

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY,

Petitioner,

vs.

Case No. 16-4657

DEPARTMENT OF MANAGEMENT  
SERVICES, DIVISION OF  
RETIREMENT,

Respondent.

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RECOMMENDED ORDER

On November 16, 2016, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Joni A. Mosely, Esquire  
Assistant County Attorney  
Miami-Dade County Attorney's Office  
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For Respondent: Veronica E. Donnelly, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether a retiree's forfeiture of Florida Retirement System (FRS) benefits authorizes Respondent to seize from unrelated remittals due Petitioner the sum of \$18,271.75, which is the amount that Respondent had previously deducted from the retiree's pension benefits and remitted to Petitioner for the payment of the retiree's insurance premiums.

PRELIMINARY STATEMENT

On March 31, 2016, Respondent setoff \$18,271.75 from a consolidated monthly remittal to Petitioner of premiums that Respondent deducted from retirees' pension benefits. The setoff represented a portion of a retiree's now-forfeited retirement benefits that, pursuant to the retiree's directions, Respondent had previously remitted to Petitioner, so Petitioner could pay the retiree's insurance premiums; however, the consolidated monthly remittal against which Respondent claimed the setoff contained no remittals on behalf of the retiree who had forfeited his pension benefits. In response to an inquiry from Petitioner, Respondent first advised Petitioner of the existence and reason for the setoff on April 1, 2016.

On August 17, 2016, Petitioner filed a Petition Requesting an Administrative Hearing to recover the withheld money. Respondent transmitted the file to DOAH on August 17, 2016.

At the start of the hearing, Respondent moved for a summary recommended order of dismissal for a lack of subject matter jurisdiction. The Administrative Law Judge reserved ruling. The legal issues raised by this motion are addressed in the Conclusions of Law.

At the hearing, Petitioner called two witnesses and offered into evidence four exhibits: Petitioner Exhibits 1-4. Respondent called one witness and offered into evidence three exhibits: Respondent Exhibits 1-3. All exhibits were admitted.

The court reporter filed the transcript on December 7, 2016. Each party filed a proposed recommended order by January 5, 2017.

#### FINDINGS OF FACT

1. Employed by Petitioner in April 1974, Garfield Perry participated in the FRS pension plan. On or about October 31, 2009, Mr. Perry terminated his employment and began receiving his monthly FRS pension benefit. Two months earlier, Mr. Perry had entered into an agreement with Petitioner for it to provide post-retirement life insurance for Mr. Perry and medical and dental insurance for Mr. Perry and his wife with all three policies commencing in November 2009. While these policies were in effect, pursuant to an agreement between Petitioner and Respondent that is described below, Respondent remitted to Petitioner a portion of Mr. Perry's FRS pension benefit equal

to \$17,429.47 for medical and dental premiums and \$842.28 for life insurance premiums, for a total of \$18,271.75.

2. Petitioner is a self-insurer for medical insurance, so, on receipt of medical insurance premiums, Petitioner pays a portion of the premiums to a third-party administrator for insurance-related services and reserves the remainder for the payment of claims. For dental and life insurance, Petitioner remits the premiums to the respective insurers.

3. On May 7, 2014, Mr. Perry pleaded guilty to one count of bribery and extortion in the United States District Court, Southern District of Florida, in connection with his employment in Petitioner's Public Works Department. On or about July 29, 2014, the court adjudicated Mr. Perry guilty. By letter dated August 6, 2014, Respondent advised Mr. Perry that, pursuant to article II, section 8(d), of the Florida Constitution, and sections 112.3173 and 121.091(5), Florida Statutes, his FRS benefits were forfeited due to his guilty plea.

4. Mr. Perry requested an administrative hearing on the forfeiture, and Respondent transmitted the file to DOAH, which designated the case as DOAH Case No. 14-4195. On December 31, 2014, Mr. Perry voluntarily dismissed his request for hearing prior to the final hearing, and, on January 9, 2015, Respondent issued a Final Order of Dismissal that finds, among other things, that Mr. Perry committed the criminal offenses "from in

or about 2006 through in or about October 2009." The final order formally declares a forfeiture of Mr. Perry's FRS pension benefits, evidently including benefits already paid.

5. Respondent did not provide Petitioner with a copy of the August 6, 2014, letter, the Final Order of Dismissal, or any of the pleadings in DOAH Case No. 14-4195. The present record does not indicate if Petitioner had actual notice of the forfeiture process. However, this case likely represents the first time that Respondent has attempted to recover insurance premiums that it has remitted to an agency or company following the retiree's forfeiture of retirement benefits, and it is unlikely that Petitioner was aware of its potential liability to repay these amounts until April 1, 2016, as described below.

