

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEATRICE COFMAN, surviving)	
spouse of JULES COFMAN, deceased,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 93-1507
)	
DEPARTMENT OF MANAGEMENT SERVICES,)	
DIVISION OF RETIREMENT,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on October 8, 1993, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Stuart B. Klein, Esquire
 Attorney at Law
 1551 Forum Place, Suite 400B
 West Palm Beach, Florida 33401

For Respondent: Stanley M. Danek, Esquire
 Division Attorney
 Division of Retirement
 Cedars Executive Center
 2639 North Monroe Street, Building C
 Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUES

The retirement benefits to which Petitioner is entitled.

PRELIMINARY STATEMENT

Jules Cofman was a member of the Florida Retirement System as an employee of the City of Margate, Florida. Mr. Cofman retired effective March 1, 1990. In February 1990 Mr. Cofman selected a retirement benefit pay-out option referred to as Option One. Retirement benefits were received and cashed by Mr. Cofman until his death on September 23, 1990. On October 2, 1990, Respondent advised Mrs. Cofman by letter that Mr. Cofman had retired under Option 1, which provides the maximum monthly benefit for the lifetime of the member only and that there would be, therefore, no separate benefits payable to her as the surviving spouse. Thereafter, Mrs. Cofman requested that she be permitted to change the option under which Mr. Cofman retired, and provided the reasons that

she thought justified her request. Mrs. Cofman's request to change the retirement option was denied by the Respondent. Mrs. Cofman timely requested a formal hearing to challenge that denial, and this proceeding followed.

At the formal hearing, Mrs. Cofman and her brother, Jack Gold, testified. The parties presented twenty-six joint exhibits, each of which was accepted into evidence. Respondent presented no witnesses at the formal hearing, but did introduce as its exhibits the depositions of Stanley Colvin and Sharon Campbell. Mr. Colvin is an employee of the Respondent. Ms. Campbell was, at the times pertinent hereto, the payroll and benefits supervisor for the City of Margate, Florida. Both depositions were accepted into evidence without objection.

No transcript of the proceedings has been filed. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the conclusion of the hearing. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days following the conclusion of the hearing. Rule 60Q-2.031, Florida Administrative Code. Rulings on the parties' proposed findings of fact may be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Jules Cofman was born September 20, 1911, and died September 23, 1990. Mr. Cofman was happily married to Petitioner, Beatrice Cofman, for 55 years, and they had two children.

2. Prior to his death, Mr. Cofman was employed by the City of Margate, Florida, as an inspector and became entitled to retirement benefits from the Florida Retirement System. Mr. Cofman retired effective March 1, 1990, with 10.14 years of credible service in the Florida Retirement System.

3. On June 20, 1989, Mr. Cofman was diagnosed as having cancer of the bladder. On June 30, 1989, Mr. Cofman underwent surgery, but the cancer continued to spread following the surgery. After his surgery in June 1990, Mr. Cofman was in constant pain and was on medication, including narcotic analgesics. Following his surgery, Mr. Cofman was treated at Bethesda Memorial Hospital between July 20, 1989, and September 14, 1990, on seven occasions as an inpatient and on twelve occasions as an outpatient. Between January 11, 1990, and July 23, 1990, Mr. Cofman was treated at Boca Medical Center on 16 separate occasions. The record does not reflect the nature of his treatments at Boca Medical Center or whether Mr. Cofman was treated as an inpatient or as an outpatient. No medical records were introduced into evidence. A letter from Dr. Mark Ziffer, the urologist who treated Mr. Cofman, was admitted into evidence as a joint exhibit, but there was no testimony from any of Mr. Cofman's treating physicians. There was no competent medical evidence introduced in this proceeding upon which it can be concluded that Mr. Cofman was incompetent when he selected his retirement option or when he cashed his retirement checks.

4. On July 21, 1989, the Respondent mailed to Mr. Cofman an estimate that provided him with an explanation of his options under the Florida Retirement System and provided him with an estimate of the benefits under each option.

5. On February 16, 1990, Mr. Cofman executed a Florida Retirement System form styled "Application for Service Retirement" (Form FR-11). This form provides the retiree with information pertaining to the four options by which his retirement benefits can be paid. On the reverse side of the form is an

explanation of each option. By this form, Mr. Cofman selected retirement benefit Option 1, which is described as being a "member benefit only." The explanation of Option 1 on the reverse side of FR-11 is as follows:

Option 1: A monthly benefit payable to you for your lifetime. Upon your death, the monthly benefit will cease and your beneficiary will receive only a refund of any contributions you paid which are in excess of the amount you received in benefits. This option does not provide a continuing benefit to a beneficiary. If you wish to provide a beneficiary with a continuing monthly benefit after your death, you should consider selecting one of the other three options. The option 1 benefit is the maximum form of lifetime payment and all other optional payments are derived by applying actuarial equivalency factors to the option 1 benefit.

