

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

OSCAR WALKER,

Petitioner,

vs.

Case No. 13-2027

DEPARTMENT OF MANAGEMENT  
SERVICES, DIVISION OF  
RETIREMENT,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 22, 2013, by video teleconference at sites in Jacksonville and Tallahassee, Florida, before W. David Watkins, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Oscar Walker, pro se  
10836 Peaceful Harbor Drive  
Jacksonville, Florida 32218

For Respondent: Ronda L. Moore, Esquire  
Department of Management Services  
Suite 160  
4050 Esplanade Way  
Tallahassee, Florida 32399-0950

STATEMENTS OF THE ISSUE

Whether Petitioner is entitled to receive retroactive Health Insurance Subsidy (HIS) payments from the Florida Retirement System (FRS) in addition to those already received. Secondly, was FRS required to notify or remind Petitioner of the option to apply for the HIS benefit in a manner other than regular mail to his address of record?

PRELIMINARY STATEMENT

By letter dated January 25, 2013, Respondent advised Petitioner that he was eligible to receive retroactive HIS benefits for a maximum of six months prior to the date on which he submitted his application for the HIS benefit, pursuant to section 112.363(9), Florida Statutes. The letter also informed Petitioner of his right to challenge Respondent's decision by filing a petition for hearing within 21 days of receipt of the letter.

Thereafter, Petitioner timely requested an administrative hearing. Respondent forwarded Petitioner's request for hearing, along with a document entitled "Respondent's Initial Brief/Petition for Review"<sup>1/</sup> to the Division of Administrative Hearings (DOAH) on June 3, 2013. In this document, Petitioner identified several disputed issues, two of which frame Petitioner's central arguments in this matter:

Whether DOR and the Duval County School Board exhausted every available option to inform Respondent of a pending responsibility to file for HIS benefits and failure to do so timely may result in Respondent losing substantial benefits?

Whether there existed a fiduciary relationship between qualifying vested retirees and DOR after constructive delivery of the initial benefit payment to retirees and whether such delivery demands of DOR to make best efforts<sup>[2/]</sup> to alert Respondent of the urgency to apply for receivership of HIS payments?

A formal administrative hearing was initially scheduled for July 22, 2013, however, Petitioner had a family emergency, and the matter was re-scheduled for October 22, 2013. The hearing took place as scheduled on October 22, 2013.

At hearing, Petitioner testified on his own behalf. Petitioner's Exhibit 1 was received into evidence. Petitioner requested and was given leave to late file two exhibits within seven days of the conclusion of the hearing. Petitioner filed Exhibits A through E on October 31, 2013. Though these exhibits were untimely filed, they have been considered in the preparation of this Recommended Order. In addition to the late-filed exhibits themselves, Petitioner included a one-page summary of the import of each of the exhibits, as well as the following "Acknowledgement":

Upon careful review of cases and law memoranda there is an undeniable preponderance of burden and responsibility

placed on the shoulders of qualifying recipients to file timely for Health Insurance Subsidy benefits. Passive disclosure and hidden agenda spills across a broad and profitable spectrum of innocence and ignorance that defines America's condition. Greed and hate; the standard of choice by some, has found its way into the fabric of government. Notwithstanding, the Department of Management Services' capacity to impose and officiate conditions against unknowing participants has and continues to cause devastating injury and suffering largely against women.

Respondent presented the testimony of its Benefits Administrator for the Retired Payroll Section, Robin Collins. Respondent's Exhibits 1 through 15 were received into evidence without objection.

At the conclusion of the hearing, Petitioner requested to file his proposed recommended order within 12 days from the filing of the official Transcript at DOAH. This request was granted. The Transcript was filed on November 5, 2013, and thereafter Petitioner and Respondent timely filed Proposed Recommended Orders, both of which have been carefully considered in the preparation of this Recommended Order.

References to the Florida Statutes will be to the 2013 version unless otherwise noted.

#### FINDINGS OF FACT

Based on the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and

on the entire record of this proceeding, the following findings of fact are made:

1. Respondent is the state agency charged with the responsibility of administering the FRS, including the HIS benefit.

2. The HIS benefit is a program authorized by Florida law. The HIS benefit is calculated at five dollars times the number of years of creditable state service at the time of retirement. Only those members of the FRS who receive monthly retirement benefits are eligible to apply for the HIS.

