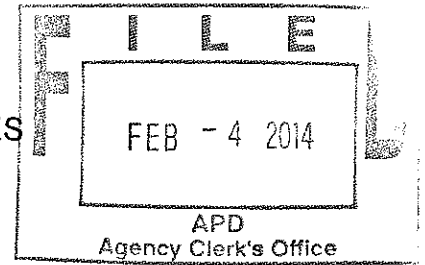


STATE OF FLORIDA  
AGENCY FOR PERSONS WITH DISABILITIES



ILEANA TOLEDO, NORMA PEDRAZA,  
LIL GUERRERO

Petitioners,

APD Case Nos. 13-2024, 13-2023, 13-2022

Vs.

DOAH Case Nos. 13-3708, 13-3709, 13-3710

AGENCY FOR PERSONS  
WITH DISABILITIES,

Rendition No. APD-14-0003-FO

Respondent.

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**FINAL ORDER**

This cause comes before the Agency for Persons with Disabilities (the Agency) based upon a Recommended Order issued by the Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH). A copy of the Recommended Order is attached to this Final Order.

The Petitioners in these cases were notified by separate letters issued on August 14, 2013, that due to an administrative coding error, a salary overpayment was made during a period of Petitioners' employment with Respondent. The overpayments were \$464.63 to Petitioner Ileana Toledo, \$624.14 to Petitioner Norma Pedraza, and \$426.65 to Petitioner Lil Guerrero, as monetary compensation for overtime hours worked. Respondents requested repayment for the above amounts and the Petitioners, being advised of their right to dispute the determination of overpayment, requested a hearing. The matter was forwarded to DOAH and an order consolidating the cases was entered at Petitioners' request. A video teleconference hearing was held on October 21, 2013.

The ALJ recommended that a Final Order be entered determining that Petitioners were erroneously paid salary in the above stated amounts respectively, and further determining that Petitioners are entitled to compensation by Respondent for their overtime hours worked through compensatory leave credits. The Petitioners timely filed exceptions to the Recommended Order.

In exception 1 Petitioners dispute the sufficiency of proof supporting factual findings contained in the Recommended Order that petitioner's "erroneously" received monetary compensation for overtime hours worked, that petitioner's had in fact become "excluded" as opposed to "included" employees for purposes of determining the appropriate manner of compensating them as career service employees working overtime hours, and that the overpayment occurred due to an "honest mistake resulting from an administrative coding error." Petitioners state that all of the above findings are "based on the *assumption* (emphasis supplied) that our status had change[d] from included to excluded employees. . . ." The question of whether the Petitioners' classification changed from "included" to "excluded" career service employees is the determining factor in the case. Included employees are required, under the federal Fair Labor Standards Act (FLSA), to receive monetary compensation for overtime hours worked.<sup>1</sup> Excluded employees are not covered under the under FLSA and are entitled to receive hour for hour compensatory leave credits for overtime hours worked under Rule 60L-34.0043 of the Florida Administrative Code (FAC).

Section 120.57(1)(j), F.S., requires that findings of fact must be based upon a preponderance of the evidence. Section 120.57(1)(l), F.S., sets forth the standard an

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<sup>1</sup> 29 U.S.C. § 201 et seq. (2001).

agency must use when reviewing a Recommended Order of an ALJ. As it relates to exceptions to findings of fact, it provides in pertinent part:

The agency may adopt the recommended order as the final order of the agency . . . The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Case law offers further guidance on this standard. "Where issues 'are determinable by ordinary methods of proof through the weighing of evidence and the judging of the credibility of witnesses,' they are 'solely the prerogative of the hearing officer as finder of fact.' " B.B. v. Department of Health & Rehabilitative Servs., 542 So.2d 1362, 1364 (Fla. 3d DCA 1989) (quoting Holmes v. Turlington, 480 So.2d 150, 153 (Fla. 1st DCA 1985)). "It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Here the ALJ received testimony from the Director of Human Resources for the Agency, Ms. Sullivan, stating that the reclassification of the Petitioners' positions to that of an excluded employee came about as part of a statewide regionalization of the offices from fifteen area offices to six regional offices in order to standardize the positions of employees performing similar duties in the various state offices.<sup>2</sup> Ms. Sullivan also testified that the Agency works from an employee classification and pay

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<sup>2</sup> Transcript at 32.

system from the Department of Management Services (DMS), and that it is DMS who designates the Agency's employee positions as being either "included" or "excluded."<sup>3</sup> In addition, Respondent's exhibits 1, 2 and 3 include the position descriptions signed and dated by each petitioner. The first page of the position descriptions contain two small boxes appearing next to the word "Overtime," one box indicating "Yes" and the other indicating "No" with an "X" marked inside the "No" box.

