

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRUCE M. DETERDING,

Petitioner,

vs.

Case No. 13-2958

DEPARTMENT OF HEALTH,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on October 10, 2013, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Bruce Milton Deterding, pro se
4841 Old Bainbridge Road
Tallahassee, Florida 32303

For Respondent: Mark John Henderson, Esquire
Department of Health
2585 Merchants Row, Room 110J
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues are whether Petitioner received a salary overpayment from Respondent for leave usage to which he was not entitled, as set forth in correspondence dated April 26, 2013;

and, if so, whether Respondent is entitled to a repayment for the salary overpayment made to Petitioner.

PRELIMINARY STATEMENT

On or about May 1, 2013, Petitioner received notice of the decision of the Department of Health (Department) to require Petitioner to compensate the Department for the agency's error in calculating Petitioner's annual leave for the purpose of preparing a Settlement Agreement. Respondent contended in its notice that Petitioner had been "overpaid" by approximately 140 hours in the amount of \$2,980.04.

Petitioner timely filed a request for a formal administrative hearing to contest the findings of the Department that Petitioner received an overpayment and must remit the amount due to Respondent. On August 9, 2013, the matter was referred to the Division of Administrative Hearings (DOAH). Based on the response of the parties to an August 12, 2013, Initial Order, the final hearing was scheduled for October 10, 2013, in Tallahassee, Florida.

At the hearing, Petitioner testified on his own behalf and offered two exhibits, which were admitted into evidence. Respondent presented the testimony of three witnesses and offered seven exhibits, all of which were admitted into evidence.

A transcript of the final hearing was not ordered by the parties. Petitioner and Respondent filed their proposed findings of fact and conclusions of law on October 21, 2013.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Bruce Deterding, was an employee of the Department of Health, having served as an executive director of a medical practice board, making him a Select Exempt Service (SES) employee.

2. Petitioner entered into a settlement agreement with the Department on December 19, 2012. The agreement required Petitioner to resign his position with the Department effective February 28, 2013, and included the following conditions:

- a) Petitioner's last day in the office would be December 18, 2012, one day preceding the signed settlement agreement; and
- b) Petitioner was required to utilize 384 hours of accrued annual leave beginning on December 19, 2012, and ending on February 27, 2013.

3. Petitioner did not participate in the preparation of the settlement agreement, but agreed to its terms by his signature. The agreement was signed by the Division of Medical Quality Assurance Director Lucy C. Gee on behalf of the Department.

4. From December 19, 2012, through February 28, 2013, Petitioner performed as obligated under the agreement. The Department paid Petitioner for the 384 hours of leave as required by the agreement. Petitioner relied on the Department's representations that he would be able to purchase his former military service time from the State Retirement System and retire with 30 years of state service on the resignation date set forth in the agreement.

5. Petitioner demonstrated through a screen shot of his personnel records in the "PeopleFirst" system that he had an available balance of 428 hours of annual leave at the time he entered into the settlement agreement with the Department.

6. The Department's employee verified through PeopleFirst that sufficient hours of leave were available prior to presenting the settlement agreement offering to pay 384 hours of leave to Petitioner.

7. The Department notified Petitioner by a letter dated April 26, 2013, that he had received salary overpayments. Specifically, the letter stated that two payments in the amounts of \$1,262.48 and \$1,717.56, dated February 22, 2013, and March 8, 2013, respectively, had been erroneously made to him.

8. Petitioner, as an SES employee, received 176 hours of annual leave on his leave accrual anniversary date of July 1 each year. In 2010, Petitioner received an annual leave accrual of

176 hours on June 18, 2010, and a second annual leave accrual on July 1, 2010.

9. On April 26, 2013, Petitioner had a telephone conversation with Meshelle Bradford, one of the Department's payroll employees, concerning potential salary overpayments.

10. During that conversation, Petitioner acknowledged he had received the two salary accruals totaling 352 hours on June 18 and July 1, 2010. Petitioner testified that he assumed he was the beneficiary of an "extraordinarily good hire date" which entitled him to receive leave on his former (from his previous state employment) and new leave accrual dates.

11. The Department conducted a payroll and leave audit after the date of Petitioner's resignation and separation from the agency. The audit revealed that Petitioner had been overpaid for annual leave hours that he had accrued in 2010 by mistake. Petitioner had been paid for annual leave he used in February 2013, when he had exhausted all of his accrued leave.

12. During the two-week pay period of February 1 through 14, 2013, Petitioner received pay for 58.5 hours of leave he did not have available, and for the two-week pay period of February 15 through 28, 2013, Petitioner received pay for 80 hours of leave he did not have available, resulting from the double accrual of leave in June and July 2010.

13. The Department's position is that Petitioner should have been in leave without pay status for the 58.5 and 80 hours of leave for which he was paid in February 2013.

14. The calculated overpayment for the unavailable leave is \$2,980.04. The Department seeks reimbursement from Petitioner for that amount. Petitioner disputes that he owes any amount due to the fact he entered into a settlement agreement that delineated the payments to be made by the Department to him as a condition of his resignation.

15. The Department's Agency Attendance and Leave Policy, in section VI.D.3, states: "It is the employee's responsibility to maintain an accurate accounting of their leave balances."

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

17. Petitioner has the burden of proving by a preponderance of the evidence that he is not responsible for the repayment of funds erroneously paid to him by the Department due to its error in determining the amount of leave due to Petitioner. See Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349 (Fla. 1st DCA 1977); McDonald v. Dep't of Prof'l Reg., 582 So. 2d 660 (Fla. 1st DCA 1991).

18. Petitioner entered into a settlement agreement with the Department which required him to utilize 384 hours of accrued annual leave beginning Wednesday, December 19, 2012, through Wednesday, February 27, 2013.

