

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT M. DAY,

Petitioner,

vs.

Case No. 17-6469

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

An administrative hearing was conducted in this case on February 13, 2018, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Loren E. Levy, Esquire
The Levy Law Firm
1828 Riggins Lane
Tallahassee, Florida 32308

For Respondent: Mitchell J. Herring, Esquire
Leah R. Wiederspahn, Esquire
Office of the General Counsel
4050 Esplanade Way, Suite 160
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STATEMENT OF THE ISSUE

Whether Respondent is entitled to contest the forfeiture of his retirement benefits.

PRELIMINARY STATEMENT

Petitioner, Robert M. Day (Petitioner), filed a Petition for Formal Administrative Hearing (Petition) pursuant to section 120.569, Florida Statutes, and Florida Administrative Code Rule 28-106.201, on November 2, 2017. The Petition alleges that Petitioner's substantial interests were affected by the Department of Management Services, Division of Retirement's (Department, Division, or Respondent) refusal to reissue its Notice of Forfeiture of Retirement Benefits (Notice of Forfeiture) dated December 28, 2006. Petitioner alleges that the Notice of Forfeiture was not received. The ultimate remedy sought by Petitioner is the opportunity to challenge the forfeiture of his retirement benefits.

On November 29, 2017, the Department referred the Petition to DOAH to conduct an administrative hearing. At the hearing, Petitioner testified and presented the deposition testimony of Mary Katherine Gould, bureau chief with the Division. The following exhibits were offered as joint exhibits for both parties and admitted into evidence without objection: Exhibit 1 (Letter dated January 22, 2007, from Robert Harper to the Division); Exhibit 2 (Composite retirement file for Petitioner); Exhibit 3 (Letter dated October 12, 2017, from the Division to Petitioner); and Exhibit 4 (Deposition of Mary Katherine Gould dated January 25, 2018).

The proceedings were recorded and a transcript of the hearing was ordered. By agreement, the parties were given 30 days from the date of the filing of the transcript within which to file their proposed recommended orders. The one-volume Transcript of the proceedings was filed on March 2, 2018. The parties later agreed to a one-day extension of their filing deadline to April 3, 2018. Both parties timely submitted their respective Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On December 28, 2006, Respondent sent a Notice of Forfeiture to Petitioner at 2848 Carriage Court, Kissimmee, Florida 34772, via certified mail. Petitioner's actual residence was not in Kissimmee, but rather located at 2848 Carriage Court, Saint Cloud, Florida 34772.

2. The certified mail receipt for the Notice of Forfeiture was returned unsigned. A printout of the United States Postal Service's website scanned in as part of Petitioner's file with the Division indicates that the Notice of Forfeiture was delivered on January 6, 2007, in Saint Cloud, Florida 34772. A handwritten notation on the copy of the printout indicates that: "must file petition on or before Jan 29, 2007."

3. On January 22, 2007, Robert Augustus Harper, who represented himself as counsel for Petitioner, sent a letter to

Respondent requesting "all records and documents on Mr. Day."
This letter was stamped as received on January 25, 2007, in Respondent's records. Respondent's records do not indicate whether a response was ever sent to Mr. Harper or Petitioner.

4. On April 8, 2009, Petitioner sent a letter to Respondent regarding the appeal of his criminal case, which was stamped as received on April 10, 2009, by Respondent. The letter advised that it was "to update your office of my retirement account with the State." The letter further stated:

At this time I have gone through one appeal process of criminal offences [sic] filed against me, out of the original 15 charges filed 13 has [sic] been reversed or found not guilty by either the Circuit Court or Appeals Court [sic] We are in the process of further appealing the remaining two counts. Enclosed is a letter from my attorney which was sent to you prior to our first appeal. After over 30 years of retirement payments made and a few years paid by myself in the 1970's I hope this results in a favorable ending to myself.

No response was sent to this letter by Respondent.

5. On July 26, 2017, Petitioner met with employees of Respondent and received a copy of the Notice of Forfeiture. At that meeting, an employee of the Division, identified as Mr. Dame, submitted the following electronic inquiry: "Member never received reply to his letter dated April 8, 2009. He would like a reply ASAP. He also would like to know the disposition of his contributions."