6. This potential liability arguably arises from a Payroll Deduction Agreement entered into by Petitioner and Respondent. The agreement allows a retiree to authorize Respondent to deduct monthly from his pension benefit an amount equal to his insurance premiums and to remit this sum to Petitioner, so that it can pay the retiree's premiums. In this case, Respondent remitted insurance premiums to Petitioner from November 2009 through October 2012 and allocated them in the manner set forth above in paragraph 2. Three and one-half years after the last remittal that included any sums for Mr. Perry's insurance premiums, almost two years after Mr. Perry's guilty plea, and

about 15 months after the final order declaring the forfeiture, Respondent withheld \$18,271.75 from Respondent's March 2016 consolidated remittal to Petitioner on the account of other retirees in an attempt to recover the remittals that Respondent had made to Petitioner to pay Mr. Perry's insurance premiums.

7. The Payroll Deduction Agreement is a form prepared by Respondent that is signed by the agency or company seeking to receive remittals for its FRS retirees. Under the agreement, which has a signature line only for the agency or company and not Respondent, the agency or company agrees to preserve the confidentiality of the information, assume responsibility for the accuracy of the premium deductions, and notify Respondent timely of the discontinuation of this payroll deduction service. An employee of Petitioner signed the Payroll Deduction Agreement on April 27, 2009.

8. The Payroll Deduction Agreement requires the agency or company to accept the "Procedures for Admitting Insurance Providers for Retired Payroll Deduction." The procedures document states that Respondent offers the convenience of payroll deduction of insurance premiums as a service to FRS pension recipients. Only two paragraphs of this document address post-deduction adjustments:

11. If a retiree's insurance premium is deducted incorrectly for any reason (i.e.-- overpayment of amount, policy cancelled,

administrative error, etc.), the Insurance provider company or FRS agency is responsible for refunding the premium amount to the retiree.

13. [1] If a retirement benefit is cancelled by the Division of Retirement, the corresponding insurance premium that was deducted from that same dated payment is recovered from the following month's consolidated insurance payment.

[2] Reasons for cancellations include payee deaths, [sic] cancelling retirement.

[3] When determining the amount of insurance premiums to be reimbursed to families of deceased members, please note that the Division cannot determine when a death will be reported or when funds will be returned [sic] from banks (resulting in cancellations). [4] There are occasions when a report of death is received months after a retiree's death.

[5] If payments for the deceased are still outstanding, they most likely will be cancelled. A common example follows:

Example: Payee dies 1/5/09. Family reports death to the Division on 4/1/09. Retiree was only due payments through the month of January. Since the February and March payments are still outstanding, these paper checks are cancelled by the Division of Retirement. This cancellation action recovers the 2/27/09 and 3/31/09 premium deductions from the 4/30/09 consolidated payment. A credit entry will also appear on the April 2009 report of retiree insurance deductions. Please Note: We recommend that you contact the Division of Retirement to inquire about possible payment cancellations prior to processing premium reimbursements.

9. Paragraph 11 of the Payroll Deduction Agreement requires that an agency or company repay the retiree any excessive premium deduction, so is irrelevant in the case of forfeiture.

10. Paragraph 13 of the Payroll Deduction Agreement applies to the situation in which a premium deduction is unfunded because of the cessation of the pension benefit from which it is deducted. In its proposed recommended order, Petitioner argues that the application of paragraph 13 is prospective only, so it would not apply to a retroactive setoff of the type that has occurred in this case.

11. The first sentence identifies the contingency of the cancelation of a retirement benefit and authorizes Respondent to recover its remittal of any premiums deducted from the cancelled pension benefit, but mentions a recovery or setoff only in the month following the cancelation. This establishes the kind of liability that Respondent seeks to impose on Petitioner, but only for the brief period of one month. Obviously, the willingness of an agency or company to assume this minor liability for the convenience of its retirees does not imply a willingness to assume a much larger liability spanning several months or even years of remittals.

12. The second sentence cites two common reasons for cancelation: the death of the retiree and the cancellation of



the pension benefit by the retiree. The use of "includes," as well as the insertion of a comma in place of "and" or "or," suggests that these two reasons are illustrative, not exhaustive. Even so, the second sentence does not add the reason of forfeiture, and, at this point in paragraph 13, the details of the parties' agreement concerning a forfeiture has not been explicitly addressed.

13. The third and fourth sentences address only the contingency of the death of the retiree, in which case Respondent recovers unearned premiums that Respondent intends to remit to the estate of the retiree--in most cases, one assumes, indirectly to the families of the deceased member. Typically, insurers are not exposed to the risk of insured losses after the death of a retiree--even a life insurer's exposure ends after the insured's death and payment of the death benefits--so any premiums paid after death are unearned and should be refunded to the proper party. The warning that Respondent may not learn of the retiree's death for many months suggests a longer period may be available for retroactive adjustments, but this warning applies only to the contingency of death, again, where the insurers are obligated to refund unearned premiums.