3. Petitioner worked for the Duval County School Board and earned creditable state service in the FRS. In July 2004, Petitioner began his participation in the FRS Deferred Retirement Option Program (DRO). Petitioner's anticipated DRO termination date was June 30, 2009.

4. In September 2004, Respondent mailed Petitioner an acknowledgement of receipt of his DRO application to his address of record on file with Respondent. Along with the acknowledgement of DRO application, Respondent provided Petitioner an estimate of his pension benefit and enclosed the "Preparing to Retire" brochure referenced in the estimate. The "Preparing to Retire" brochure discussed the HIS benefit and stated, in pertinent part, that:

Around the time you receive your first monthly benefit payment after termination, an application for HIS, Form HIS-1, will be mailed to you. You must return a completed HIS application to the Division of Retirement **within 6 months** after your retirement benefit starts in order to be paid retroactive to your retirement date. If you fail to return the form within the 6-month period, retroactive subsidy payments will be limited to a maximum of 6 months. **You are responsible for obtaining certification of your health insurance coverage and applying for the HIS.** (Emphasis provided in the original.)

5. In March 2009, Respondent mailed Petitioner forms, brochures and informational material relevant to his upcoming DROP termination to the address of record on file with Respondent. The cover letter advised Petitioner that:

After your name is added to the retired payroll, you will receive a retiree packet that contains an information letter, *After You Retire* booklet, Tax Withholding Certificate for Pension Payments (Form W -4P), Health Insurance Subsidy application (Form HIS-1) and Direct Deposit Authorization form. The retiree packet is mailed approximately one week before you receive your first monthly benefit. (Emphasis provided in the original.)

6. On or about June 9, 2009, Petitioner completed his DROP termination form and the form was received by Respondent. In July 2009, Respondent added Petitioner to the retired payroll for him to begin receiving his monthly pension benefit.

7. In July 2009, Respondent also mailed Petitioner's retiree packet to his address of record on file with Respondent.

The retiree packet contained a cover letter, an information brochure titled "After You Retire," a direct deposit authorization form, a tax withholding form, and an HIS application. The cover letter of the retiree packet included the following:

YOUR RETIREMENT PACKET INCLUDES:

- "After You Retire" Brochure - PLEASE READ FOR ADDITIONAL INFORMATION

\* \* \*

-Health Insurance Subsidy Certification (Form HIS-1) and Instructions Page

\* \* \*

HEALTH INSURANCE SUBSIDY (HIS): The HIS is extra money that is added to the monthly retirement benefit of eligible payees to help with the cost of health insurance. The member, or other payee who is the spouse or other financial dependent, may be eligible if he/she has health insurance, Medicare, or Tricare. If you are eligible to apply for the HIS, Form HIS-1 has been enclosed. It is your responsibility to obtain certification of your health insurance coverage and submit the enclosed Form HIS-1 to the Division. Please note that if Form HIS-1 is NOT received by the Division within six months of your first benefit payment, retroactive HIS benefits will be limited to a maximum of six months as long as your health insurance certification covers all six months.

(Emphasis provided in the original.)

8. The "After You Retire" brochure, included in the retiree packet, dedicates several pages to explaining the HIS

benefit. It reiterates that it is the retiree's responsibility to obtain health insurance coverage, and to apply for the benefit by completing the HIS application included in the retiree packet.

9. It is the Respondent's practice to comply with the requirements of Florida Administrative Code Rule 608-4.020, by mailing the retiree packet, which includes the HIS application, to retirees when they are placed on the retired payroll.

10. In a separate mailing in July 2009, Respondent sent Petitioner's first monthly pension benefit check to his address of record. Petitioner has continued to receive his monthly pension benefit check from Respondent by mail uninterrupted to the date of the hearing.

11. Within the first five months of a retiree's being placed on the retired payroll, Respondent runs an HIS reminder listing to notify it of retirees who have not submitted their HIS applications. Respondent's practice is to send an HIS reminder letter to retirees on the HIS reminder listing to notify them that their HIS applications have not been received, encouraging them to file for the HIS benefit, and enclosing an HIS application.