6. The FR-11 also contained the following statement in capital letters: ONCE YOU RETIRE, YOU CANNOT ADD ADDITIONAL SERVICE NOR CHANGE OPTIONS. RETIREMENT BECOMES FINAL WHEN THE FIRST BENEFIT CHECK IS CASHED OR DEPOSITED!

7. Between the date of his retirement and the date of his death, Mr. Cofman received seven retirement benefit checks from the Florida Retirement System and cashed those benefit checks.

8. The Respondent was notified of the death of Mr. Cofman by a telephone call from Mrs. Cofman on September 24, 1990. On October 2, 1990, the Respondent notified Mrs. Cofman by letter that Mr. Cofman had ". . . elected to retire under Option 1 of the Florida Retirement System which provides the maximum monthly benefit for the lifetime of the member only." This was the first time that Mrs. Cofman was aware that Mr. Cofman had selected a retirement option that would not provide her benefits after his death.

9. By letter to Respondent dated December 7, 1992, Ms. Cofman stated, in pertinent part, as follows:

My husband, Jules Cofman (Social Security No. 028-01-6868) has worked as Lot Inspector at the Public Works Department of Margate, Florida for 13 years.

In June of 1989 he was diagnosed with bladder cancer. Because of surgery, chemotherapy and radiation he found it necessary to retire.

He received notice that he would receive his retirement check the end of April, 1990. In conversations I have had with him in regard to his retirement, he said "of course I would be his beneficiary". He did not discuss the Options with anyone.

He received about four checks before he passed away on September 23, 1990.

I was shocked to learn that because of his state of mind, he had inadvertently put down

Option One instead of Option Two.

He had been unable to accept the fact that he was so sick and could not discuss his possible death even with me.

He never made any arrangements for my financial security. He had no insurance and no savings. We always planned on his retirement to augment our Social Security.

I cannot believe that he would knowingly do this to me. We had been happily married for 55 years.

If he had been in a rational state of mind, knowing that he had less than a year to live, he would have certainly chosen OPTION TWO.

I would greatly appreciate it if you would review his case and determine whether it would be possible for me to receive his Retirement Benefit.

Thank you for your consideration.

10. By letter dated January 28, 1993, the Respondent denied Petitioner's request to change the option selected by Mr. Cofman. The letter asserted the position that the selection cannot be changed since the retirement checks were cashed and cited the following portion of Rule 60S-4.002(4)(b), Florida Administrative Code:

After a retirement benefit payment has been cashed or deposited:

* * *

(b) The selection of an option may not be changed . . .

11. Mrs. Cofman does not believe that her husband made a rational choice in selecting retirement Option 1. Mrs. Cofman believes that her husband would not accept the fact that he had cancer and that he was in a state of denial to the extent he refused to discuss his illness. The testimony of Mrs. Cofman and that of Mr. Gold established that Mr. Cofman's personality changed after he became ill. Prior to his illness, Mr. Cofman was a warm, extroverted person. After his illness, he became withdrawn, moody, depressed, and lifeless. The testimony of Mrs. Cofman and the testimony of Mr. Gold do not, however, establish that Mr. Cofman was incompetent at the time that he selected his retirement option or at the times he cashed his retirement checks.

12. Mrs. Cofman attempted to talk to her husband about his condition and about family financial matters, but he would not talk to her. When Mr. Cofman executed his retirement option, the form did not require the consent or signature of the spouse. Since Mr. Cofman's death, the form has been changed to require that the spouse sign if the retiree selects Option 1. Mrs. Cofman testified that had she been informed as to Mr. Cofman's retirement options, she would have insisted that he select Option 2.

13. Mr. Cofman executed FR-11 on February 16, 1990. The form appears to have been completed in type on February 15, 1990. The evidence in this matter does not establish that Mr. Cofman was incompetent to execute the FR-11 on February 15 or 16, 1990, or that there was any irregularity in the execution of this form or in its delivery to the personnel office of the City of Margate.

14. Between March 1, 1990, and the date of his death, Mr. Cofman received and cashed seven retirement benefit checks. Mrs. Cofman testified that she would not have permitted those checks to have been cashed had she been informed as to Mr. Cofman's retirement options.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

16. Petitioner has the burden of proving by a preponderance of the evidence that she is entitled to the relief she seeks. Rule 28-6.08(3), Florida Administrative Code. See also, Florida Department of Transportation v. J.W.C., Co., 396 So.2d 778 (Fla. 1st DCA 1981).

17. Chapter 121, Florida Statutes (1989), also known as the Florida Retirement System Act, established the Florida Retirement System. Pursuant to the provisions of Section 121.091(6), Florida Statutes, there are four payment options available under the Florida Retirement System that are pertinent to this proceeding. Included among those options is the one selected by Mr. Cofman. Section 121.031(1), Florida Statutes, grants the Division of Retirement authority to promulgate rules for the effective and efficient operation of the retirement system.