19. Section 110.205, Florida Statutes, sets forth those positions in state government that are exempt from the Career Service System. The executive director of a board or commission established in the Department of Business and Professional Regulation or Department of Health is specifically exempt. § 110.205(2), Fla. Stat. Petitioner is therefore exempt from the Career Service System.

20. Section 110.605 provides the authority for setting the powers and duties, personnel rules, records, and reports for select exempt personnel in state agencies. Subsection (2) of that statute provides, in pertinent part:

Each employing agency shall operate within the uniform personnel rules adopted by the department pursuant to the provisions of this part. Each employing agency may adopt rules as necessary to implement the provisions of this part, but such rules shall not prescribe any personnel policies inconsistent with the provisions of this part or the rules of the department.

Subparagraph (1)(c) of that same section requires that:

The employing agency must maintain, on a current basis, all records and reports required by applicable rules. The department shall periodically audit employing agency records to determine compliance with the

provisions of this part and the rules of the department.

21. Section 110.1165 provides authorization for procedures involving executive branch personnel errors, as follows:

(2) An agency of the executive branch, including the State University System, is authorized to take such action as may be appropriate to provide a remedy for an employee concerning his or her claim regarding detrimental reliance on erroneous written information provided by the employing agency relating to pay and benefits, provided such remedy is within the purview of the agency's authority. The agency has no authority whatsoever to modify the state retirement system or the state insurance program. Any monetary remedy afforded by the agency must fall within the agency's budgetary authority. Any person dissatisfied with the outcome of this process may file either a grievance pursuant to the agency's internal grievance process or an appeal to the Division of Administrative Hearings pursuant to chapter 120, but not both.

(3) The time limit to file any action to recover compensation, including, but not limited to, salaries, wages, overtime pay, fringe benefits, or damages or penalties relating to errors in such compensation from, by, or on behalf of a state officer or employee is 2 years from the date of the alleged error in payment of such compensation. The time limit applies in all disputes over compensation for work performed by state officers or employees, and is not confined to cases arising under subsections (1) and (2).

Pursuant to the above-quoted provision, Petitioner chose to appeal to DOAH the request for reimbursement of the funds allegedly paid in error to him by the Department.

22. Section 110.219 defines the general policies for attendance and leave for state employees:

(3) The granting of any leave of absence, with or without pay, shall be in writing and shall be approved by the agency head. An employee who is granted leave of absence with or without pay shall be an employee of the state while on such leave and shall be returned to the same position or a different position in the same class and same work location upon termination of the approved leave of absence. The agency head and the employee may agree in writing to other conditions and terms under which the leave is to be granted.

(4) Each agency shall keep an accurate record of all hours of work performed by each employee, as well as a complete and accurate record of all authorized leave which is approved. The ultimate responsibility for the accuracy and proper maintenance of all attendance and leave records shall be with the agency head.

23. The Department and Petitioner, through their voluntary entry into the settlement agreement, have clearly indicated that they agreed to "other conditions and terms under which leave is to be granted" as contemplated by section 110.219(3). Further, subsection (4) of section 110.219 indicates that it is the "ultimate responsibility" of the employing agency to keep "a complete and accurate record of all authorized leave" when it is approved.

24. Petitioner relied on the accuracy of the Department's records concerning his accrued leave when he signed the agreement. The Department is responsible for the accuracy of

those records and the calculations made in drafting the terms of the settlement agreement. However, Petitioner was admittedly aware that he had received two full deposits of leave within 30 days of one another and considered himself the fortunate beneficiary of an "extraordinarily good hire date," which entitled him to double leave when he changed jobs within the state employment system. In fact, Petitioner was the recipient of a windfall created by a clerical error, neither of his wrongdoing nor of the Department's.

25. Section 110.1165(1) provides:

An agency of the executive branch, including the State University System, shall establish procedures for the receipt, consideration, and disposition of a claim regarding pay or benefits brought by an employee when that employee is damaged as a result of being provided with erroneous written information by the employing agency regarding his or her pay or benefits, and the employee detrimentally relies upon such written information. In order to qualify for the relief provided by this section, the employee's reliance on the representation must have been reasonable and based only upon the written representations made by those persons authorized by the agency head to make such representations. Furthermore, the erroneous calculation and payment of an employee's salary, wages, or benefits is not among the written representations which will trigger relief under this section.

This statutory provision requires that the "written information by the employing agency regarding his or her pay or benefits" be detrimentally relied upon by the employee. Such reliance "must

have been reasonable and based only upon the written representations made by those persons authorized by the agency head to make such representations."

26. Although the incorrect leave balance was stated in Petitioner's resignation settlement agreement, no evidence was presented at hearing that Petitioner relied on the mistaken balance to his detriment. Had Petitioner not signed the settlement agreement resigning from his position, he was going to be terminated from his employment, not retained. Petitioner presented no evidence that having to reimburse the salary overpayments will have a negative impact on any of his retirement benefits. Further, the evidence does not support Petitioner's claim that he reasonably relied upon the erroneous leave calculations. He was aware in July 2010 that he had received two annual leave accruals and considered himself lucky to have done so.

27. Finally, section 110.1165(1) makes it clear that "the erroneous calculation and payment of an employee's salary, wages, or benefits is not among the written representations which will trigger relief." A state agency cannot waive or forgive overpayments that are the result of errors, and employees who receive erroneous salary payments, even pursuant to a resignation settlement agreement in lieu of a termination of employment, are not entitled to relief under this statute.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Health requiring Petitioner to repay the overpayment of salary in the amount of \$2,980.04.

DONE AND ENTERED this 5th day of December, 2013, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of December, 2013.

COPIES FURNISHED:

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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.