STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELSA L. LOPEZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-0437
	)	
DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF STATE GROUP INSURANCE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on April 17, 2003, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Margherita Downey, Esquire
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For Respondent: Sonja P. Mathews, Esquire
Department of Management Services
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STATEMENT OF THE ISSUE

The issue in this case is whether the unused balance in a state employee's flexible spending account must be forfeited as

a result of her failure to file claims exhausting the account before the April 15, 2002, deadline.

PRELIMINARY STATEMENT

By letter dated June 24, 2002, Respondent Department of Management Services, Division of State Group Insurance, as Administrator of the Salary Reduction Cafeteria Plan for state employees, notified Petitioner Elsa Lopez that her claim for reimbursement of dependent care expenses incurred in 2001 was being denied, and her unused flexible spending account balance forfeited, because she had failed to file the claim before the deadline of April 15, 2002. In response, Petitioner timely filed a Petition for Informal Hearing ("Petition"), which Respondent later referred to the Division of Administrative Hearings upon determining that disputed issues of fact had been raised.

The final hearing took place on April 17, 2002, as scheduled, with counsel for both parties participating. Petitioner testified on her own behalf and also called her husband, Lucio Lopez. Additionally, Petitioner offered five exhibits, numbered 1 through 5, which were admitted into evidence. (Petitioner's Exhibit 6 was identified but not introduced.) Respondent presented J. Scott Sims, Esquire, as an expert witness, together with agency employees Verla Lawson, Sandie Wade, and Shirley Knight. Respondent also introduced

Respondent's Exhibits 1, 3, 5, 6, 8-10, 13-15, 17, 19, 20, and 23, which were received into evidence.

A final hearing transcript was not filed. Each party timely submitted a Proposed Recommended Order.

FINDINGS OF FACT

1. The State of Florida has established a Salary Reduction Cafeteria Plan ("Plan") for the benefit of its employees. The Plan, which is set forth in a formal written document that was most recently amended and restated as of September 20, 2000, is designed to take advantage of provisions in the Internal Revenue Code that permit the exclusion of reimbursement for various specified expenses——such as medical and dependent care costs——from the gross income of employees who participate in a "cafeteria plan"[1] that meets all the conditions prescribed under federal tax law. Simply put, the Plan allows state employees to pay for certain qualified expenses with pretax dollars by electing to have a predetermined amount deducted from each paycheck and deposited into a "flexible spending account," out of which qualified expenses can be reimbursed, tax free, according to the terms of the Plan.

2. Pursuant to authority granted under Section 110.161, Florida Statutes, the Florida Department of Management Services ("DMS") operates and administers the Plan. The Division of

State Group Insurance ("Division") is designated in the Plan document as the Plan's "Administrator."

3. Petitioner Elsa Lopez ("Mrs. Lopez") is a state employee. She works as a secretary in the Office of the Public Defender for the Fifteenth Judicial Circuit, in West Palm Beach, Florida.

4. During the "open enrollment" period[2] in 1998, Mrs. Lopez elected to participate in the Plan during "plan year"[3] 1999, authorizing the state to reduce her salary by $2,500 over the course of the plan year, the money to be placed in a flexible spending account for the purpose of reimbursing her (with pretax dollars) for dependent care expenses. In this way, Mrs. Lopez effectively sheltered $2,500 from federal income tax.

5. In late 1999, in order to continue paying for dependent care with pretax dollars, Mrs. Lopez again chose to participate in the Plan, authorizing the state to reduce her salary by $3,500 during plan year 2000.

6. Mrs. Lopez made the above-described elections by signing, in each instance, an Open Enrollment Form. She signed the first of these forms on October 15, 1998, and the second on September 30, 1999. On both forms, an "employee certification" appears just above Mrs. Lopez's signature. This certification states in pertinent part:

> I understand that I will forfeit any balance(s) remaining in my account(s) at the end of the Plan Year in accordance with the Internal Revenue Code Section 125. If eligible expenses are not incurred during my eligible period of participation equal to the[4] account balance and/or if claims for the expenses are not filed with the Division of State Group Insurance by the claims filing deadline date (April 15), I will forfeit any remaining balance(s).

7. The risk of forfeiture to which the certification refers is an important condition for the favorable tax treatment accorded flexible spending accounts established under cafeteria plans. Federal law requires that, to qualify for the tax break, a cafeteria plan cannot provide for deferred compensation. See 26 U.S.C. § 125(d)(2)(A). The Internal Revenue Service has determined that plans which allow participants to carry over unused contributions from one plan year to another operate to enable participants to defer the receipt of compensation——and thus do not meet the conditions for excluding contributions from income. See Prop. Treas. Reg. § 1.125-1, Q/A-7 (49 F.R. 19321, 19324, 1984 WL 139403). Consequently, employees participating in a qualified plan must timely "use or lose" their respective contributions in exchange for the benefit of paying for health and/or child care expenses[5] with pretax dollars.