Petitioners argue that no document, including the position description, specifically states that their job status changed to an excluded position. While an indication on the position description would have been an additional indicator to a person versed in the intricacies of the FLSA what the impact of that reference means for an employee with regard to overtime compensation, the absence of the term from the position description is insufficient to cause the Agency to conclude that the ALJ's finding was not supported by competent substantial evidence. The inclusion of the word "Overtime" with the box "No" clearly checked communicates the fact that this position classification does not allow for monetary overtime compensation.

Petitioners also support their position by noting that they were not notified verbally by their respective supervisors or the Agency's human resource personnel of the change of their position classification from included to excluded. Petitioners offer this evidence to support their belief that their positions had not changed from included to excluded. Factual finding number 18 shows that the ALJ considered evidence in this regard and determined that neither the Petitioners nor their supervisors were aware that the reclassified position was an excluded career service position. The evidence at the hearing clearly establishes that the reason the Petitioners were not notified verbally by

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<sup>3</sup> Transcript at 43.

their supervisors of the change in their classification from included to excluded was because their supervisors were unaware of the change themselves and not because the Petitioners new position classification had in fact remained unchanged. Furthermore, the testimony from the hearing supports the conclusion reached by the ALJ that their positions were in fact reclassified to positions designated by DMS to be excluded positions, and that Petitioners accepted the Agency's offer of employment in those positions.<sup>4</sup>

Additionally, Petitioners point to the fact that the letter dated 03/26/2013 from Ms. Sullivan states that their "current status and salary will remain unchanged" as further support for their position. With respect to the letter's statement that their "current status" will remain unchanged, the testimony supports the finding of the ALJ in finding number 7 that it was the Petitioners' "job duties, salaries and permanent status" that remained unchanged.

With respect to all factual findings made by the ALJ disputed by Petitioners in exception 1, the Agency concludes that all such findings were supported by competent and substantial evidence.

In exception 2 Petitioner's disagree with the ALJ's recommendation again disputing the sufficiency of proof that their positions were reclassified to excluded positions based the position description offered into evidence by Respondent. Petitioners contend the form's indication of "Overtime" with the "No" box marked with an "x" is contradicted by other documents, APD policy, and is "unclear, insufficient and inappropriate."

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<sup>4</sup> See Recommended Order Factual Findings 2, 3, 5, 15, 16 and Conclusion of Law 25.

For this exception Petitioners rely in part on the letter from Ms. Sullivan dated 03/26/2013 and argue that it stands in contradiction to the position description. For the reasons previously discussed with respect to exception 1, the language of the letter does not contradict the position description.

Petitioners also raise for the first time a claim that the position description contradicts Agency Policy No. 01.009.11 because language in the policy defines excluded employees and provides that they are to be compensated for overtime with regular compensatory leave credits, while the position description "states categorically 'overtime No.'" In other words, the Petitioners contend that the position description indicates that all manner of overtime is prohibited while the Agency policy states otherwise. From this Petitioners argue that the position description is "unclear and inappropriate and cannot be taken as proof . . ." that they are, in fact, excluded employees because overtime is not categorically prohibited by the policy. The Petitioners also claim that they remain unsure that they are excluded employees. The basis for the Petitioners continued uncertainty is not clear since there has never been any assertion in these proceedings that a prohibition on all manner of overtime was ever communicated to them or even available. By the same rationale that the Petitioners claim to be unsure that they are excluded employees, they should be more uncertain that they could still be included employees since included employees are afforded the overtime protections of the FLSA requiring monetary compensation for overtime. The answer to Petitioners assertion that the position description is unclear lies in the fact that the position description communicates the effect of being an excluded employee, rather than the fact of being an excluded employee. The effect of a reclassification of

petitioners' positions from included to excluded was that in their reclassified position there is no paid overtime. In addition, the Agency policy, like Rule 60L-34.0043, (FAC), requires the granting of hour-for-hour compensatory leave credits for overtime hours worked. The ALJ found no contradiction between this Rule and the position description, we decline to find one on the basis of the Agency policy.

The Agency finds no grounds to reject the findings of the ALJ based on the claims raised in exception 2.

In exception 3 Petitioners take issue with the fact that the Recommended Order fails to make a factual finding that Petitioners received instructions to work overtime from their supervisors and were following those instructions. Petitioners disagree with the factual findings as written in paragraph 11. The Recommended Order acknowledges in paragraph 18 that the Petitioner's supervisors were not aware that Petitioners could not receive monetary compensation for their overtime. Whether or not the Petitioners were acting under the instructions of their supervisors is no basis for altering the finding of the ALJ that at the time Petitioners worked overtime hours, they were excluded employees and not entitled to monetary compensation for overtime.

