

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEVEN J. MEGREGIAN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 99-0502  
 )  
 DEPARTMENT OF MANAGEMENT SERVICES, )  
 DIVISION OF RETIREMENT, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

On August 31, 1999, a formal administrative hearing in this case was held by videoconference in Tallahassee and Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: David A. Pearson, Esquire  
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For Respondent: Robert B. Button, Esquire  
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STATEMENT OF THE ISSUE

The issue in the case is whether supplemental payments made to the Petitioner by Brevard Community College constitute creditable compensation for purposes of determining retirement benefits under the Florida Retirement System.

### PRELIMINARY STATEMENT

By letter dated April 30, 1999, the Division of Retirement notified Stephen J. Megregian, that supplemental payments made under Brevard Community College's severance pay "opt-out" plan would not be included in creditable compensation calculations for purposes of determining benefits under the Florida Retirement System. Mr. Megregian requested a formal administrative hearing. The Division of Retirement forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, Mr. Megregian (Petitioner) presented the testimony of two witnesses and had Exhibits numbered 1-3 admitted into evidence. The Division of Retirement (Respondent) presented the testimony of three witnesses and had Exhibits numbered 1-4 admitted into evidence. Joint Exhibits numbered 1-3 were also admitted into evidence. The Transcript of the hearing was filed on September 16, 1999. Both parties filed Proposed Recommended Orders pursuant to a deadline extension granted after the Petitioner's copy of the transcript was delayed.

### FINDINGS OF FACT

1. From 1970 until his retirement in June 1998, Brevard Community College employed Stephen J. Megregian at an executive level.

2. The State of Florida, Division of Retirement, manages and oversees operation of the Florida Retirement System (FRS) in which Brevard Community College (BCC) participates.

3. In June 1990, the college adopted an Employee Benefit Plan for BCC Executive Employees. The provisions of the plan covered Mr. Megregian, an executive employee. In fact, Mr. Megregian drafted the plan, which was adopted by the college's Board of Trustees.

4. The executive benefit plan included a severance pay benefit for plan participants. The severance benefit was calculated according to a formula using the employee's daily base pay as multiplied by the sum of "benefit days." Benefit days were earned according to employment longevity. A "severance day" calculation determined the amount of severance pay a departing employee would receive.

5. Apparently, at some point in 1994, participants in the FRS learned that the Division of Retirement would exclude some types of compensation, including severance pay, from the "creditable compensation" used to determine retirement benefits.

6. In June 1995, the college amended the plan to provide a severance pay "opt-out" provision to plan participants. The provision entitled plan participants who were within five years of eligibility for FRS retirement benefits to "opt-out" of the severance package and instead immediately begin to receive

supplemental payments. Mr. Megregian drafted the "opt-out" provision, which was adopted by the college board.

7. The decision to "opt-out" was irrevocable. A plan participant could not change his or her mind and take the severance package once the "opt-out" decision was made.

8. The supplemental payments were calculated based upon the "severance days" that the employee would have otherwise earned during the year. The payments were made along with the employee's salary payment.

9. The "opt-out" plan did not require a participant to retire after the fifth year of receiving the supplemental payment.

10. The Petitioner asserts that the creation of the "opt-out" provision was in accordance with information provided by the Division of Retirement.

11. There is no evidence that the Division of Retirement provided any information suggesting that the "opt-out" provision would result in an increase in creditable compensation for purposes of determining FRS benefits, or that the "opt-out" provision was an acceptable method of avoiding the severance pay exclusion.

12. There is no evidence that, prior to March of 1998, the college specifically sought any direction or advice from the Division of Retirement as to the supplemental payments made to employees under the "opt-out" provision.

13. The evidence as to why the college did not simply increase base salaries for employees to whom supplemental payments were being made is unclear. There was testimony that the plan was designed to avoid unidentified tax consequences. There was also testimony that the supplemental plan was designed to avoid increasing some employees base salaries beyond the percentage increases awarded to other employees. There was apparently some concern as to the impact the supplemental payments would have on other college employees who were not receiving the additional funds.

