

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUSAN G. BERG,

Petitioner,

vs.

Case No. 14-0540

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF STATE
GROUP INSURANCE,

Respondent.

_____ /

RECOMMENDED ORDER OF DISMISSAL

This cause came before the undersigned on Respondent's Motion to Dismiss filed February 10, 2014, and Petitioner's Response to Motion to Dismiss filed February 11, 2014.

APPEARANCES

For Petitioner: Susan G. Berg
11143 Pine Ridge Road
Leesburg, Florida 34788

For Respondent: Sonja P. Mathews, Esquire
Department of Management Services
Office of the General Counsel
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner's request for hearing was timely filed or should otherwise be accepted by the Department of Management Services and the Division of Administrative Hearings.

PRELIMINARY STATEMENT

This case was initiated after the Department of Management Services, Division of State Group Insurance (Department or Respondent) issued a notice (Notice) setting forth its [preliminary] determination to deny Petitioner's Level-II Appeal regarding Petitioner's request to cancel her dental plan and receive reimbursement for associated costs. Thereafter, Petitioner filed a petition for a formal hearing (Petition), which was referred to the Division of Administrative Hearings (DOAH) on February 4, 2014. The undersigned issued an Initial Order in this case on February 4, 2014.

On February 10, 2014, Respondent filed a Motion to Dismiss (Motion) alleging that the Petition was untimely filed. Attached to the Motion were a copy of the Notice; a copy of the certified mail receipt of the Notice that was date-stamped May 14, 2013; and a copy of the Petition bearing the Department's June 5, 2013, date-stamped filing date. Petitioner's response (Response) to the Motion does not dispute the alleged date that she received the Notice or the date that her Petition was filed with the Department. Rather, Petitioner's Response asserts that Petitioner mailed her Petition to the Department by certified mail on June 1, 2013, and the post office receipt reflects that June 3, 2013, was the "expected date of delivery." Petitioner's Response further

argues that if the Memorial Day of May 27th is excluded from the 21-day filing deadline period, her Petition was timely filed.

The Motion and Response, together with the attached exhibits of each, show that Petitioner's Petition requesting an administrative hearing was filed with the Department beyond the 21-day period required by the Notice and Florida Administrative Code Rule 60P-1.004.

Having reviewed the matter fully, accepting all of Petitioner's allegations as true, and having considered the allegations in the manner most favorable to the Petitioner, for the reasons set forth below it is concluded that, as a matter of law, the request for formal hearing should be dismissed as untimely, and the Department of Management Services should enter a final order consistent with its notice of proposed agency action.

FINDINGS OF FACT

1. On May 14, 2013, Petitioner received the Notice, consisting of the Department's letter denying Petitioner's Level-II Appeal in which Petitioner had requested cancellation of her dental plan and reimbursement of associated costs.

2. The Notice included a notice of rights advising Petitioner that she could request an administrative hearing by filing a request for hearing within 21-calendar days of her receipt of the Notice.

3. Memorial Day was observed as a national holiday in the United States on May 27, 2013. There are no facts or circumstances in this case, however, indicating that the 21-day period for filing a request for administrative hearing was tolled or suspended because of Memorial Day.

4. Not counting the May 14, 2013, date of receipt of the Notice, the 21st day for filing a request for hearing fell on Tuesday, June 4, 2013.

5. Petitioner mailed her Petition requesting a hearing on June 1, 2013.

6. Petitioner's receipt from the post office reflects an expected delivery date of June 3, 2013. Petitioner's Petition, however, was not received by the Department until June 5, 2013.

7. There is no indication that Petitioner sought or was granted an extension of the 21-day period within which to seek an administrative hearing from the date of her receipt of the Notice.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Fla. Stat. (2013).^{1/}

9. Respondent cites to Florida Administrative Code Rule 60P-1.004 as support for the dismissal of the request for hearing. That rule provides that:

Any party whose substantial interests have been or will be determined by a decision or intended decision of the Division of State Group Insurance and who desires to contest the agency's decision or intended decision shall submit a petition for an administrative hearing that complies with Rule 28-106.201, F.A.C., if there is a dispute of material fact, or Rule 28-106.301, F.A.C., if there is no dispute of material fact. The petition must be received by the agency clerk of the Department within twenty-one (21) calendar days after notice of the decision or intended decision is received by the party. The clerk's address is Office of General Counsel, Department of Management Services, 4050 Esplanade Way, Tallahassee, FL 32399-0949. Proceedings shall be conducted pursuant to Chapter 120, Florida Statutes, and Rule Chapter 28-106. (emphasis added).

