

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GERALD KREUCHER,

Petitioner,

vs.

Case No. 13-4644

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF STATE
GROUP INSURANCE,

Respondent.

_____ /

RECOMMENDED ORDER

On February 6, 2014, Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings conducted a hearing pursuant to section 120.57(1), Florida Statutes (2013), in Tallahassee, Florida.

APPEARANCES

For Petitioner: Gerald Kreucher, pro se
1905 South Magnolia Drive
Tallahassee, Florida 32301

For Respondent: Veronica Donnelly, Esquire
Department of Management Services
4050 Esplanade Way, Suite 60
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue to be determined in this proceeding is whether Petitioner is entitled to a refund of premiums paid for life insurance coverage during the 2013 plan year.

PRELIMINARY STATEMENT

On September 10, 2013, Petitioner, Gerald Kreucher, wrote to the People First Service Center and requested a refund of those funds deducted from his pay that reflected an increase in the premium for additional life insurance beginning in March 2013. His request was denied, and, pursuant to the instructions given, Petitioner filed a "Level II appeal" to the Division of State Group Insurance (the Division).

On October 11, 2013, the Division denied Petitioner's Level-II appeal. On November 6, 2013, Petitioner filed a request for hearing with respect to the denial and on November 26, 2013, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

The case was assigned originally to Administrative Law Judge Diane Cleavinger, who on December 16, 2013, scheduled the hearing to commence February 6, 2014, in Tallahassee. Shortly before the hearing, the case was transferred to Administrative Law Judge Lisa Nelson and the case commenced as scheduled.

At hearing, Petitioner testified on his own behalf and Petitioner's Exhibits numbered 1-10 were admitted without objection. Respondent presented the testimony of Lindsay Lichti and Respondent's Exhibits numbered 1-11 were admitted into evidence without objection. The proceedings were recorded but no transcript was ordered. Both parties filed their Proposed

Recommended Orders on February 17, 2014, which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a state employee with over 30 years of public employment.

2. Respondent, Department of Management Services, Division of State Group Insurance (Division), is the state agency charged with administering the state group insurance program. Pursuant to section 110.123(5), Florida Statutes, its duties include determining the benefits to be provided to state employees and the contributions to be required for the state group insurance program. The Department of Management Services is also authorized, pursuant to section 110.161, to administer a pre-tax benefits program that allows employees' contributions to premiums be paid on a pre-tax basis, and to provide for the payment of such premiums through a pre-tax payroll procedure.

3. Among the insurance products available to state employees are group health insurance, basic group term life insurance, and optional group term life insurance. At the crux of this case is the premium to be paid for group term life insurance.

4. Basic insurance is noncontributory insurance (meaning the employer pays the premium) for full-time employees and is

contributory insurance (meaning the employee pays the premium) for part-time employees. Optional insurance is contributory insurance for all employees.

5. At the time relevant to this proceeding, career service, university system support staff, senior management, and select exempt service employees, as well as active state senators and representatives, were entitled to a basic group term life insurance benefit of \$25,000. For retired vested legislators, the basic group term life benefit was \$150,000, and for retirees who were not vested legislators, the benefit was either \$2,500 or \$10,000.

6. Optional group term life insurance was also available to active employees enrolled in basic term life. This insurance coverage was available for purchase up to seven times an employee's annual earnings, to a maximum of \$1,000,000. Both basic and optional life insurance are provided through Minnesota Life.

7. The opportunity to enroll in or make changes to insurance coverage occurs during open enrollment each year.

8. During open enrollment in 2012, Petitioner made selections for the 2013 plan year, which corresponds with the calendar year. Among his selections, Petitioner opted to continue his optional life insurance coverage at four times his annual salary.

9. To make his selection, Petitioner used the People First System. The Minnesota Life screen shot for determining the premium for coverage contains the following information:

Determining the cost

To determine the new monthly cost of changing your Optional Life coverage, please follow the example below:

How is your monthly premium calculated?