14. There is no evidence that the Petitioner performed any additional duties on the college's behalf in exchange for the supplemental payments.

15. The Petitioner was eligible to participate in the "opt-out" plan beginning in the college's 1995-1996 fiscal year, and he elected to do so.

16. As a result of his election, supplemental payments were made in amounts as follows:

Fiscal Year 1995-1996, \$7,938.46.  
Fiscal Year 1996-1997, \$8,147.13.  
Fiscal Year 1997-1998, \$8,395.40.

17. On March 21, 1998, Brevard Community College requested clarification from the Division of Retirement as to how the supplemental payments would affect a plan participant's benefit.

18. On April 30, 1998, the Division of Retirement notified the college that the supplemental payments would not be included within the calculation of creditable compensation.

19. The Petitioner retired from his employment at Brevard Community College on June 30, 1998.

20. The Petitioner is presently entitled to retirement benefits under the FRS.

21. The Division calculates FRS retirement benefits based on "creditable compensation" paid to an employee during the five years in which an employee's compensation is highest.

22. Some or all of the three years during which the Petitioner received supplemental payments are included in the calculation of his creditable compensation.

23. The evidence fails to establish that the supplemental payments made to the Petitioner should be included within the creditable compensation upon which FRS benefits are calculated.

24. Under the statutes and rules governing FRS benefit determinations, the supplemental payments made to the Petitioner are "bonuses" and are excluded from the "creditable compensation" calculation.

#### CONCLUSIONS OF LAW

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

26. The Petitioner has the burden of establishing by a preponderance of the evidence, entitlement to the relief sought. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (1st DCA 1977). Florida Department of Transportation v. JWC Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this case, the burden has not been met.

27. The evidence fails to establish that the supplemental payments to Stephen J. Megregian, constitute "compensation" for purposes of determining retirement benefits under the FRS. Section 121.021(22), Florida Statutes, in relevant part provides as follows:

"Compensation" means the monthly salary paid a member by his or her employer for work performed arising from that employment.

(a) Compensation shall include:

1. Overtime payments paid from a salary fund.
  2. Accumulated annual leave payments.
  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;
    - b. The policy provides that payments shall commence no later than the 11th year of employment;
    - c. The payments are paid for as long as the employee continues his or her employment; and
    - d. The payments are paid at least annually.
- (emphasis supplied)

28. The formal written policy under which Mr. Megregian received supplemental payments did not provide that the payments were to commence not later than the eleventh year of his employment.

29. Section 121.021(22), Florida Statutes, in relevant part, further provides as follows:

(b) Under no circumstances shall compensation include:

1. Fees paid professional persons for special or particular services or include salary payments made from a faculty practice plan operated by rule of the Board of Regents for eligible clinical faculty at the University of Florida and the University of South Florida; or
2. Any bonuses or other payments prohibited from inclusion in the member's average final compensation and defined in subsection (47). (emphasis supplied)

30. The supplemental payments to the Petitioner are bonuses as defined at Section 121.021(47), Florida Statutes, which in part provides as follows:

"Bonus" means a payment made in addition to an employee's regular or overtime salary. A bonus 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. Effective July 1, 1989, employers may not report such payments to the division as salary, and may not make retirement contributions on such payments.

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

1. The payment is not made according to a formal written policy that applies to all eligible employees equally.
2. The payment commences later than the 11th year of employment.
3. The payment is not based on permanent eligibility.
4. The payment is made less frequently than annually. (emphasis supplied)

31. In this case, the payment of supplemental funds to the Petitioner constituted payment of a bonus. The payments to



Mr. Megregian commenced later than the eleventh year of his employment.

32. The Petitioner asserts that Section 121.021(47), Florida Statutes, characterizes a bonus as "nonrecurring, does not increase the employee's base rate of pay, and includes no commitment for payment in a subsequent year," and that the payments made to the Petitioner are contrary to these characteristics. The Petitioner's interpretation requires that the qualifier "usually" be ignored, as well as the remainder of the section, including the requirement that such supplementary payments commence prior to the eleventh year of employment.