6. On August 9, 2017, Kathy Gould, bureau chief of Benefit Calculations for Respondent, sent Petitioner a letter in response to his inquiry of July 26, 2017. The August 9, 2017, letter from Ms. Gould to Petitioner stated in pertinent part:

The Division has reviewed the legal circumstances surrounding the forfeiture of your Florida Retirement System Benefits.

On December 28, 2006, a Notice of Forfeiture of Retirement Benefits was sent by certified mail to you. This notice also included a statement of your rights to appeal the forfeiture decision by administrative hearing within 21 days, if you believed your rights under Chapter 121, F.S. were improperly or wrongfully determined. We have no evidence that you filed an appeal with the Division within 21 days.

You have \$315.89 in employee contributions on deposit. I am enclosing a Request For Refund of Employee Contributions (form FRS-M81) for your completion.

Please contact our office if you have any questions or need additional information.

7. On September 18, 2017, Petitioner sent Respondent a letter addressed to Ms. Gould stating in pertinent part:

Thank you for your letter dated August 9, 2017. Although your letter indicates that a Notice of Retirement Benefits was sent by certified mail on December 28, 2006, I did not receive the notice. In fact, when I visited with staff of the Division of Retirement on July 26, 2017, I was advised of the existence of the forfeiture notice and provided a copy of the Certified Mail Receipt from my file. Importantly, the receipt is unsigned and the mailing address was incorrect.

The file also includes a request from my attorney for a copy of all records and documents related to myself. The letter is dated January 22, 2007. No documents, records, or other response, however, was provided.

The timing of the forfeiture letter is very curious to me. At the time the letter was mailed, my convictions were under appeal. A decision was not issued until February 22, 2008. *Day v. State*, 977 So. 2d 664 (Fla. 5th DCA 2008). That decision reversed all of the convictions for the misdemeanor offenses. The two felony convictions were upheld but, as of the date of the forfeiture letter, they were on appeal and not yet final.

My file also includes a letter dated April 8, 2009, from myself to the Division of Retirement advising that the process of further appealing the remaining two felony counts was continuing. The letter attached the previous letter from my attorney requesting a copy of my file. Again, no response from the Division was received.

I believe that I have a meritorious argument regarding whether the retirement benefits for my 30-years of service were lawfully forfeited. Under the circumstances, it would be greatly appreciated if you would review my file and advise whether the Division will re-issue the forfeiture letter so as to allow me appropriate notice and an opportunity to contest the determination.

8. The letter was stamped as received by Respondent on September 21, 2017.

9. On October 12, 2017, Respondent, through its Assistant General Counsel Mitchell Herring sent a letter to Petitioner

denying his request to reissue the forfeiture letter. The pertinent part of the letter states:

I am responding to your letter dated September 18, 2017 addressed to Kathy Gould. Based on a review of the original legal file related to the forfeiture of your retirement benefits, a Notice of Forfeiture of Retirement Benefits was mailed to 2848 Carriage Court, Kissimmee, FL on December 28, 2006 and delivered to that address on January 6, 2007. This was the address that you provided to the Florida Retirement System as your home address, and therefore constituted your address of record. Accordingly, this Notice was effective pursuant to section 120.569, Florida Statutes (2006), and your opportunity to file a petition expired on January 27, 2007.

There is no record indicating that a petition was filed. More importantly, our records indicate that the Department was not provided with any notice that an appeal of your criminal conviction was occurring until more than two years after the Notice had originally been sent. Regardless of this, had the appeal overturned all convictions which could have served as the basis for the forfeiture of your retirement benefits, the forfeiture would have been reversed. However, this did not occur, as either of the two convictions for grand theft which still stand are independently sufficient bases for the forfeiture of retirement benefits pursuant to section 112.3173, Florida Statutes (2001-2017), and were included as justification for the forfeiture in the Notice of Forfeiture of Retirement Benefits.

Because it has been more than ten years since the Department notified you of its forfeiture of your rights and benefits under the Florida Retirement System, a sufficient

basis for the forfeiture still exists, and the Department provided effective notice of its intended action pursuant to law, the Notice of Forfeiture of Retirement Benefits will not be re-issued.

10. At the hearing, Petitioner persuasively testified and offered evidence that he neither received the Notice of Forfeiture in January 2007, nor was aware that such a notice had been issued until his meeting with an employee of the Division near the end of July 2017.