1. Your annual earnings = $\frac{\text{_____}}{\text{Basic amount}}$
 2. Choose the salary multiple of one to seven times your annual earnings = $\frac{\text{_____}}{\text{Optional multiple}}$
 3. Multiply your basic amount by your optional multiple and round to the next higher thousand = $\frac{\text{_____}}{\text{Coverage amount}}$
 4. Divide your coverage amount by 1,000 = $\frac{\text{_____}}{\text{\$1,000 increments Of coverage}}$
 5. From the table on the right, find the rate that corresponds with your age = $\frac{\text{_____}}{\text{Rate from table}}$
- X $\frac{\text{_____}}{\text{Answer from \#4}}$
- = $\frac{\text{_____}}{\text{Your monthly Insurance premium}}$

10. The table referenced above provides the premium rates based on age bands, such as under age 30, 30-34, 35-39, etc. For ages 55-59, the rate is \$0.335. From 60-64, the rate is \$0.613.

11. Below the rate/age table is the statement, "[r]ates increase with age and all rates subject to change." However, nothing in the worksheet indicates that the rate changes during a plan year if the insured has a birthday that puts the employee in a different age band.

12. Based upon his completion of the worksheet in People First, the monthly premium for the optional life insurance selected by Petitioner was \$81.08.

13. Petitioner received a document entitled "State of Florida Confirmation of Benefits for 2013 Plan Year." The Confirmation of Benefits document confirmed that for the 2013 plan year, Petitioner's monthly cost for optional life insurance would be \$81.08.

14. For the first two months of 2013, the expected amount of \$81.08 was deducted from Petitioner's salary. However, beginning in March 2013, for the coverage beginning in April 2013, the premium increased from \$81.08 to \$148.36, a difference of \$67.28 per month.^{1/}

15. Petitioner did not receive any specific notice regarding the change in policy premiums. He did not notice the difference in his net pay immediately because his salary is subject to additives, and it was not unusual for the net pay to vary from month to month. Employees do not automatically receive a copy of

their pay stubs. They must affirmatively retrieve them electronically from a Department of Financial Services website.

16. Petitioner first called the People First information line on August 27, 2013, to inquire regarding the increase in premiums. He followed up with a letter dated September 10, 2013, asking for a refund of the amount deducted from his salary in excess of \$81.08 a month.

17. On September 12, 2013, the People First Service Center responded to his request by stating that the increase was a "Significant Cost Increase Qualifying Status Change (QSC) event," and that inasmuch as Petitioner did not request a decrease in coverage level within 60 days of the QSC event, any change to his benefits would have to wait until open enrollment. The letter referenced Florida Administrative Code Rule 60P-2.003, stating,

We are charged with the responsibility of administering the State Group Insurance Program pursuant to these state regulations, as well as the federal regulations.

The rules pertaining to changes in health plans are found in Chapter 60P-2.003 which states:

"An employee may elect, change or cancel coverage within thirty-one (31) days of a Qualified Status Change (QSC) event if the change is consistent with the event pursuant to subsection 60P-2.003(7), F.A.C. or during the open enrollment period."

18. While the letter purports to quote the rule, rule 60P-2.003, the language above does not actually appear as quoted in the rule. Rule 60P-2.003 states in relevant part:

(1) An employee enrolled in the Health Program may apply for a change to family coverage or individual coverage within thirty-one (31) calendar days of a QSC event if the change is consistent with the event or during the open enrollment period.

* * *

(7) All applications for coverage changes must be approved by the Department, subject to the following:

(a) The Department shall approve a coverage change if the completed application is submitted to the employing agency within thirty-one (31) calendar days of and is consistent with the QSC event.

(b) Documentation substantiating a QSC event is as follows:

1. If changing to family coverage, proof of family status change or proof of loss of other group coverage is required.

2. If changing to individual coverage, proof of family status change or proof of change of employment status is required.

