

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT F. COOK,)
)
 Petitioner,)
)
vs.) CASE NO. 94-2292
)
DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF)
RETIREMENT,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Hearing Officer of the Division of Administrative Hearings, on October 4, 1994, in Marianna, Florida.

APPEARANCES

For Petitioner: Albert F. Cook, pro se
Post Office Box 782
Sneads, Florida 32460

For Respondent: Robert B. Button, Esquire
Department of Management Services
Division of Retirement
2639 North Monroe Street, Building C
Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUES

The issue to be resolved in this proceeding concerns whether the Petitioner, Albert F. Cook, had a relationship with the Department of Corrections (DOC) at any time during the month of April, 1993, and if so, whether he was eligible to receive a retirement benefit for that month, as well.

PRELIMINARY STATEMENT

This cause arose upon the Petitioner's request for a formal administrative proceeding to contest notice of initial agency action, issued on February 9, 1994, informing the Petitioner that his retirement benefits would be temporarily reduced to recover an alleged incorrectly paid retirement payment.

The cause came on for hearing as noticed, at which the issue concerned whether the Division of Retirement had authority to recover the Petitioner's April 1993 retirement benefit payment. If it has such authority, the Petitioner does not challenge the amount in controversy, by which the Division maintains that his benefits should be reduced in order to collect the alleged overpayment.

He does not contest the method of recovery. The sole issue concerns whether the agency has authority to collect the overpayment for the period of April 1-16, 1993.

The Petitioner testified on his own behalf and did not offer any exhibits. The Respondent presented the testimony of Andy Snuggs, Retirement Administrator of the Division of Retirement. Additionally, the Respondent had admitted into evidence Exhibit 1, consisting of the deposition of Marion Bronson, Personnel Director of the Florida State prison, together with Attachments A-E, as well as Respondent's Exhibits 2, 3 and 4, which were admitted into evidence, as well. The parties were accorded the right to submit proposed findings of fact and conclusions of law in the form of Proposed Recommended Orders. The Respondent submitted such a pleading; however, no Proposed Recommended Order has been received from the Petitioner. The proposed findings of fact are treated in this Recommended Order and ruled upon in the Appendix attached hereto and incorporated by reference herein.

FINDINGS OF FACT

1. The Petitioner was employed at times pertinent hereto by the Department of Corrections (DOC) at its Baker Correctional Institution facility. On February 19, 1993, he was notified of his transfer to the Florida State Prison, purportedly for disciplinary reasons. Upon learning of this eventuality, the Petitioner immediately went on sick leave. He maintains that it was duly-approved sick leave. No medical evidence to that effect was presented, but the Petitioner suggested that his illness might be of a psychiatric nature. He clearly was disgusted with the action taken by the DOC to transfer him. Subsequently thereto, he decided to apply for retirement, effective March 31, 1993. Shortly thereafter, he sought to have his retirement request rescinded or withdrawn; however, that request was denied. He was thereupon removed from the DOC payroll, effective March 31, 1993, essentially as a termination action. He received a retirement benefit check for the period of April 1-30, 1993 in the amount of \$2,324.53 from the Division of Retirement.

2. The Petitioner appealed the DOC employment action to the Public Employees Relations Commission and an administrative proceeding ensued. Ultimately, a settlement agreement was reached in that case which resulted in the Petitioner being allowed to resign, effective April 16, 1993, rather than suffer termination effective March 31, 1993. That agreement entered into by the parties in that case specifically stated that "the agency [DOC] will take whatever action is necessary to return the employee [Cook] to the payroll for the period between March 31, 1993 and April 16, 1993". The Division of Retirement was, of course, not a party to that agreement since it was not a party to the litigation involved. The agreement was incorporated into a Final Order issued by the Public Employees Relations Commission in Case No. CF-93-196, entered June 7, 1993.

