing in the above-styled case on January 19, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Sheryl G. Wood
Jacquelyn W. Birch
South Florida Water Management District
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West Palm Beach, Florida 33416-4680

For Respondent: Stanley M. Danek, Division Attorney
Department of Management Services
Division of Retirement
Cedars Executive Center
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STATEMENT OF THE ISSUES

Whether the lump sum performance payments paid to Petitioner's employees should be considered compensation and included within the "average final compensation;" or whether such payments are "bonuses" and are, therefore, excluded for retirement purposes.

PRELIMINARY STATEMENT

This case began on May 20, 1993, when the South Florida Water Management District (District) received a notice from the Department of Management Services, Division of Retirement (Retirement) that excluded the District's lump sum performance payments as compensation unless such payments were received after reaching the salary maximum for the employee's applicable pay grade. As it claims this exclusion will substantially change the average final compensation calculation for its employees, the District timely filed a challenge to the decision.

More specifically, the District alleged that it is substantially affected by the decision as are all of its former employees who have retired, and its current employees who will retire, who have based or will base their average final compensation relying on contributions made during the period July 1, 1989 through February 19, 1993, because retirement benefits will not be calculated to include those amounts received as lump sum performance payments. Further, the District is affected because it made contributions to the Florida Retirement System throughout the cited period of time as if the disputed payments to its employees were compensation.

Subsequently, the Petitioner filed a rule challenge (DOAH case no. 93-5937RX) to dispute the validity of Rule 60S-6.001(6), (11), and (16), Florida Administrative Code. The cases were consolidated for hearing on November 2, 1993. Issues related to the rule challenge are addressed in a separate final order.

The District also filed a motion to disqualify A.J. McMullian from acting further in this case. That request provided, in part:

Mr. A.J. McMullian participated in and issued the final agency action letter dated May 14, 1993 to the District which is the basis for the Section 120.57, Florida Statutes, action filed by the Petitioner in this proceeding. As Agency Head of the Division of Retirement, Mr. A.J. McMullian issues Final Orders after receipt of the Recommended Order from the Hearing Officer in these types of proceedings.

* * *

The standard to be used in disqualifying an individual serving as agency head is the same standard used in disqualifying a judge.

This motion was initially withdrawn by the District but was renewed at the final hearing. It is hereby denied. Pursuant to Chapter 120, Florida Statutes, the undersigned is charged with the responsibility of conducting a formal hearing, making findings of fact supported by competent substantial evidence, and of issuing a recommendation to the agency with final order authority. Once the recommended order is issued, the Division of Administrative Hearings has limited authority (see, e.g., Rule 60Q-2.032, Florida Administrative Code), and lacks jurisdiction over the subject matter of the proceeding. No authority allows the undersigned to anticipate that an agency head will, because of bias, prejudice, or other interest, fail to impartially and fairly review the record in these proceedings. If, as Petitioner suggests, the standard is that for the disqualification of a judge, Petitioner should renew its motion to the agency head after the entry of this recommended order.

The Division of Retirement has also challenged the District's authority to represent the interests of its former employees or those who may retire and who may be affected by the instant case. No such employee has joined in the subject proceeding. Because the District has standing to represent its interest in this cause, and because the companion rule challenge and this case have been resolved as they have, no conclusion is reached as to whether or not the District has standing to represent employees and former employees.

At the hearing, the District presented the testimony of the following witnesses: Richard Stelling, the District's department director for administration; Lewis M. Dennard, an assistant director with the Division of Retirement; Kathy Smith, retirement administrator in the bureau of enrollment and contributions; Sarabeth Snuggs, chief of the bureau of enrollment and contributions; and Mary Beth Brewer, a research associate with the Division of Retirement responsible for legislation and rule analysis and drafting. The District's exhibits numbered 1 through 8, 10, 11, 16, 17, 18, 20, 24, and 25 were admitted into evidence. Kathy Smith and Mary Beth Brewer also testified on behalf of Retirement as did Lawrence J. Gibney, a state retirement actuary. Its exhibits numbered 3, 4, 5, 7, and 9 were admitted into evidence. Official recognition has been taken of the matters identified in the parties' joint prehearing stipulation (Petitioner's exhibit 25) as Respondent's exhibits 1, 2, and 6.