3. If adding an eligible dependent to family coverage, proof of family status change is required.

4. If terminating coverage, proof of family status change or proof of employment change is required.

19. On September 23, 2013, Petitioner sought a Level-II appeal, forwarding all of his correspondence to the Division. On October 11, 2013, Barbara Crosier, Director of the Division, wrote to Petitioner and advised that his Level-II appeal was denied. The letter cited rule 60P-2, and stated that Petitioner needed to

have acted within 31 days of the QSC event if the change was consistent with the event, or wait until the open enrollment period. The letter provided Petitioner with notice of his right to a hearing pursuant to chapter 120, Florida Statutes, and on November 6, 2013, Petitioner filed a request for hearing that resulted in these proceedings.

20. Both the correspondence from People First and the letter from Ms. Crosier refer to a qualifying status change. However, the definition of a QSC event in rule 60P-1.003(17) does not include a change in age band. The events identified in the rule are "the change in employment status, for subscriber or spouse, family status or significant change in health coverage of the employee or spouse attributable to the spouse's employment."

21. There is a table available somewhere through People First^{2/} entitled "State of Florida Qualifying Status Change Event Matrix." The matrix identifies changes in status, the type of documentation required, and the options available to the employee. There was no evidence presented indicating that the matrix has been adopted by rule and in some instances, the matrix is inconsistent with both section 110.123 and rule 60P-1.003. Petitioner did not see this matrix when making his insurance selections during open enrollment.

22. Included in the matrix as a category of QSC events is a category entitled "Significant Cost Changes." Under this

category, the grid identifies "[p]remium increase or decrease to subscriber of at least \$20 per month as a result of a change in pay plan (e.g., Career Service to SES), FTE (e.g., part-time to full-time), LWOP, FMLA, legislative premium mandates, Optional Life age banding, etc."

23. The category "significant cost changes" is not identified as a QSC event in rule 60P-1.003(17).

24. Footnote four of the matrix states, "[t]he period of time to make allowable changes to benefits, as defined by the IRS. All QSC windows are 60 days unless otherwise specified." Footnote four is appended to text within the cell for information related to a change in marital status, which states "60-day QSC window⁴." Petitioner credibly testified that he was not experiencing any change to marital status, so did not believe that the information identified in footnote four would necessarily relate to his circumstances.

25. On December 19, 2008, the Division published the State of Florida Salary Reduction Cafeteria Plan with a Premium Payment Feature, a Medical Reimbursement Component, and a Dependent Care Component (Salary Reduction Cafeteria Plan), which Petitioner submitted without objection as Petitioner's Exhibit 10. This document is available on the DMS website but has not been identified as a rule. However, it is consistent with the requirements of 26 U.S.C. § 125, which authorizes cafeteria plans,

and 26 C.F.R. § 125-4, which identifies permitted election changes in cafeteria plans. The Salary Reduction Cafeteria Plan states:

1.1 Establishment of Plan

The Department of Management Services, Division of State Group Insurance established the State of Florida Flexible Benefits Plan effective July 1, 1989. The Department of Management Services, Division of State Group Insurance hereby amends, restates and continues the State of Florida Flexible Benefits Plan, hereafter known as the State of Florida Salary Reduction Cafeteria Plan ("the Plan"), effective December 19, 2008.

This plan is designed to permit an Eligible Employee to pay on a pre-tax basis for his or her share of premiums under the Health Insurance Plan, the Life Insurance Plan and the Supplemental Insurance Plan, and to contribute to an account for pre-tax reimbursement of certain medical care expenses and dependent care expenses.

1.2 Legal Status

This Plan is intended to qualify as a "cafeteria plan" under Section 125 of the Internal Revenue Code 1986, as amended ("the Code"), and regulations issued there under.

The Medical Reimbursement Component of this Plan is also intended to qualify as a "self-insured medical reimbursement plan" under Code 105(h), and the Medical Care Expenses reimbursed under that component are intended to be eligible for exclusion from participating Employees' gross income under Code 105(b).

The Dependent Care Component of the Plan is intended to meet the requirements of Code 129.

The Life Insurance Plan is intended to meet the requirements of Code 79.