14. The fifth sentence also addresses only the contingency of the death of a retiree and seems to provide only that Respondent will cancel any pension benefits or premium remittals

still outstanding at the time of the retiree's death. The example illustrates a three-month delay in the receipt of notification of a retiree's death followed by the cancellation of the pension benefits issued in the preceding two months, which presumably could not have been lawfully presented for payment by anyone besides the deceased retiree. In this case, Respondent would issue a corresponding credit entry on the next month's report of premium deductions made on account of the retiree.

15. The procedures document thus fails to address the contingency of forfeiture. The provisions applicable to the contingencies of the death of the retiree and the retiree's cancellation of pension benefits are a poor fit for the contingency of forfeiture.

16. Respondent has previously recovered income tax withheld on paid pension benefits following a forfeiture, but the recovery was limited to the period during which an amended personal income tax return could be filed--the effect being that the amount could be effectively recovered in the form of a tax refund from the Internal Revenue Service, rather than from an agency or company.

#### CONCLUSIONS OF LAW

17. Administrative jurisdiction is limited to a "proceeding. . . in which the substantial interests of a party

are determined by an agency." § 120.569(1), Fla. Stat. If a disputed issue of material fact exists, DOAH has jurisdiction to conduct a formal hearing under section 120.57(1); if not and absent a contrary agreement between the parties, the agency has jurisdiction to conduct an informal hearing under section 120.57(2). Id.

18. Respondent primarily argues that this is not a proceeding in which the substantial interests of a party are determined by an agency. In the alternative, though, Respondent argues that no disputed issue of material fact exists, so, if a right to an administrative proceeding exists, it is a right to an informal hearing conducted by Respondent, not a formal hearing conducted by DOAH. The more extensive analysis required to resolve Respondent's primary argument is more clearly presented by first dismissing Respondent's alternative argument.

19. The parties agree on the basic facts of the case, but dispute whether, after Mr. Perry forfeited his pension benefits, the Payroll Deduction Agreement authorizes Respondent's seizure of \$18,271.75 from monies otherwise due to be remitted by Respondent to Petitioner. The resolution of this dispute is the fact question that would provide the right to a formal hearing, under section 120.57(1), provided the other jurisdictional requirements of section 120.569 had been met.

20. If an agreement contains a patent ambiguity, it cannot be resolved without improperly writing the contract for the parties, but, if an agreement that is not obviously ambiguous fails merely to address a certain contingency, it contains a latent ambiguity that can be resolved. See, e.g., Hunt v. First Nat'l Bank, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980). Various rules govern the resolution of disputes under a latently ambiguous contract: for instance, a reasonable interpretation is preferred over an unreasonable interpretation, and an equitable interpretation is preferred over an inequitable interpretation. Id. at 1197.

21. The Payroll Deduction Agreement contains a latent ambiguity because it fails to address the contingency of forfeiture. Determining the proper treatment of the premiums that Respondent deducted from Mr. Perry's pension benefits and remitted to Petitioner, it is necessary to imply the parties' contract in fact. A contract in fact

is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words. Where an agreement is arrived at by words, oral or written, the contract is said to be "express." A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. It is to this process of defining an enforceable agreement that Florida courts have referred when they have

indicated that contracts implied in fact  
"rest upon the assent of the parties."

Gem Broadcasting, Inc. v. Minker, 763 So. 2d 1149, 1150 (Fla.  
4th DCA 2000).

22. Both Petitioner and Respondent suffered losses from the criminal acts of Mr. Perry. As Mr. Perry's employer, Petitioner suffered the loss of the honest administration of public works contracts and Mr. Perry's usurpation of property rights that belonged to Petitioner. As the administrator of Mr. Perry's pension plan, Respondent suffered the loss of paying benefits to a retiree who had abused the public trust in the course of his FRS-covered employment and thus forfeited his retirement benefits. In this proceeding, Respondent attempts to shift a portion of the economic burden of its loss onto Petitioner, even though the equities lie entirely with Petitioner.

23. It is unreasonable and inequitable to extend an agency or company's casual assumption of liability for one or two months of remitted premiums to an assumption of liability for several years of remitted premiums. Not surprisingly, this is likely the first time that Respondent has construed the Payroll Deduction Agreement to authorize a post-forfeiture setoff of deducted premiums remitted to a third party; this is almost certainly the first time that Respondent has construed the

Payroll Deduction Agreement to authorize a setoff three and one-half years following the last of a lengthy period of remittals to a third party. Lastly, the remittals that Respondent has "recovered" no longer exist because, years earlier, they were expended on Mr. Perry's insurance coverage. Respondent has instead merely seized from unrelated money due to be remitted to Petitioner an amount equal to the amount that, years earlier, it had remitted to Petitioner for Petitioner to expend on Mr. Perry's insurance coverage.