12. Petitioner was listed on Respondent's December 2009, HIS reminder listing. In January 2010, Respondent mailed



Petitioner an HIS reminder letter to his address of record. The HIS reminder letter included yet another HIS application.

13. Each January and July, Respondent mails a newsletter to retirees (FRS Retiree Newsletter). The HIS benefit is specifically referenced in articles in the July 2009, January 2010, July 2010, July 2011, and January 2012, FRS Retiree Newsletters. The articles range in substance and include information regarding a retiree's responsibility to apply for the HIS benefit; an explanation that the HIS benefit is not guaranteed; notification that the Florida Legislature can reduce or eliminate it; information about the tax consequences of the HIS benefit; notice that retirees can see whether they are receiving the HIS benefit by reviewing their annual statement; and that if they have questions they can consult their "After Your Retire" brochure, go online, or call the Retired Payroll Section.

14. In January of each year, Respondent mails retirees who have received retirement benefits during the prior year information to assist them in preparing their tax returns. Included in the January mailing is the IRS Form 1099-R, an annual statement detailing the income payment types received (Retiree Annual Statement), and the January FRS Retiree Newsletter. The Retiree Annual Statement identifies two different types of income payments made to retirees: (1) the

monthly retirement benefit, and (2) the monthly HIS benefit. The amount of HIS benefit reflected on Petitioner's 2009, 2010 and 2011 Retiree Annual Statement is \$0.00.

15. Petitioner disputes whether he received Respondent's various mailings regarding the HIS benefit. However, Petitioner does not dispute that he has received his monthly pension benefit check by mail from Respondent each month from July 2009, to present. Petitioner receives "a lot of junk mail," but he keeps a close eye out for his monthly pension benefit check.

16. Respondent's records reflect, and Petitioner does not dispute, that his address at the time he retired was 1923 Durkee Drive West. Respondent's records reflect that Petitioner's address changed to 10836 Peaceful Harbor Drive, effective May 3, 2010. These two addresses are the only addresses where Petitioner has lived since he retired. It is incumbent upon a retiree to keep Respondent notified of any change of address.

17. Respondent's records reflect that its mailings to Petitioner, including his monthly pension benefit check, have not been returned as undeliverable to Respondent.

18. At some point in 2012, Petitioner called Respondent to inquire about changing his tax deduction status. During the course of that conversation, Respondent reminded Petitioner that he had not applied for and was not receiving the HIS benefit. Petitioner then submitted his HIS application to Respondent in

December 2012. Petitioner began receiving his HIS benefit effective December 2012. Based on the date of receipt of Petitioner's HIS application, Petitioner was eligible for six months of retroactive HIS benefit, effective June 2012.

19. Petitioner argues that Respondent should have communicated the requirement for him to apply for the HIS benefit by certified mail, by an active telephone call, or by notification in the envelope he receives his monthly pension benefit check. Petitioner asserts no statutory, regulatory, or other authority for this proposition.

20. Petitioner also alleges that Respondent ultimately sent the HIS application to him by certified mail, and that it was the only certified mail he has received from Respondent. However, the record reflects that the certified mail Petitioner is referring to is Respondent's January 25, 2013, final agency action letter sent to Petitioner.

21. Petitioner further asserts that the HIS benefit is an earned right, an entitlement, not subject to arbitrary forfeiture, and is unclaimed property under chapter 717, Florida Statutes. Again, Petitioner provides no authority for this argument.

#### CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties hereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

23. As the person seeking to establish his entitlement to benefits, Petitioner has the burden of proof by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.; Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981) (The party asserting the affirmative of an issue has the burden of proof.).

24. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997), quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

25. In pertinent part, section 112.363, Florida Statutes, provides for the payment of a Health Insurance Subsidy as follows:

(1) PURPOSE OF SECTION. — The purpose of this section is to provide a monthly subsidy payment to retired members of any state-administered retirement system in order to assist such retired members in paying the costs of health insurance.

(2) ELIGIBILITY FOR RETIREE HEALTH INSURANCE SUBSIDY. — (a) A person who is retired under a state-administered retirement system, or a beneficiary who is a

spouse or financial dependent entitled to receive benefits under a state-administered retirement system, is eligible for health insurance subsidy payments provided under this section; except that pension recipients under sections 121.40, 238.07(18)(a), and 250.22, recipients of health insurance coverage under section 110.1232, or any other special pension or relief act shall not be eligible for such payments.