26. The Salary Reduction Cafeteria Plan contained definitions for a change in status. Those definitions are consistent with the definitions in rule 60P-1.003(17), although more detailed in terms of description. The definition does not include a change in cost due to age banding.

27. Section 4.3 of the Salary Reduction Cafeteria Plan provides:

Each eligible Employee's Salary Reduction Agreement shall remain in effect for the entire Plan Year to which it applies, shall be irrevocable (except as provided in Sections 5.6, 6.4, and 7.4) and shall set forth the amount of the Participant's Compensation to be used to purchase or provide benefits and the benefits to be purchased or provided.

28. Sections 6.4 and 7.4 deal with a participant's election to participate in the medical reimbursement component and the dependent care components of the plan and have no bearing on this proceeding.

29. Section 5.6 deals with the irrevocability of the election under the premium component of the plan. The section states in pertinent part:

In other words, unless one of the exceptions applies, the Participant may not change any elections for the duration of the Plan Year regarding:

- Participation in this Plan;
- Salary Reduction Amounts; or
- Election of particular component plan benefits.

The exceptions to the irrevocability requirement, which would permit a Participant to make a mid-year election change in benefits and/or Salary Reduction amounts for this Premium Payment Component, are as follows:

(a) *Change in Status:* A Participant may change or terminate his actual or deemed election under the Plan upon the occurrence of a change in status, but only if such change or termination is made on account of, and is consistent with, the change in status. The Administrator (in its sole discretion) shall determine whether a requested change is on account of, and is consistent with, a change in status.

(b) *Special HIPAA Enrollment rights. . . .*

(c) *Certain judgments, decrees and orders. . . .*

(d) *Medicare and Medicaid. . . .*

(e) *Significant Change in Cost or Coverage.* A Participant may revoke a prior election with respect to pre-tax contributions and, in lieu thereof, may receive, on a prospective basis, coverage under another plan with similar coverage if any independent, third-party provider of medical benefits previously elected by the Participant either significantly increases the premium for such coverage, or significantly curtails the coverage available under such plans, during the plan year coverage period. (Note: if any mid-year premium increase by the third-party provider is insignificant, the Participant's Salary Reduction election will be

automatically adjusted by the Administrator or its agent.

(f) *Significant Change in Coverage Attributable to Spouse's Employment. . . .*
(emphasis added).

30. None of the exceptions to irrevocability identified above apply in this instance.

31. Section 5.2 of the Agreement addresses the Participant's contributions and is the provision upon which Petitioner relies. It states in pertinent part:

If an employee elects to participate in the Premium Payment Component the Participant's share (as determined by the employer) of the premium for the plan benefits elected by the Participant will be financed by salary reductions. The salary reduction for each pay period is an amount equal to the annual premium divided by the number of pay periods in the plan year, or an amount otherwise agreed upon. . . . (emphasis added).

32. Petitioner did not experience a QSC event.

33. The Confirmation of Benefits received by Petitioner identifies the amount of premium Petitioner has agreed to pay and the benefit he was to receive for that premium.

34. He elected optional life insurance coverage in accordance with the information provided to him on the People First screen. The statement "rates increase with age" can be construed, as Petitioner did, to explain the differences in rates reflected in the table described in paragraph 10.

35. Nothing placed Petitioner on notice that upon achieving his 60th birthday, his premium would automatically increase to the next premium category. Such an interpretation is inconsistent with the method of premium calculation described in paragraph 5.2 of the Salary Reduction Cafeteria Plan.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.659 and 120.57(1), Florida Statutes (2013).

37. Petitioner is substantially affected by the increase in premium deducted from his salary. Accordingly, Petitioner has standing to challenge the deduction of the additional premium.

38. Petitioner is seeking a refund of the additional premium. Because he is seeking affirmative relief, Petitioner has the burden of demonstrating his entitlement to a refund by a preponderance of the evidence. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); § 120.57(1)(j), Fla. Stat.