The transcript of the proceedings was filed on January 26, 1994. The parties filed proposed recommended orders which have been considered in the preparation of this order. Specific rulings on the proposed findings of fact are included in the appendix at the conclusion of this order.

FINDINGS OF FACT

1. The District is a public corporation in the State of Florida existing by virtue of Chapter 25270, Laws of Florida, 1949, and operating pursuant to Chapter 373, Florida Statutes, and Chapter 40E, Florida Administrative Code, as a water management district.

2. Retirement is an agency of the State of Florida existing by virtue of Section 20.22(2)(i), Florida Statutes, and operating pursuant to Chapter 121, Florida Statutes, and Chapter 60S, Florida Administrative Code, as the retirement and pension administrator for the Florida Retirement System (FRS).

3. The District is an employer and its employees are eligible to be members of the FRS.

4. The District is a member of the FRS pursuant to Section 121.051(2)(b)1., Florida Statutes, and, as such, makes regular contributions (based upon its employees' total compensation) to Retirement.

5. Until February, 1993, and for the period of time at issue in this case, the District provided its employees with a total compensation package which included: one performance appraisal with a base pay increase depending on merit, and one interim performance appraisal with a lump sum performance payment also dependent on merit.

6. The District's lump sum performance payments were funded on a sound actuarial basis.

7. The District's performance appraisals are based on merit and the procedure for both base pay and lump sum performance appraisals are identical.

8. The District's lump sum performance payments are paid according to a formal written policy which was adopted as a rule and applies to all eligible employees equally. In order to receive the lump sum amount, the employee must requalify for it each year based on merit.

9. Eligibility for the District's lump sum performance payments commences during the first year an employee works at the District.

10. The District's lump sum performance payments are paid at least annually to all employees who qualify for it. Not all District employees qualify for the payment. Less than one percent of the District's employees do not receive the lump sum performance payment.

11. The District has made contributions to Retirement based upon the total compensation paid to its employees, including the lump sum performance payments. However, the District did not pay contributions for the months of February, 1990, through April, 1990; this cumulative amount was paid in lump sum to Retirement in May, 1990.

12. Retirement accepted the contributions, including the lump sum performance payments, through February, 1993, when the plan was terminated and contributions ceased.

13. The District was aware that Retirement had a dispute regarding the reporting of lump sum performance payments in June, 1992, as the result of a calculation of a District employee's retirement benefit.

14. In May, 1993, after receiving notice of the disallowance, the District timely challenged Retirement's decision to exclude the lump sum performance payments from average final compensation.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

16. Section 121.021(24), Florida Statutes, provides:

"Average final compensation" means the average of the 5 highest fiscal years of compensation for creditable service prior to retirement, termination, or death. For in-line-of-duty disability benefits, if less than 5 years of creditable service have been completed, the term "average final compensation" means the average annual compensation of the total number of years of creditable service. Each year used in the calculation of average final compensation shall commence on July 1. The payment for accumulated sick leave, accumulated annual leave in excess of 500 hours, and bonuses, whether paid as salary or otherwise, shall not be used in the calculation of the average final compensation.

17. Rule 60S-6.001(6), (11), and (16), Florida Administrative Code, provides:

(6) AVERAGE FINAL COMPENSATION--Means the average of the 5 highest fiscal years of compensation for creditable service prior to retirement, termination or death calculated in accordance with 60S-4.004(1).

(a) The average final compensation shall include:

1. Accumulated annual leave payments as defined in 60S-6.001(1), not to exceed 500 hours.

2. All payments defined as compensation in 60S-6.001(16).

(b) The average final compensation shall not include:

1. Compensation paid to professional persons for special or particular services.

2. Salary incentives paid to law enforcement personnel, fire-fighters or correctional officers, as provided in Section 943.22, f.s. and Section 633.382, F.S.

3. Payments made due to retirement or termination for accumulated sick leave as defined in 60S-6.001(3).

4. Payments for annual leave in excess of 500 hours.

5. Bonuses as defined in 60S-6.001(11).

6. Third party payments made on and after July 1, 1990.

7. Automobile allowances.

8. Housing allowances.

* * *

(11) BONUS--Means a payment made in addition to an employee's regular or overtime salary that is usually nonrecurring, does not increase the employee's base rate of pay and includes no commitment for payment in a subsequent year. Such payments are not considered compensation and, effective July 1, 1989, shall not be reported to the Division as salary, and retirement contributions shall not be made on such payments.