11. When Petitioner obtained a copy of the Notice of Forfeiture during his July 2017 meeting, he noticed that it had an incorrect address, i.e., it was mailed to Kissimmee instead of St. Cloud. Kissimmee and St. Cloud are distinct cities and the only two incorporated cities in Osceola County.

12. Petitioner further explained that his home in St. Cloud was located about a quarter-mile down a private dirt road from a county-maintained road. His home was situated on five acres, with a fence surrounding the property and a locked gate at the driveway. He purchased the property in 2001 and resided there until 2011.

13. Petitioner testified that all of the mailboxes for homes on the private dirt road were clustered together and located at the end of the road where it intersected with the county-maintained road. Anyone from the post office would have

been unable to access Petitioner's home because of the fence and locked gate. Petitioner also had a "cur dog" that would not let anybody on the property.

14. The other individuals residing in Petitioner's home in January 2007 were his wife and daughter. Petitioner's wife worked during the week and his daughter went to school and worked part-time. Petitioner testified that there would have been no one around during the week to receive any certified mail delivered at his home from the post office.

15. There were occasions where the post office would leave certified mail slips in Petitioner's mailbox at the end of the road. On such occasions, Petitioner would go into town to the post office to pick them up. Petitioner did not recall, however, the delivery of, or anyone showing up at his home with, a certified mail letter from the Division.

16. The fact that Petitioner was aware that his criminal convictions could impact his ability to obtain retirement benefits does not demonstrate that he received the Notice of Forfeiture in January 2007. Petitioner acknowledged that he never asked for his deferred retirement option program (DROP) proceeds to be distributed. However, when asked why he sent his letter in April 2009, advising the Division of the status of his appeals and post-conviction efforts, if he was unaware of the forfeiture letter, Petitioner explained that he was still able

to work, he was not 62 at the time, and that he wanted to let the Division know that he was still out there. Petitioner further explained that he informed the Division about the status of his appeals because he thought that he could receive his retirement benefits if he won in the appeal process.

17. Petitioner's testimony that he did not receive the Notice of Forfeiture until his meeting with a Division employee in July 2017 was credible. The location and physical description of Petitioner's home was uncontested and it appears unlikely that the postal service would have been able to deliver the certified mail to Petitioner.

18. Other than the printout of the United States Postal Service website indicating that the Notice of Forfeiture was delivered on January 6, 2007, in St. Cloud, Florida, the Division produced no evidence that Petitioner, in fact, received it. The absence of a signed receipt, when considered with the postal service's Track and Confirm printout indicating delivery, could, at best, suggest that Petitioner deliberately failed to pick up the certified mail letter. If delivered to St. Cloud, it is plausible that the certified mail slip was placed in the wrong mailbox. The evidence is insufficient, however, to show that Petitioner refused to accept the certified mail letter. The Division's records do not include any notation that the certified mail was undeliverable or refused.

19. Considering the evidence in light of all of the surrounding facts and circumstances, it is found, as a matter of fact, that the evidence is insufficient to show that Petitioner received the Notice of Forfeiture in January 2007.

20. The Department presented no testimony regarding the practices and policies of the Division when the Notice of Forfeiture was issued. Division employees who were historically involved with Petitioner's retirement forfeiture issues have either retired or obtained employment elsewhere.

21. The deposition testimony of Mary Katherine Gould, the present bureau chief of the Division's Benefit Calculations, discussed the Division's current practice regarding unsigned certified mail receipts for notices of forfeiture. Ms. Gould testified that, currently, additional efforts are undertaken to locate the member and additional certified mailings are attempted to obtain the member's signature on the return receipt. She also indicated that current practice would include further review of a member's file to discover any other addresses.

22. Petitioner's retirement file with the Division shows that the general counsel for the Department at the time was aware that the certified mail return receipt was neither signed nor dated. And, there is nothing in the file indicating that Petitioner was avoiding delivery of the certified mail.

23. Based on her review of Petitioner's file, Ms. Gould could not determine whether any additional efforts had been made to search for a different address to attempt another certified mail delivery.

24. Had the Division reviewed its own files, it could have easily discovered Petitioner's correct mailing address. There are letters, applications, and other retirement form submittals within Petitioner's file reflecting that his correct mailing address at the time was 2848 Carriage Court, St. Cloud, Florida 34772. For example, there are several documents from Petitioner related to his DROP application and submittals that contain his correct mailing address. His file also contains several letters and documents mailed from the Division to Petitioner at his correct address.