39. Section 110.123(4)(g), Florida Statutes, provides that "[n]o administrative or civil proceeding shall be commenced to collect an underpayment or refund an overpayment of premiums collected pursuant to this subsection unless such claim is filed with the department within 2 years after the alleged underpayment

or overpayment was made." The subsection specifies that "[f]or purposes of this paragraph, a payroll deduction, salary deduction, or contribution by an agency is deemed to be made on the date the salary warrant is issued." The first increase in premium deducted from Petitioner's salary occurred in March 2013, and his request for refund occurred in September 2013.

Petitioner's request for a refund is thus timely pursuant to section 110.123.

40. Petitioner contends that he is entitled to a refund because the agreement he made was to receive term life insurance at four times his salary for a premium of \$81.08 a month for the plan year. The increase in premium, he asserts, was not contemplated in the agreement that he entered or by the Confirmation of Benefits that he received.

41. Respondent counters that his change in age is a qualifying status change event, contemplated by documents available in People First, and that his request to change benefits was beyond the time period allowed for adjustments as a result of QSC events. Respondent also asserts that Petitioner consented to the increase pursuant to Florida Administrative Code Rule 60P-2.002(3).

42. Respondent's claim that attainment of the age of 60 is a QSC event relies on the matrix contained in Respondent's Exhibit 4. However, no evidence was presented to demonstrate

that this matrix has been adopted through the rulemaking process. Further, the definition of a QSC event contained in rule 60P-1.003(17) does not include age banding. Rule 60P-1.003(17) states:

“Qualifying status change (QSC) event” or “QSC event” means the change in employment status, for subscriber or spouse, family status or significant change in health insurance coverage of the employee or spouse attributable to the spouse’s employment.

The same definition is contained in rule 60P-6.006(13). Neither rule refers to a change in age as a QSC event. Accordingly, attaining the age of 60 is not a QSC event.

43. The Division also relies on rules 60P-2.002(3) and 60P-6.0068(1). Rule 60P-2.002(3) provides:

(3) The employee acknowledges that eligibility and enrollment are governed by Section 110.123, Florida Statutes; authorizes the State to reduce salary as often and in amount necessary to continue coverage; authorizes the State to deduct from salary any underpayment of employee contribution or overpayment of claims; acknowledges that premiums may change from time to time;

Similarly, rule 60P-6.60068 states in pertinent part:

(1) A participant’s salary reduction amount shall be increased or decreased automatically to correspond to any changes in employee contributions where, during the Plan Year, there has been a change in the cost of the premium under the State Health Insurance Program.

44. Rule 60P-6.0068 specifies that the automatic change salary reduction is tied to mid-year changes to the premium of the State Health Insurance Program. The premium at issue here is not for health insurance, but life insurance. Regardless, the acknowledgement identified in the rule that insurance premiums may change from time to time does not necessarily mean that an employee waives the right to contest the basis of the change.

45. In support of his argument that he bargained for the premium contained in his Confirmation of Benefits, Petitioner points to the Salary Reduction Cafeteria Plan (Petitioner's Exhibit 10), which states that the premium amount is determined by dividing the annual premium by the number of pay periods in the plan year. Respondent did not object to the introduction of Petitioner's Exhibit 10.

46. The Salary Reduction Cafeteria Plan, like the matrix in Petitioner's Exhibit 4, does not appear to have been adopted by rule. Usually, an agency may not base agency action that determines the substantial interests of a party on an unadopted rule. § 120.57(1)(e), Fla. Stat. However, section 110.123(5) requires the Department to determine the benefits to be provided and the contributions to be required for the state group insurance program. The Salary Reduction Cafeteria Plan appears to serve this function. Section 110.123(5)(a) expressly exempts these determinations from the definition of a rule under section 120.52.

If the Salary Reduction Plan is not what is contemplated by section 110.123(5), then the Department is remiss in not adopting what was intended as a rule pursuant to section 120.54. Given the length of time that it has remained in place without rule adoption, it is presumed that it constitutes the determination and plan contemplated by section 110.123(5) (a) and (b).