8. To preserve the tax-exempt status of the Plan, DMS has promulgated rules intended to prevent the Plan from providing

deferred compensation. For example, Rule 60P-6.0081(3), Florida Administrative Code, provides that

> [i]nitial requests for reimbursement for expenses incurred during a participant's period of coverage must be postmarked or received if not mailed, at the Department no later than April 15 following the prior Plan Year.

DMS has also mandated that "if unused portions of the participant's annual election remain in an account for which otherwise eligible claims are not received prior to the claims filing deadline, these funds shall be forfeited." Rule 60P-6.010, Florida Administrative Code (emphasis added). The term "claim filing deadline" is elsewhere defined as "April 15 following the participant's period of eligibility." Rule 60P-6.006(1), Florida Administrative Code.

9. Faithful to the foregoing rules, the Plan document prescribes a reimbursement procedure for dependent care expenses that provides in pertinent part:

> (a) *Expenses That May Be Reimbursed.* Under the Dependent Care Component, a Participant may receive reimbursement for [covered costs] incurred during the Plan Year for which an election is in force.
>
> * * *
>
> (d) *Use-It-Or-Lose-It Rule.* If a Participant does not submit enough expenses to receive reimbursements for the full amount of coverage elected for a Plan Year, then the excess amount will be forfeited[.]

> (e) *Applying for Reimbursements.* A Participant who has elected to receive dependent care benefits for a Plan Year may apply for reimbursement by submitting an application in writing to the Administrator in such form as the Administrator may prescribe, during the Plan Year but not later than by April 15 following the close of the Plan Year in which the expense arose[.]

Plan § 7.5

10. Mrs. Lopez understood that her funds were subject to forfeiture under the "use it or lose it rule." She also knew that the claim filing deadline for plan years 1999 and 2000 was April 15 following each respective plan year. What Mrs. Lopez did not know, she insists, is that the claim filing deadline for plan year 2001 was April 15, 2002.

11. Mrs. Lopez chose to participate in the Plan during plan year 2001, not by submitting an Open Enrollment Form, as in previous years, but by doing nothing, which resulted, by operation of the Plan, in a "rollover election." A rollover election occurs, pursuant to the provisions of Section 4.4(b) of the Plan document, when an existing participant fails timely to submit an Open Enrollment Form, which inaction is deemed to constitute an election of the same type of coverage as was in effect for the previous plan year. In accordance with Section 4.4(b), Mrs. Lopez was deemed to have authorized the state to deduct $3,500 from her salary for plan year 2001, such untaxed

amount to be used for the reimbursement of dependent care expenses.

12. Mrs. Lopez does not complain that the rollover election thwarted her actual intent. In fact, Mrs. Lopez desired to participate in the Plan during plan year 2001. Because she did not submit an Open Enrollment Form for plan year 2001, however, there is no document bearing Mrs. Lopez's signature below an "employee certification" acknowledging the April 15, 2002, claim filing deadline——a date which, as just mentioned, she denies having been aware of.

13. Mrs. Lopez goes beyond merely disclaiming knowledge of the deadline; she charges that the state misled her into believing that she could file claims for reimbursement through June of 2002. According to Mrs. Lopez, she placed a telephone call to the Division in February 2002 to request claims forms and inquire about the deadline for filing claims, which she knew from experience was approaching. The person with whom she spoke, says Mrs. Lopez, told her that claims incurred during plan year 2001 could be submitted until June 2002.

14. Needless to say, the Division disputes Mrs. Lopez's account of this purported conversation. However, because Mrs. Lopez has not been able to identify the person with whom she claims to have spoken, the date and time of the alleged call, or even the phone number she dialed, the Division was hard-pressed

to present evidence directly refuting Mrs. Lopez's testimony. Therefore, the Division adduced evidence concerning the routine practices and procedures of its customer service employees. This evidence persuaded the undersigned (who hereby finds) that it is highly unlikely Mrs. Lopez was informed by a customer service representative[6] that the claim filing deadline was in June of 2002.[7]