24. Even though the present proceeding presents a disputed issue of material fact, administrative jurisdiction exists only if the present proceeding is a "proceeding. . . in which the substantial interests of [Petitioner] are determined by [Respondent]." A claim of right to money is a substantial interest. O'Connor v. Zane, 79 So. 3d 105 (Fla. 1st DCA 2012) (dictum). Cases failing the substantial-interests test often do so because the nonagency party is pursuing a unilateral expectation of receiving a benefit in a transaction that has not been statutorily recognized as a basis for an administrative hearing. See, e.g., Univ. of S. Fla. Coll. of Nursing v. Dep't of Health, 812 So. 2d 572, 574 (Fla. 2d DCA 2002) (due to health care exemption to statutory bid law, as set forth in former section 287.057(4) (f)6. (now section 287.057(3) (e)5.), frustrated bidder with "mere unilateral expectation of receiving

a benefit" lacks a substantial interest); Herold v. Univ. of S. Fla., 2002 Fla. App. LEXIS 1449 (Fla. 2d DCA 2002) (university professor's unilateral expectation of promotion to full professor does not constitute a substantial interest).

Petitioner's claim to recover the money that Respondent has seized is not a unilateral expectation of receiving a benefit.

25. However, the substantial interests of Petitioner are not of a type that may be determined by Respondent. Within the meaning of section 120.569, substantial interests are determined by an agency only when the agency is substantially exercising its core regulatory duties.

26. A dispute may not involve the core regulatory duties of an agency. For example, in Vincent J. Fasano, Inc. v. Sch. Bd., 436 So. 2d 201 (Fla. 4th DCA 1983) (per curiam), a contractor and school board entered into a contract for the construction of a school, and the contractor failed to complete construction within the time specified in the contract. Following a formal administrative hearing conducted by the school board, the school board entered a final order assessing liquidated damages for tardy performance. The court quashed the final order on the ground that the school board lacked jurisdiction.

27. The Fasano opinion states:

A breach of contract is normally a matter for judicial rather than administrative or quasi-judicial consideration.

What an agency may hear and determine must be within the framework of the powers conferred upon the agency. [citation omitted] An agency has no authority "to administratively adjudicate claims made against it by persons with whom it has contracted for the purchase of materials or the rendition of services. Disputes such as these are traditionally settled in the courts of this state by adversary proceedings in which the agency as a contracting party is treated as any other citizen." [citation omitted]

Id. at 202-03. See also State Road Dep't v. Cone Bros. Contracting Co., 207 So. 2d 489 (Fla. 1st DCA 1968).

28. Or an agency may exercise its core regulatory duties, but insubstantially. In Diaz v. State, 65 So. 3d 78 (Fla. 3d DCA 2011), a provider agreement between an operator and Agency for Persons with Disabilities (APD) was terminable at any time without cause. As provided by the agreement, APD terminated the agreement without cause, and the operator filed a request for a formal administrative hearing. APD declined the request, reasoning that, because the provider agreement was terminable without cause, a court, not an agency, was the forum for the adjudication of a dispute involving a voluntary contract.

29. Sustaining APD's decision, the Diaz court stated that the relevant statute designated the provider agreement as a



"voluntary contract" and that APD terminated the contract in accordance with its express conditions. The court rejected as irrelevant the operator's argument for administrative jurisdiction based on various statutory provisions specifying administrative hearings for the imposition of certain sanctions and for the imposition of certain sanctions and recovery of Medicaid overpayments. The court's use of "voluntary" seems to have meant a contract with a term only as long as both parties desired, as distinguished from a binding contract that mandated the mutual performance of contractual undertakings over a preagreed term. Because the provider agreement was terminable at any time and for any or no reason, the agreement and APD's exercise of its core regulatory duties were both insubstantial.

30. As relevant to this case, the core regulatory duties of Respondent include the calculation and payment of pension benefits. §§ 121.025 and 121.031. When substantial interests of a party are determined by Respondent--meaning the determination of matters such as the calculation and payment of pension benefits--administrative jurisdiction attaches under sections 120.569 and 120.57(1).

31. Respondent's entering into premium deduction agreements with third parties is not an exercise of a core regulatory duty or, if it were, it is not a substantial exercise of a core regulatory duty. Respondent's agreeing to remit a

portion of a pension benefit to an agency or company to pay a retiree's insurance resembles Respondent's agreeing to pay a publisher for a subscription to a pension administration periodical. In either transaction, if a dispute arises, a court, not Respondent or DOAH, determines the substantial interests of the parties.

RECOMMENDATION

It is

RECOMMENDED that the Department of Management Services enter a final order dismissing the Petition Requesting an Administrative Hearing filed on August 17, 2016.

DONE AND ENTERED this 8th day of February, 2017, in Tallahassee, Leon County, Florida.



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Robert E. Meale  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of February, 2017.

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.