33. Calculation of benefits under the FRS is based upon the employee's "average final compensation." Section 121.021(24), Florida Statutes, provides as follows:

(24) "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.

(a) The average final compensation shall include:

1. Accumulated annual leave payments, not to exceed 500 hours; and
2. All payments defined as compensation in subsection (22).

(b) The average final compensation shall not include:

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

2. Payments for accumulated sick leave made due to retirement or termination;
3. Payments for accumulated annual leave in excess of 500 hours;
4. Bonuses as defined in subsection (47);
5. Third party payments made on and after July 1, 1990; or
6. Fringe benefits (for example, automobile allowances or housing allowances).(emphasis supplied)

34. The Division of Retirement has adopted rules that have been codified by the preceding statutes. Rule 60S-6.001(16), Florida Administrative Code, provides as follows:

- (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 Section 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;
  5. Payments, whether made annually or in 12 or 26 equal payments within a 12- month period, made in lieu of a permanent increase in the base rate of pay when the member's base pay is at the maximum of his pay range. When a portion of a member's annual increase raises his base pay to the maximum of his pay range, and the excess is paid as a lump sum payment, such lump sum payment shall be

compensation for retirement purposes.

(b) Compensation shall not include:

1. Any bonuses or other payments prohibited from inclusion in the member's average final compensation and defined in 60S-6.001(6)(b);

2. Any public funds paid by an employer into an employee's salary reduction, deferred compensation, or tax-sheltered annuity program on or after July 1, 1990 (the date as of which all employers were notified in writing by the Division to cease making contributions based on such amounts).

However, if an employer was notified in writing by the Division to cease making such contributions as of a different date, that employer shall be subject to the requirements of such written notice.

3. Any amounts in excess of the Internal Revenue Code (IRC) Section 401(a)(17) limitation as follows:

a. For any person who first became a member before July 1, 1996, compensation for all plan years beginning on or after July 1, 1990, shall not include any amounts in excess of the maximum of \$200,000 in 1989, adjusted for changes in the cost of living;

b. For any person who first became a member on or after July 1, 1996, compensation for any plan year shall not include any amounts in excess of the maximum of \$150,000 in 1996, adjusted for changes in the cost of living only in increments of \$10,000. (emphasis supplied)

35. Rule 60S-6.001(6), Florida Administrative Code, provides as follows:

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

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

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

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

6. Automobile allowances.

7. Housing allowances. (emphasis supplied)

36. Rule 60S-6.001(11), Florida Administrative Code, provides as follows:

(11) BONUS -- Means a payment made in addition to an employee's regular or overtime salary that is usually non-recurring, 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. (emphasis supplied)

37. Essentially, the Brevard Community College "opt-out" provision was an attempt to circumvent the State Division of Retirement exclusion of severance payments from creditable compensation calculations. College officials were aware of, and concerned about, the Division's severance exclusion, yet the college made no attempt to determine whether the "opt-out" provision would avoid the severance pay exclusion.

38. The college asserts that a hypothetical employee, apparently with substantial FRS credits prior to employment, could take advantage of the "opt-out" provision and receive payments prior to the 11th year of employment, thus avoiding the "bonus" definition.

39. The hypothetical presented by the college is irrelevant in this case, where the facts are clearly different. Here, the supplemental payments to the Petitioner clearly meet the statutory and rule definition of "bonus" and are excludable from creditable compensation for determination of FRS retirement benefits.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the State of Florida, Division of Retirement, enter a final order finding that supplemental payments made to Stephen J. Megregian are bonus payments and are excluded from calculation of creditable compensation for FRS benefit purposes.

DONE AND ENTERED this 2nd day of December, 1999, in Tallahassee, Leon County, Florida.

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WILLIAM F. QUATTLEBAUM  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of December, 1999.

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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 must be filed with the agency that will issue the final order in this case.