25. The Division's file for Petitioner further reveals that it received the public records request by Petitioner's attorney, Robert Harper, on January 25, 2007. At the hearing, Petitioner explained that he had retained Mr. Harper to represent him in the appeals of his convictions, which were ongoing at the time of the public records request. Petitioner also asked Mr. Harper to help him "keep track of . . . the retirement part."

26. There is no evidence that the Department ever responded to Mr. Harper's request.

27. According to practice, the Division calendars the 21-day time period for the challenge of a forfeiture as commencing on the date the notice is received by the member. Although there is no certified mail return receipt, the purported delivery date of the Notice of Forfeiture indicated by the postal service was January 6, 2007. Therefore, had Petitioner actually received the Notice of Forfeiture, there was still time for Petitioner to contest the forfeiture, when the Division received the public records request by Mr. Harper on January 25, 2007.

28. On January 30, 2007, five days after Mr. Harper's public records request, the Division sent a memorandum to the General Counsel's office. The subject of the memorandum is "Request for OGC Assistance with Public Records Request." The memo specifically advised that the public records request was for a copy of Petitioner's retirement file and that there was a "legal block of Mr. Day's retirement account because of possible forfeiture. There should be a file in the Legal Office."

29. An interoffice memorandum regarding the matter from Sarabeth Snuggs, director of the Division, to Geoffrey Christian, Office of General Counsel, dated February 1, 2007, states, in part:

The return receipt was neither signed nor dated. However, according to the postal service's track and confirm website, the letter was delivered on January 6, 2007.

The member has failed to protest the forfeiture action within the 21-day time limit. The benefits are now forfeited and the legal file is closed.

30. In other words, even though the certified mail receipt was returned unsigned, and despite the fact that the Division and its general counsel were aware of the pending unanswered public record's request from Petitioner's counsel, the Division closed Petitioner's file on the grounds that Petitioner failed to timely challenge the forfeiture.

31. Regarding Petitioner's meeting with Division employee, Mr. Dame, on July 26, 2017, Petitioner provided undisputed and persuasive testimony that Mr. Dame provided him with a copy of the Notice of Forfeiture, the certified mail return receipt, and the Postal Service Track and Confirm printout. During the meeting, Mr. Dame pointed out the fact that the return receipt was unsigned. At the time, Mr. Dame also advised Petitioner that he was going to send an inquiry regarding the issue and that Petitioner should "sit tight, we'll see what happens." Mr. Dame never advised Petitioner that his 21-day time period to challenge the forfeiture letter would re-commence based upon the fact that Petitioner received a copy of the Notice of Forfeiture during that July 2017 meeting.

32. Petitioner filed the Petition in this case in response to the letter from the Department's Assistant General Counsel Mitchell Herring, dated October 12, 2017, because it had a case number on it. The letter referenced Petitioner's September 18, 2017, letter and "OGC Case No. 17-36457." Prior to that time, Petitioner's understanding was that the Division was investigating the circumstances surrounding his forfeiture letter.

33. Based upon these facts, it is found that the Department never provided Petitioner with a clear point of entry within which to contest the forfeiture of his retirement benefits.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. See §§ 120.569, 120.57(1), Fla. Stat.^{1/}

35. Section 120.569 requires an agency to provide notice to parties that are substantially affected by an agency decision. In particular, section 120.569(1) instructs:

Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the

procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

36. Florida Administrative Code Rule 28-106.111, entitled "Point of Entry into Proceedings and Mediation," requires notices of agency decisions to "contain the information required by Section 120.569(1), F.S." Rule 28-106.111(4) states:

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.

37. With regard to the issue of whether Petitioner received the Notice of Forfeiture in January 2007, or any date prior to July 2017, the Division has conceded that it has the burden of proof. See, e.g., Accardi v. Dep't of Env'tl. Prot., 824 So. 2d 992, 995 (Fla. 4th DCA 2002) ("The Florida Administrative Code contains no provision requiring that receipt of the notice be irrefutably presumed following an allegation of mailing by [the agency]. Here, a fact-finder must determine whether the [party] received the written notice allegedly mailed by [the agency].").

38. With regard to the issue of equitable tolling, Petitioner has conceded that he has the burden of proof. See, e.g., Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977) (party asserting the affirmative has the burden of proof).