The Agency finds no grounds to reject the findings of the ALJ based on the claim raised in exception 3.

In exception 4 Petitioners claim that the Recommended Order minimizes the significance of Agency errors when it refers to an "administrative coding error," describes how it occurred, and found that it was due to an honest mistake. The Petitioners position is that there were multiple mistakes made by various persons within the Agency and that they trusted the information provided by their supervisors.

It is unfortunate that none of the Petitioners nor their supervisors took sufficient notice of the indication on the position description of "Overtime" – "No." Had there been any question asked in regard to that indication on the form, Petitioners and their supervisors may have discovered that compensation for extra hours would only be made in the form of compensatory leave credits under their new position classification. In any event, it is clear from the testimony and the exhibits that the mistaken impression of the Petitioners and their supervisors are not determinative of whether the Petitioners were, in fact, reclassified as excluded employees and therefore not authorized by law to receive monetary compensation for their extra work hours. The reference by the ALJ to the "administrative coding error" and his conclusion that it was an "honest mistake" is based on the testimony provided in the hearing and is supported by competent substantial evidence. With respect to this issue the evidence leads to only one conclusion - had the administrative coding error not occurred, Petitioners would not have received monetary compensation for extra hours worked contrary to Rule 60L-34.0043, FAC.

The Agency finds no grounds to reject the findings of the ALJ based on the claim raised in exception 4.

With respect to all of Petitioners disputes with the ALJ's factual findings, it should be noted that even in situations where an agency may disagree with the factual findings of an ALJ based on a different view of the facts, and even if that agency's different view of the facts is supported by competent and substantial evidence, the factual findings of the ALJ, once supported by substantial and competent evidence, must prevail over an agency's determination of factual findings. The ALJ's factual findings must **not** be



supported by competent and substantial evidence in order for an agency to reject or modify those findings. “[I]f the court concludes that both the administrative law judge’s findings and the agency’s substituted or modified findings are supported by substantial competent evidence, the findings made by the administrative law judge must prevail and the agency’s order rejecting or modifying them must be reversed.” Gross v. Department of Health, 819 So.2d 997 (Fla. 5<sup>th</sup> DCA, 2002).

Based on a review of the record, competent and substantial evidence exists as to all of the ALJ’s factual findings. Paragraph 25 of the Recommended Order states:

The evidence at the hearing clearly shows that after the reclassification of their position to Human Services Program Analyst, Petitioners were classified as excluded career service employees service employees, worked overtime, and received monetary compensation for their overtime hours for which they were not entitled. Instead of receiving monetary compensation for their overtime hours, Petitioners were entitled to receive regular compensatory leave credits on an hour-for-hour basis pursuant to Florida Administrative Code Rule 60L-34.0043.

The Agency agrees.

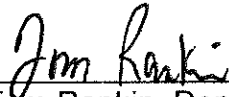
#### CONCLUSION

The Findings of Fact and Conclusions of Law in the Recommended Order are approved and adopted.

Based on the foregoing and being fully advised on the premises, the Agency finds that: 1) Petitioner Ileana Toledo was erroneously paid salary in the amount of \$464.63; 2) Petitioner Norma Pedraza was erroneously paid salary in the amount of \$624.14; and 3) Petitioner Lil Guerrero was erroneously paid salary in the amount of \$426.65. It is hereby ORDERED that the Agency recover the amount of erroneously paid salary from each Petitioner respectively and award each Petitioner compensatory

leave credits for their overtime hours worked as reflected in paragraphs 12-14 of the Recommended Order.

DONE AND ORDERED this 4<sup>th</sup> day of February, 2014, in Tallahassee, Leon County, Florida.

  
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Tom Rankin, Deputy Director of Operations  
Agency for Persons with Disabilities

**RIGHT TO APPEAL**

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. Review proceedings shall be conducted in accordance with Florida Rules of Appellate Procedure. The Notices must be filed within thirty (30) days of the rendition of this final order.<sup>5</sup>

Information about some sources of possible legal assistance may be found at: <http://apd.myflorida.com/customers/legal/resource-listing.htm>.

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Juan Ricardo Collins, Deputy General  
Counsel  
Agency for Persons with Disabilities

Claudia Llado, Clerk  
Division of Administrative Hearings

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, by U.S. Mail or electronic mail, this 4 day of Feb, 2014.

  
\_\_\_\_\_  
Jamie Morrow, Agency Clerk  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, FL 32399-0950

<sup>5</sup> The date of the "rendition" of this Order is the date that is stamped on its first page. The Notices of Appeal must be received on or before the thirtieth day after that date.