(a) A payment is a bonus if any of the following apply:

1. The payments are not paid according to a formal written policy applying to all eligible employees equally, or

2. The payments commence later than the eleventh year of employment, or

3. The payments are not based on permanent eligibility, or

4. The payments are paid less than annually.

(b) Bonuses shall include but not be limited to the following:

1. Exit bonus or severance pay;
2. Longevity payments in conformance with the provisions of 60S-6.001(11)(a) above;
3. Salary increases granted due to an employee's agreement to retire, including increases paid over several months or years prior to retirement;
4. Payments for accumulated overtime or compensatory time, reserve time, or holiday time worked, if not made within 11 months of the month in which the work was performed;
5. Quality Instruction Incentives Program (QUIIP) Payments;
6. Lump sum payments in recognition of employees' accomplishments.

* * *

(16) COMPENSATION OR GROSS COMPENSATION--

(a) Compensation means the total gross monthly salary paid a member by his employer for work performed arising from that employment, including:

1. Overtime payments, except as provided in 60S-6.001(11)(b)4.;
2. Accumulated annual leave payments, as defined in Rule 60S-6.001(1);
3. Payments in addition to the employee's base rate of pay if all the following apply:
 - a. The payments are paid according to a formal written policy that applies to all eligible employees equally, and
 - b. The policy provides that payments shall commence not later than the eleventh year of employment, and
 - c. The payments are paid for as long as the employee continues his employment, and
 - d. The payments are paid at least annually;
4. Amounts withheld for tax-sheltered annuities or deferred compensation programs, or any other type of salary reduction plan authorized under the Internal Revenue Code;

(b) Compensation shall not include any bonuses or other payments prohibited from inclusion in the member's average final compensation as defined in 60S-6.001(6)(b).

18. It is undisputed that "bonuses" are not to be included in the average final compensation. Therefore, the issue to be resolved is whether the District's lump sum performance payment is a "bonus." The evidence established that the lump sum performance payment is not automatic. That is, the employee

must qualify for the payment each year. Additionally, the payment sum does not become a part of the employee's base pay. Therefore, the base pay is unaffected by whether or not the employee receives the lump sum payment. If an employee receives an annual merit increase to base pay, such amount is independent of the lump sum payment. All employees did not receive the lump sum performance payments. Based upon the foregoing, the lump sum payments are bonuses and, therefore, may not be included in the average final compensation.

RECOMMENDATION

Based on the foregoing, it is, hereby,

RECOMMENDED:

That Department of Management Services, Division of Retirement, enter a final order disallowing the lump sum performance payments from the average final compensation of the District's employees and refunding all amounts contributed based upon such payments.

DONE AND RECOMMENDED this 19th day of April, 1994, in Tallahassee, Leon County, Florida.

JOYOUS D. PARRISH
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 19th day of April, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-3377

Rulings on the proposed findings of fact submitted by the Petitioner:

1. Paragraphs 1 through 13, 16, 17, 19, 20, 21, 23, and 28 are accepted.
2. Paragraph 14 is rejected as contrary to the weight of the credible evidence.
3. Paragraph 15 is rejected as contrary to the weight of the credible evidence.
4. Paragraph 18 is rejected as contrary to the weight of the credible evidence.
5. Paragraph 22 is rejected as contrary to the weight of the credible evidence.
6. Paragraph 24 is rejected as contrary to the weight of the credible evidence.
7. Paragraph 25 is rejected as contrary to the weight of the credible evidence.

8. Paragraph 26 is rejected as erroneous conclusion of law.
9. Paragraph 27 is rejected as erroneous conclusion of law.
10. Paragraph 29 is rejected as erroneous conclusion of law.

Rulings on the proposed findings of fact submitted by the Respondent:

1. Paragraphs 1 through 3, 7 through 11, 13 through 23, and 25 through 28 are accepted.
2. With the deletion of the last sentence which is rejected as a conclusion of law, paragraph 4 is accepted.
3. With the deletion of the last sentence which is rejected as a conclusion of law, paragraph 5 is accepted.
4. With the deletion of the last sentence which is rejected as a conclusion of law, paragraph 6 is accepted.
5. With the deletion of the third sentence which is rejected as irrelevant, paragraph 12 is accepted.
6. Paragraph 24 is rejected as irrelevant.

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.