10. Florida Administrative Code Rules 28-106.111(2)-(4)

provide:

(2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision.

(3) An agency may, for good cause shown, grant a request for an extension of time for filing an initial pleading. Requests for extension of time must be filed with the agency prior to the applicable deadline. Such requests for extensions of time shall contain a certificate that the moving party has consulted with all other parties, if any, concerning the extension and that the agency and any other parties agree to or oppose the extension. A timely request for extension of time shall toll the running of

the time period for filing a petition until the request is acted upon.

(4) Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

11. Florida Administrative Code Rule 28-106.104(1)

provides:

In construing these rules or any order of a presiding officer, filing shall mean received by the office of the agency clerk during normal business hours or by the presiding officer during the course of a hearing.

12. Section 120.569(2)(c), Florida Statutes, provides, in pertinent part, that "[a] petition shall be dismissed if it . . . has been untimely filed."

13. Dismissal of an untimely request for hearing is mandatory unless facts exist to support the application of the doctrine of equitable tolling. Section 120.569(2)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.111(4); Machules v. Dep't of Admin., 523 So. 2d 1132 (Fla. 1988); Riverwood Nursing Ctr., LLC v. Ag. for Health Care Admin., 58 So. 3d 907 (Fla. 1st DCA 2011); Cann v. Dep't. of Child. & Fam. Servs., 813 So. 2d 237 (Fla. 2d DCA 2000). Equitable tolling may be applicable "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or

has timely asserted his rights mistakenly in the wrong forum.”
Machules at 1134.

14. There has been no suggestion that Petitioner was misled or lulled into inaction as a result of any act or omission of the Department or any other person. To the contrary, the documents filed in this proceeding reflect that the Department clearly advised Petitioner of the timeframe and procedure for requesting a hearing as well as the consequences for failure to timely request a hearing. Likewise, Petitioner has not asserted that she timely asserted her rights in the wrong forum. Therefore, the sole issue for consideration is whether Petitioner was, in some extraordinary way, prevented from timely asserting her rights.

15. The facts alleged by Petitioner are not so extraordinary as to have prevented Petitioner from asserting her rights. The fact that the post office receipt reflects an expected date of delivery of June 3, 2013, is not an extraordinary occurrence as to require the application of equitable tolling to excuse the late filing of Petitioner's request for hearing. Likewise, a four-day delay from mailing until delivery is not extraordinary. Cf., e.g., Fla. Admin. Code R. 28-106.103 (where applicable, 5 days added for service by mail).^{2/}

16. Petitioner could have requested additional time to file which would have, without more, tolled the time for filing. Fla. Admin. Code R. 28-106.111(3). Petitioner, however, did not request additional time, but rather relied on an "expected date" of delivery by the post office.

17. Petitioner's suggestion that the intervening Memorial Day holiday should add another day to the 21-day period is also without merit. Florida Administrative Code Rule 28-106.103, Computation of Time, provides for additional time for intermediate Saturdays, Sundays, and legal holidays only when the period of time is less than 7 days, or when a Saturday, Sunday or holiday falls on the last day of a given time period.

18. In sum, Petitioner's request for hearing should be dismissed because it was filed with the Department more than 21 days after Petitioner received the letter denying her Level-II appeal.

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Management Services, issue a final order dismissing Petitioner's request for hearing.

DONE AND ENTERED this 28th day of February, 2014, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2014.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes or Florida Administrative Code are to the 2013 versions.

^{2/} In this case, since the Department must receive Petitioner's request within the 21-day period, the date of filing, as opposed to the date of service, is the pertinent date.

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 of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will issue the Final Order in this case.