47. The Salary Reduction Cafeteria Plan supports Petitioner's position. The Confirmation of Benefits he received indicates that it was for the 2013 plan year, as opposed to some portion of that year. The Salary Reduction Cafeteria Plan indicates that the payment is determined by a division of the annual premium. Absent some express notification that Petitioner's 60th birthday would trigger a different premium, he was entitled to rely on the representation that for the plan year, his premium would be \$81.08 per month.

48. Respondent points to the statement that "rates increase with age" on the premium worksheet as alerting Petitioner that his rate would change during the course of the year. However, the statement can also be interpreted as simply explaining the reason for the different age bands. It does not place an employee on notice that upon reaching the birthday at the top of a band, the rate changes during the course of the year.

49. There are other reasons why this statement would not notify an employee of an automatic change in premium. First, it

is inconsistent with the treatment identified in the Division's rules with respect to other age-related issues. For example, rule 60P-1.003(7) defines eligible children for the purposes of plan benefits. Children are eligible for coverage as defined in the rule as follows:

(a) From their date of birth to the end of the month in which their nineteenth (19th) birthday occurs;

(b) From their nineteenth (19th) birthday to the end of the calendar year in which their twenty-fifth (25th) birthday occurs, if they are dependent upon the subscriber for support and are either living with the subscriber or enrolled in any school

50. This rule specifically indicates when the coverage eligibility stops at the end of the month during the plan year and when it extends through the plan year. The Division is clearly capable of identifying when coverage issues and premiums change during a plan year. Given that the Confirmation of Benefits gave a single amount for a monthly premium for the year in its entirety, it was logical and reasonable for Petitioner to believe that the listed amount was the amount contemplated for the entire year.

51. Second, the Division's contract with Minnesota Life requires the contractor to "comply with all laws, rules, codes, ordinances, and licensing requirements that are applicable to the conduct of its business." (Respondent's Exhibit 10, Section 10.5)

This necessarily requires compliance with those regulations related to the offering of life insurance.

52. Chapter 626, Florida Statutes, and Florida Administrative Code Chapter 690-150 regulate the activities of insurers and their agents. The rules in chapter 690-150 were officially recognized by Order dated January 22, 2014.

53. Florida Administrative Code Rule 690-150.107(1)(b) specifies that "[i]nvitations to contract must clearly reflect the insurer, the agent, the policy form number(s), the type plan, premium payable, payment period, and if applicable, changes in face amounts and premiums." Similarly, rule 690-150.108 requires that "[a]n advertisement which is an invitation to contract shall disclose the provisions relating to renewability, cancellability, and termination and any modification of benefits, losses covered or premiums because of age or for other reasons, in a manner which shall not minimize or render obscure the qualifying conditions."

54. Simply put, these provisions make it clear that notice must be clearly stated to a purchaser when and if there will be changes to the premium. When the change, such as one tied to age banding, is clearly contemplated by the insurer, the notice must be plainly stated. The general statement "rates increase with age and are subject to change" does not accomplish this objective and, without more, is misleading. Moreover, when asked at hearing whether there was any statement available at open enrollment that

notified an employee that the rate would automatically change when the employee reached his birthday, the Division's representative could not identify any such statement.

55. Under these circumstances, Petitioner has demonstrated by a preponderance of the evidence that he contracted for optional life insurance at a rate of \$81.08 per month for the plan year 2013, and increased deductions based upon his age were not appropriate, absent express notification in accordance with rules 690-150.107 and 690-150.108.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a Final Order authorizing the refund of excess premiums in the amount of \$605.52.

DONE AND ENTERED this 13th day of March, 2014, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of March, 2014.

ENDNOTES

^{1/} The premium for Petitioner's optional life insurance also increased in November 2013, from \$148.36 to \$149.59. December's premium was \$150.82. Both increases were as a result of salary increases (and a correspondent increase in the coverage amount). Petitioner does not contest these small increases.

^{2/} How one would access this table was not explained at hearing.

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.