See also generally, Machules v. Dep't of Admin., 523 So. 2d 1132 (Fla. 1988) (discussion of equitable tolling).

39. The standard of proof for each of the parties on these respective issues is a preponderance of the evidence.

See § 120.57(1)(j), Fla. Stat.

40. While proof of mailing normally raises a rebuttable presumption that the mailed item was received, no such presumption arises when there is no evidence that the mailed item was sent to the correct address. Ciolli v. City of Palm Bay, 59 So. 3d 295, 297 (Fla. 5th DCA 2001); Thorne v. Dep't of Corr., 36 So. 3d 805, 806 (Fla. 1st DCA 2010) (presumption that mail was received is inapplicable where no proof that the envelope was properly addressed). The evidence demonstrated that the Notice of Forfeiture was mailed to an erroneous address.

41. Considering the facts, circumstances, and applicable law in this case, it is concluded that the Division failed to establish, by a preponderance of the evidence, that Petitioner received the Notice of Forfeiture prior to his meeting with Mr. Dame on July 26, 2017.

42. In the instant case, the Division could have simply searched its own records and it would have discovered the error in the mailing address and re-sent the Notice of Forfeiture. However, it did not. Further, the Division failed to produce

evidence of reasonable efforts to notify Petitioner. Absent receipt of the Notice of Forfeiture, Petitioner's 21-day time period to challenge the forfeiture never commenced.

43. Despite lack of evidence demonstrating that Petitioner received the Notice of Forfeiture in January 2007, the Department argues that the 21-day time period commenced when Petitioner received a copy of the Notice of Forfeiture at the meeting with Mr. Dame on July 26, 2017. However, considering the facts regarding that meeting, the doctrine of equitable tolling would apply. See Machules, 523 So. 2d at 1134 (under equitable tolling, a late-filed petition should be accepted when a party "has been misled or lulled into inaction" provided that the opposing party will suffer no prejudice). There is no evidence that Petitioner was ever informed that delivery of that copy of the Notice of Forfeiture during that meeting commenced Petitioner's 21-day time period to challenge the forfeiture. Rather, the uncontroverted evidence shows that, at that meeting, Mr. Dame advised Petitioner to "sit tight" while a review of his file was ongoing. It was reasonable for Petitioner to rely on that advice.

44. Further, Petitioner's explanation that he decided to file a formal petition once he received a letter from the Department's counsel dated October 12, 2017, with a case number on the letter, is reasonable and prudent under the

circumstances. The Department does not claim prejudice from the passage of time between July 26, 2017, and the filing of the Petition initiating this case on November 2, 2018.

45. Even without considering the doctrine of equitable tolling, it is found that the evidence does not support a finding that Petitioner's 21-day time period somehow recommenced when Petitioner received the Notice of Forfeiture from Mr. Dame in July 2017. There was no agency decision that determined Petitioner's substantial interests on that date. Rather, the agency decision occurred many years prior in December 2006.

46. Finally, it is concluded that the Department's decision to refuse Petitioner's request to reissue the Notice of Forfeiture or give Petitioner a 21-day time period to challenge the forfeiture of his retirement benefits is contrary to due process afforded under the Florida Administrative Code. Based upon the testimony and exhibits introduced into evidence, Petitioner did not receive the Notice of Forfeiture prior to his meeting with Mr. Dame in July 2017 at which time he was instructed by the Department's representatives to "sit tight." Thereafter, Petitioner timely filed a Petition contesting the Department's October 12, 2017, decision to not reissue its Notice of Forfeiture. In order to ensure due process and the fair treatment contemplated under the Administrative Procedures Act, Petitioner must be provided an opportunity to challenge the

forfeiture of his retirement benefits. Whether Petitioner ultimately may be successful in that challenge is not an issue in this case and must be resolved in a separate proceeding, if initiated.

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Management Services, either reissue the Notice of Forfeiture of Retirement Benefits to Petitioner or otherwise allow him a point of entry with a 21-day time period within which to contest the forfeiture of retirement benefits.

DONE AND ENTERED this 14th day of May, 2018, 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 14th day of May, 2015.

ENDNOTE

^{1/} Unless otherwise noted, all citations to the Florida Statutes and Florida Administrative Code are to current versions.

COPIES FURISHED:

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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.