15. That said, the undersigned accepts Mrs. Lopez's testimony (and finds) that she was told about a June 2002 deadline. Resolving conflicts in the evidence, he finds that what happened, more likely than not, was that the customer service person informed Mrs. Lopez, correctly, that the claim filing run-out period lasted through the end of June 2002. (The "claim filing run-out period" is the "period during which [DMS] will accept documentation in support of claims filed within the claim filing deadline. This period will not extend beyond June 30 following the end of the prior plan year." Rule 60P-6.006(2), Florida Administrative Code (emphasis added). The claim filing run-out period gives a participant whose timely filed claim lacks proper documentation a little extra time to submit such documentation and thereby prevent denial of the claim. See Rule 60P-6.0081(4), Florida Administrative Code.) For reasons that cannot be determined, the customer service representative probably believed, mistakenly but not

unreasonably, that Mrs. Lopez wanted to know whether additional documentation (such as the child care provider's invoice[8]) relating to an already, or soon-to-be, filed claim for reimbursement could be submitted at a later date. While the customer service person most likely answered a different question than the one Mrs. Lopez meant to ask, there is no evidence that he or she acted improperly, negligently, or with the intent to deceive Mrs. Lopez.

16. Mrs. Lopez failed to submit her claim before the April 15, 2002, deadline. This forced the Division, as the Plan's Administrator, to declare her unused balance of $3,500 forfeited under the "use it or lose it rule."

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

18. Mrs. Lopez bears the burden of proving the allegations in her Petition by a preponderance of the evidence. See Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Florida Dept. of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974); Section 120.57(1)(j), Florida Statutes.

19. The relevant provisions of the Plan document, pertinent statutes, rules, and regulations (which were cited

and, when necessary, quoted in the foregoing Findings of Fact) are clear and unambiguous as a matter of law, capable of being relied upon, and applied to the historical events at hand, without a simultaneous examination of extrinsic evidence or resort to principles of interpretation. To the extent that any of the various fact-findings herein are deemed to constitute or reflect legal conclusions because they were derived from——or are declarations concerning——the unambiguous language of the Plan document, statutes, rules, or regulations, such fact-findings are hereby incorporated by reference as if set forth in this Conclusions of Law section of the Recommended Order and adopted as such.

20. It is concluded that the Division, as the Administrator of the Plan, has no discretion to waive either the claim filing deadline or the "use it or lose it rule." If a participant fails to submit, by the April 15 deadline, claims that exhaust the amount of coverage elected for the preceding plan year, then the Division has no choice but to treat the participant's unused balance as a forfeit.[9] The forfeiture rules are facially harsh and, as here, can produce harsh results when applied,[10] but they are part of the price that must be paid to ensure that the Plan complies with federal law and maintains its tax-exempt status.

21. Mrs. Lopez urges that the Division be estopped from enforcing the April 15, 2002, claim filing deadline in this instance because she was told by an employee of the Division that she had until June 2002 to seek reimbursement of expenses incurred in plan year 2001. The facts do not support Mrs. Lopez's argument, however, as the undersigned has found that she was provided accurate information about the claim filing run-out period.

22. But even if Mrs. Lopez were given bad advice concerning the claim filing deadline, the Division still would not be estopped from declaring her unused balance a forfeit. This is because, under the circumstances, the alleged representation to Mrs. Lopez that her claims would be treated as timely if received in June 2002 was a statement of law, not fact,[11] and it is well settled that estoppel "cannot be asserted against a government entity based on mistaken statements of the law." Ammons v. Okeechobee County, 710 So. 2d 641, 644 (Fla. 4th DCA 1998).

23. Moreover, agencies must follow their own existing rules. E.g. Cleveland Clinic Florida Hosp. v. Agency for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996), rev. denied sub nom. South Broward Hosp. Dist. v. Cleveland Clinic Florida Hosp., 695 So. 2d 701 (1997). Accordingly, the Division is bound by Rule 60P-6.010, Florida Administrative Code, which

mandates the forfeiture of any funds remaining in a participant's account after the reimbursement of all covered expenses for which claims were timely submitted, and it cannot be estopped from complying therewith. Indeed, the Division simply lacks authority to accept any claim of Mrs. Lopez that was filed after April 15, 2002, and estoppel cannot empower the Division to do that which it is without authority to do in the first instance. See Town of Lauderdale-by-the-Sea, Florida v. Meretsky, 773 So. 2d 1245, 1249 (Fla. 4th DCA 2000)(governmental entity cannot be estopped from revoking building permit that it was without authority to grant).