3. The Petitioner sent a letter to E.I. Perrin, the Superintendent of Florida State Prison, dated April 12, 1993, in which he stated "that if I am still on the payroll, I hereby resign my position with the Florida Department of Corrections effective April 16, 1993 . . .".

4. According to attendance and leave reports signed by both the Petitioner and Marion Bronson, the Personnel Director of Florida State Prison, the Petitioner was on sick leave for the payroll period of March 26, 1993 through April 8, 1993. While the date of the Petitioner's signature on the relevant time sheet was April 8, 1993, the end of the pay period, the Petitioner

testified that the time sheets had actually been submitted earlier. Attendance and leave reports for the following pay period indicated that the Petitioner continued on sick leave status through April 16, 1993. The time sheets for the latter period were not signed by the Petitioner but were signed by Marion Bronson.

5. DOC ordered a manual payroll made up to record payment and to pay the Petitioner through April 16, 1993. He received a salary warrant for \$1,234.43 for that period from April 1-16, 1993. That salary check and warrant reflects that retirement contributions were paid as to that April payroll period salary.

6. Because he received additional retirement service credit and a new average final compensation as a result of being in a payroll status and being paid for the period of time in April 1993, the Petitioner's monthly retirement benefits actually now exceed what he would receive as retirement benefit payments had he not been compensated as an employee for his service through April 16, 1993.

7. The Petitioner testified at hearing that he was terminated on March 31, 1993 and not re-hired. He further testified that he neither wanted nor expected payment from DOC for the period of March 31, 1993 through April 16, 1993 and that he "merely wanted to clear his name". Nevertheless, he entered into the settlement agreement which provided for him to be compensated and on payroll status through April 16, 1993, when he entered into the settlement with DOC in the proceeding before the Public Employees Relations Commission. He is presumed to have full knowledge of the content of that settlement agreement, and it reflects that he freely and voluntarily entered into it, as does his testimony.

8. According to Mr. Bronson's testimony, during the relevant period from March 31, 1993 through April 16, 1993, the Petitioner was occupying an authorized and established employment position with DOC. His employment relationship continued with the Department, as a result of the settlement agreement, until April 16, 1993. Because Mr. Bronson and DOC are not parties to the present proceeding and have no financial interest in the outcome of this litigation, Mr. Bronson's testimony is deemed credible and is accepted insofar as it may differ from that of the Petitioner.

9. The Respondent agency learned that a payroll had been prepared for the period of time in April of 1993 in question and that a salary warrant was issued on the basis of the settlement agreement extending the Petitioner's employment with DOC through April 16, 1993. The Division of Retirement thus temporarily reduced the Petitioner's retirement benefits to recover the amount of the resulting, unauthorized April retirement check. It was unauthorized because he remained employed for the period of time in April and was paid as though he were employed, as a result of the settlement agreement. Consequently, he was not entitled to retirement benefits for that period of time in April 1993 ending on April 16, 1993. Mr. Snuggs testified that every retirement applicant, such as the Petitioner, receives a form FRS-TAR, entitled "Retirement System Termination and Re-Employment". The Petitioner did not deny receiving that form (Respondent's Exhibit 4) which advises prospective retirees of their rights and obligations in terms of retirement and retirement benefits as it relates to re-employment.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

11. The issue in this proceeding concerns whether the Petitioner actually had an employment relationship with DOC during April of 1993. Mr. Bronson's testimony, as well as the Division's exhibits in evidence, clearly establishes that the Petitioner had an employment relationship with DOC during April of 1993 and ending on April 16, 1993. Section 121.091, Florida Statutes, provides pertinently as follows:

121.091 Benefits Payable Under the System -
No benefits shall be paid under this section unless the member has terminated employment as provided in s. 121.021(39) and proper application has been filed in the manner prescribed by the Division.

Section 121.021(39), Florida Statutes, provides, in pertinent part, as follows:

'Termination' occurs when a member ceases all employment relationships with employers under this system as defined in subsection (10), but in the event a member should be employed by any such employer within the next calendar month, termination shall be deemed not to have occurred
. . .