18. Pursuant to its legislative grant of authority, the Respondent promulgated Rule 60S-4.002(4)(b), Florida Administrative Code, which is correctly quoted by Respondent's letter of January 28, 1993, and which clearly provides that the selection of a retirement option cannot be changed once the retirement benefit check has been cashed or deposited. Compare, Arnow v. Williams, 343 So.2d 1309 (Fla. 1st DCA 1977). No challenge has been raised to the validity of this rule by Petitioner. Respondent's Rule 60S-4.002(4)(b), Florida Administrative Code, is presumed valid and dictates the resolution of this proceeding.

19. While the evidence in this proceeding established that Mr. Cofman made a decision that was not in the best interest of his wife, the evidence does not establish that he was irrational, incompetent, or otherwise incapable of selecting his retirement option. It is concluded that Petitioner has failed to meet her burden of proof in this proceeding and that her request to change her husband's retirement option must be denied.

RECOMMENDATION

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

RECOMMENDED that the Respondent enter a final order which denies Petitioner's request to change the retirement option selected by Jules Cofman.

DONE AND ENTERED this 29th day of December 1993, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 1993.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-1507

The following rulings are made on the proposed findings of fact submitted by Petitioner.

1. The proposed findings of fact in paragraphs 1, 2, and 3 are adopted in material part by the Recommended Order.
2. The proposed findings of fact in paragraphs 4, 5, and 6 are adopted in part by the Recommended Order. The argument contained in those paragraphs are rejected as findings of fact as being argument and as being, in part, contrary to the findings made and the conclusions reached.
3. The proposed findings of fact in paragraph 7 are rejected as being contrary to the greater weight of the evidence and to the findings made.
4. The proposed findings of fact in paragraph 8 are subordinate to the findings made.
5. The proposed findings of fact in paragraph 9 are rejected as being unsubstantiated by the evidence or as being argument that is contrary to the findings made or to the conclusions reached.

The following rulings are made on the proposed findings of fact submitted by Respondent.

1. The proposed findings of fact in paragraphs 1, 2, 3, 4, 5, 7, 12, and 13 are adopted in material part by the Recommended Order.
2. The proposed findings of fact in paragraph 6 are adopted in part by the Recommended Order. As reflected by Joint Exhibit 1, Mr. Cofman had additional hospital visits.
3. The proposed findings of fact in paragraphs 8, 9, and 10 are rejected as being subordinate to the findings made.
4. The proposed findings of fact in paragraph 11 are adopted in material part by the Recommended Order or are subordinate to the findings made.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES
DIVISION OF RETIREMENT

BEATRICE COFMAN,

Petitioner,

vs.

DOR Case No. DMS-DR 92-14
DOAH Case No. 93-1507

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT.

Respondent.

_____ /

FINAL ORDER

This matter came up for hearing in West Palm Beach, Florida, on October 8, 1993, before Claude B. Arrington, a duly appointed Hearing Officer of the Division of Administrative Hearings. The Parties filed proposed findings of fact and conclusions of law. The Parties are as follows:

For Petitioner:

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West Palm Beach, Florida 33401

For Respondent:

Stanley M. Danek
Division Attorney
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Tallahassee, Florida 32399

A Recommended Order was issued on December 29, 1993. A copy of the Recommended Order is attached hereto, incorporated by reference and made a part of this Final Order as an exhibit. No Exceptions to the Recommended Order were filed by the Petitioner as permitted by law. Under the Model Rules, a petitioner may file exceptions to the recommended order within 20 days of the issuance of the recommended order.

After deliberation of the record in this cause, the Recommended Order and the exhibits introduced at the hearing, the Division now enters its final order. In reviewing the Recommended Order and the exhibits, the Division has considered all matters of record which have been reduced to writing and which are now

before the Division with the exception of Petitioner's Exceptions as stated above. As of this time, the hearing conducted by the Hearing Officer has not been transcribed. Therefore, the Division does not have the transcript of the hearing before it in considering the Recommended Order and other information.

Under Section 120.57(1)(b)9, Florida Statutes, the Division cannot reject or modify the Hearing Officer's proposed findings of fact, unless the Division reviewed "the complete record", including the transcript of the hearing. Therefore, since the Petitioner has not provided a copy of the hearing transcript to the Division, we cannot modify the Recommended Order.

THEREFORE, based on the above and foregoing, it is

ORDERED and DIRECTED that the request of Beatrice Cofman to have option selected by her husband changed from Option 1 to Option 3 so as to permit her to obtain a continuing survivor's option and have her retirement benefit recalculated accordingly be and the same is hereby DENIED. It is further

ORDERED and DIRECTED that the Petition of Beatrice Cofman be dismissed and the case closed.

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF RETIREMENT, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

DONE and ORDERED this 28th day of January, 1994, at Tallahassee, Leon County, Florida.

A. J. McMullian, III
State Retirement Director
Division of Retirement

FILED WITH THE CLERK OF THE
DIVISION OF RETIREMENT, THE
31st DAY OF JANUARY, 1994.

Copies furnished to:

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