24. Finally, Mrs. Lopez argues that there was no "meeting of the minds" between the parties sufficient to create an enforceable contract because she never agreed that her funds could be forfeited if claims were not filed before April 15, 2002. Assuming for argument's sake (without deciding) that state contract law governs the Plan, the undersigned concludes that, by electing to participate in (and thus to be bound by the terms and conditions of) the Plan, Mrs. Lopez did agree to the forfeiture of all funds not claimed by April 15, 2002. The forfeiture provisions and claim filing deadline are clearly spelled out in the Plan document, which constitutes the written "agreement" between the parties. Mrs. Lopez is presumed to have read and understood the provisions of the agreement into which

she entered. See Allied Van Lines, Inc. v. Bratton, 351 So. 2d 344, 347-48 (Fla. 1977); Qubty v. Nagda, 817 So. 2d 952, 958-59 (Fla. 5th DCA 2002).[12]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that that Division enter a final order denying all claims for reimbursement of dependent care expenses incurred in plan year 2001 that Mrs. Lopez submitted after the claim filing deadline of April 15, 2002, and declaring the entire unused balance remaining in her account for that year forfeited.

DONE AND ENTERED this 3rd day of June, 2003, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
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this 3rd day of June, 2003.

ENDNOTES

[1]/ Generally speaking, a "cafeteria plan" is a written plan under which "all participants are employees" and "the participants may choose among 2 or more benefits consisting of cash and qualified benefits." 26 U.S.C. § 125(d)(1).

[2]/ The term "open enrollment" refers to the period during which eligible employees can elect to participate in the Plan. See Rule 60P-6.0063, Florida Administrative Code.

[3]/ The term "plan year" means "a 12-month period beginning January 1 and ending December 31." Rule 60P-6.006(11), Florida Administrative Code.

[4]/ Here, the Open Enrollment Form for plan year 1999 uses the possessive pronoun "my" in place of the article "the." The meaning is exactly the same either way.

[5]/ Title 26, United States Code, Section 129 provides an income exclusion for dependent care expenses if the employer furnishes dependent care assistance pursuant to a qualified "dependent care assistance program." Florida offers such a program as a benefit under the Plan.

[6]/ Since it is not known whom Mrs. Lopez spoke with, the possibility exists that she talked to someone unfamiliar with the Plan who, being unaware of the actual claim filing deadline and unwilling to admit ignorance in this regard, made up a date that turned out to be incorrect. The undersigned finds, however, that it is more likely Mrs. Lopez spoke with someone in the Division's customer service unit who was trained to answer questions concerning the Plan.

[7]/ This is because the evidence is overwhelming that the customer service personnel were well aware that April 15, 2002, was the claim filing deadline for plan year 2001.

[8]/ Mrs. Lopez testified that her child care provider was dilatory in rendering a statement for services provided in 2001, which in turn prevented Mrs. Lopez from sooner filing her claim for reimbursement of the cost of such services.

[9]/ If the Division were to bend the rules in even one difficult case, then it would be practically bound, as a matter of consistency and fairness, to show mercy in the next one, and the one after that, all of which eventually could lead to disastrous

results if the Internal Revenue Service consequently were to declare the Plan unqualified for favorable tax treatment pursuant to Title 26, United States Code, Section 125. See American Family Mut. Ins. Co. v. United States, 815 F.Supp. 1206 (W.D.Wis. 1992)(employer required to pay deficiency after IRS determined that cafeteria plan failed to qualify for tax-exempt status).

[10]/ The loss of several thousand dollars will undoubtedly be a severe financial blow for the Lopez family to absorb. While the undersigned is sympathetic to their plight, the law is clear and unambiguous and must be applied without emotion.

[11]/ The existence of administrative rules concerning the claim filing deadline is, of course, a matter of fact. Similarly, the contents of these rules can be communicated in declarative statements of fact. Thus, for example, it would be incorrect as a matter of fact (not law) to state that there is no administrative rule defining the term "claim filing deadline," because such a rule exists in fact. Likewise, if one were to declare that Rule 60P-6.006(1), Florida Administrative Code, specifies June 15 as the deadline for filing claims, such an assertion would be incorrect as a matter of fact (not law), for the Rule actually specifies the date "April 15." In contrast, when, as alleged here, the reliance-inducing statement reflects the speaker's understanding of what the law means or how it operates, or describes conduct that complies with or violates a rule, then the representation is less a factual assertion than a legal opinion.

[12]/ It is not necessary that assent to a contract be given by signing a document. See Bullock v. Harwick, 30 So. 2d 539, 541-42 (Fla. 1947). In this case, Mrs. Lopez signified her acceptance of the state's "offer" to continue participating in the Plan during plan year 2001 by not submitting an Open Enrollment Form canceling or changing her existing coverage, which was a mode of assent that the state had specifically invited. Thereafter, Mrs. Lopez accepted benefits under the Plan (tax savings during plan year 2001) without protest, confirming through her conduct that a "contract" had been made.

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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 should be filed with the agency that will issue the Final Order in this case.