\* \* \*

(d) Payment of the retiree health insurance subsidy shall be made only after coverage for health insurance for the retiree or beneficiary has been certified in writing to the Department of Management Services. Participation in a former employer's group health insurance program is not a requirement for eligibility under this section. Coverage issued pursuant to section 408.9091 is considered health insurance for the purposes of this section.

\* \* \*

(7) ADMINISTRATION OF SYSTEM. - The Department of Management Services may adopt such rules and regulations as are necessary for the effective and efficient administration of this section. The cost of administration shall be appropriated from the trust fund.

\* \* \*

(9) BENEFITS. - Subsidy payments shall be payable under the retiree health insurance subsidy program only to participants in the program or their beneficiaries, beginning with the month the division receives certification of coverage for health insurance for the eligible retiree or beneficiary. If the division receives such certification at any time during the 6 months after retirement benefits commence,

the retiree health insurance subsidy shall be paid retroactive to the effective retirement date. If, however, the division receives such certification 7 or more months after commencement of benefits, the retroactive retiree health insurance subsidy payment will cover a maximum of 6 months. Such subsidy payments shall not be subject to assignment, execution, or attachment or to any legal process whatsoever.  
(Emphasis added.)

26. Florida Administrative Code Rule 60S-4.020(2),  
provides that:

(2) Eligible retired members or beneficiaries must make application to the Division for the Health Insurance Subsidy and certify their health insurance coverage in accordance with procedures established by the Division in order to receive the Health Insurance Subsidy. FRS Pension Plan retirees or beneficiaries shall make application and certify their health insurance coverage to the Division on Form HIS-1 (Rev. 07/05) <http://www.flrules.org/Gateway/reference.asp?No=Ref-00403>, Florida Retirement System Pension Plan Health Insurance Subsidy Certification Form, herein adopted by reference, which is mailed to the FRS Pension Retiree's address of record when placed on retired payroll and may also be obtained from the Forms page of the Division's website, [www.frs.MyFlorida.com](http://www.frs.MyFlorida.com), or by calling the Division's Retired Payroll Section Toll Free at (888) 377-7687, if calling from outside the Tallahassee calling area or locally at (850) 488-4742, or if hearing or speech impaired by calling the Division via T.D.D. at the Florida Relay System by dialing 711 or (800) 955-8771. FRS Investment Plan retirees or beneficiaries shall make application to the Division for the Health Insurance Subsidy on Form HIS-IP (Rev. 03/12)

<http://www.flrules.org/Gateway/reference.asp?No=Ref-01936>, Florida Retirement System (FRS) Application for Health Insurance Subsidy for Investment Plan Members, herein adopted by reference, and shall certify their health insurance coverage to the Division on Form HIS-IP-2 (Rev 10/11)

<http://www.flrules.org/Gateway/reference.asp?No=Ref-00405>, Florida Retirement System (FRS) Health Insurance Subsidy Certification for Investment Plan Members, herein adopted by reference. Both of these forms may be obtained from the Forms page of the Division's website, [www.frs.MyFlorida.com](http://www.frs.MyFlorida.com), or by calling the Division's Bureau of Retirement Calculations Toll Free at (888) 738-2252, if calling from outside the Tallahassee calling area or locally at (850) 488-6491, or if hearing or speech impaired by calling the Division via T.D.D. at the Florida Relay System by dialing 711 or (800) 955-8771. If the Division receives such application and certification of health insurance coverage within 6 months after retirement FRS benefits commence, the Retiree Health Insurance Subsidy may be paid retroactive up to the effective retirement date. If the Division receives the certification of insurance coverage 6 or more months after retirement benefits commence, the member will be eligible to receive retroactive payments for a maximum of 6 months only. Retroactive Retiree Health Insurance Subsidy benefits can only be paid for the months of certified health insurance coverage.

(Emphasis added).

27. Section 112.363, limits retroactive payment of HIS benefits to a retiree to a maximum of six months. Respondent has no authority to pay more than six months retroactive HIS benefits to a retiree.