Section 121.021(10), Florida Statutes, defines the term "employer", which definition clearly includes DOC for purposes of this proceeding.

12. Mr. Bronson testified that the Petitioner had an "employment relationship" with DOC through April 16, 1993. Under the career service rules, he continued to fill an authorized, established position with that department through that date, pursuant to Rules 60K-1.0021(13)(14), Florida Administrative Code.

13. The documentary evidence corroborates Mr. Bronson's conclusion and establishes that the Petitioner had an employment relationship with DOC during the period of time in question in April 1993. The settlement agreement provided that the Petitioner was to be returned to the payroll for the period of March 31, 1993 through April 16, 1993. The time sheets in evidence provided that the Petitioner was on sick leave from March 31, 1993 through April 16, 1993. The Petitioner received a salary warrant for that period, concerning which retirement contributions were made by the agency and service credits were earned. Finally, the Petitioner, in his April 12, 1993 letter to Superintendent Perrin, stated that he would be retiring on April 16, 1993, showing his intent and understanding at the time that he still remained employed on the payroll.

14. The fact that the Petitioner had initially been removed from the Department's payroll on March 31, 1993, effectively being terminated, is not a pivotal consideration in resolving this dispute. Rather, it merely marked the occasion and reason he initially applied for retirement status, which resulted in receiving the disputed retirement benefits for April 1993. The Petitioner's status was analogous to being an actual employed member of the retirement system

upon being returned to the payroll and receiving the salary payment for his employment in April. Rule 60S-4.012(2)(a), Florida Administrative Code, provides as follows:

Real employment with an employer in the first calendar month after his effective date of retirement shall result in cancellation of retirement; the member's retirement application shall be void and he shall be required to repay all retirement benefits received.

15. Since the Petitioner has failed to repay, as yet, the April 1993 retirement benefit, the Division is required to reduce the Petitioner's subsequent retirement benefits to offset the unauthorized April 1993 benefit amount. Form FRS-2AR, which is sent to all retiring members and, presumptively, to the Petitioner, provides that "after you retire, you cannot be re-employed in any capacity with any FRS employers for one complete calendar month . . . you will be required to repay all retirement benefits received . . ." (emphasis in the original).

16. After his termination, the Petitioner was returned to the payroll. His intended April 16, 1993 termination date was subsequently honored. This results, as a matter of law, in his ineligibility to receive a retirement benefit for the month of April 1993. He had an employment relationship with DOC until his termination on April 16, 1993. His continued employment relationship with the Department through that date has actually resulted in an increased monthly retirement benefit due to the additional service credit, additional wages, and resulting in an additional average compensation rate, for purposes of retirement benefit calculations.

17. If it were determined that no employment relationship existed between the Petitioner and DOC during April 1993, which is not the case, the Petitioner's permanent, prospective monthly retirement benefits would have to be reduced because of the resultant lack of his April 1993 salary in retirement contribution being figured into the retirement benefit calculation. Additionally, the Division of Retirement would be obligated to recover the additional benefits he already has received since April 16, 1993 representing the enhanced retirement benefits predicated on the April payroll. However, it has been established that he was employed until April 16, 1993, so that the April retirement benefit paid the Petitioner is the amount which must be reimbursed.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is

RECOMMENDED that a Final Order be entered by the Department of Management Services, Division of Retirement, temporarily reducing the Petitioner's retirement benefits, in the manner already proposed by that agency, until such time as his April 1993 retirement benefit, paid to him previously, has been reimbursed to the agency.

DONE AND ENTERED this 30th day of December, 1994, in Tallahassee, Florida.

P. MICHAEL RUFF
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 30th day of December, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-2292

Respondent's Proposed Findings of Fact

1-11. Accepted.

The Petitioner filed no proposed findings of fact.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten 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.