28. Neither section 112.363 nor rule 60S-4.020, imposes a duty on Respondent to mail notice of the HIS benefit through certified mail or in any other fashion proposed by Petitioner. The evidence established that Respondent complied with its legal requirements when it mailed the retiree packet to Petitioner at his address-of-record when he was placed on the retired payroll in July 2009.

29. Similarly, there is no legal duty placed on Respondent to repeatedly notify or remind retirees of the HIS benefit. However, Respondent, in addition to meeting its statutory and rule requirements, sends additional reminders and newsletters to retirees regarding the HIS benefit.

30. Even assuming, as argued by Petitioner, that the HIS benefit is an earned right, an entitlement not subject to arbitrary forfeiture, and is tantamount to unclaimed property under chapter 717, Florida Statutes, such fact would still not have compelled Respondent to contact Petitioner in any of the manners asserted by Petitioner. Section 717.118, provides in relevant part:

717.118 Notification of apparent owners of unclaimed property. —

(1) It is specifically recognized that the state has an obligation to make an effort to notify owners of unclaimed property in a cost-effective manner. In order to provide all the citizens of this state an effective and efficient program for the recovery of



unclaimed property, the department shall use cost-effective means to make at least one active attempt to notify owners of unclaimed property accounts valued at more than \$250 with a reported address or taxpayer identification number. Such active attempt to notify apparent owners shall include any attempt by the department to directly contact the owner. Other means of notification, such as publication of the names of owners in the newspaper, on television, on the Internet, or through other promotional efforts and items in which the department does not directly attempt to contact the owner are expressly declared to be passive attempts. Nothing in this subsection precludes other agencies or entities of state government from notifying owners of the existence of unclaimed property or attempting to notify apparent owners of unclaimed property.

31. Nothing in section 717.118, or elsewhere in chapter 717, requires notification by certified mail or telephone. Rather, "active attempt" is defined as "any attempt by the department to directly contact the owner." Even were section 717.118 applicable to the HIS benefit, FRS would have complied with the obligation to make an "active attempt" to contact Petitioner, since it repeatedly mailed reminders directly to Petitioner at his home address of record.<sup>3/</sup>

32. Because Petitioner receives his monthly pension benefit check by mail, and Respondent's records do not reflect any returned mail from Petitioner, the creditable, persuasive evidence established that Respondent received the retiree packet and other mailings regarding the HIS benefit.

33. Respondent has no duty, let alone ability, to ensure that FRS retirees actually open and read correspondence mailed to them. Respondent discharged its duty to Petitioner when it notified him by regular mail of his option to apply for the HIS benefit.

34. The evidence established that Petitioner applied for and received the HIS benefit in December 2012, and received retroactive HIS benefits for six months beginning in June 2012. Petitioner has received the maximum retroactive HIS payment allowed by law and is not entitled to any additional HIS benefit payments.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order denying Petitioner's request for additional HIS benefits retroactive to his retirement date.

DONE AND ENTERED this 22nd day of November, 2013, in  
Tallahassee, Leon County, Florida.



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W. DAVID WATKINS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of November, 2013.

ENDNOTES

<sup>1/</sup> Though denominated Respondent's Initial Brief/Petition for Review, the document was submitted to the Division of Retirement by Petitioner.

<sup>2/</sup> At hearing, Petitioner defined "Best Effort" to mean written communication via certified mail, telephone call, or a notice in the same envelope as his pension check.

<sup>3/</sup> Nor would the use of certified mail be a "cost-effective manner" by which to remind retirees of their option to apply for the HIS benefit, since some would simply choose not to apply, either because they are not eligible pursuant to section 112.363(2), or for other reasons.

COPIES FURNISHED:

Ronda L. Moore, Esquire  
Department of Management Services  
Suite 160  
4050 Esplanade Way  
Tallahassee, Florida 32399-0950

Oscar Walker  
10836 Peaceful Harbor Drive  
Jacksonville, Florida 32218

Dan Drake, Director  
Division of Retirement  
Department of Management Services  
Post Office Box 9000  
Tallahassee, Florida 32315-9000

Jason Dimitris, General Counsel  
Department of Management Services  
Suite 160  
4050 Esplanade Way  
Tallahassee, Florida 32399-0950

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.