

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLADYS L. WHALEY,)
)
 Petitioner,)
)
 vs.) CASE NO. 95-0059
)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On May 8, 1995, a formal administrative hearing was held before Carolyn S. Holifield, Hearing Officer, Division of Administrative Hearings. The hearing was held by videoconference between Tampa and Tallahassee, Florida.

APPEARANCES

For Petitioner: Gladys L. Whaley
3807 East Norfolk Street
Tampa, Florida 33604

For Respondent: Robert B. Button, Esquire
Division of Retirement
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUES

The central issue is whether the Petitioner is entitled to modify her deceased husband's retirement benefit option.

PRELIMINARY STATEMENT

By letter dated September 15, 1994, the Respondent, Division of Retirement, notified the Petitioner, Gladys Whaley, that it intended to deny her request to change the retirement option of her deceased husband, Lamar W. Whaley, Jr. The Petitioner requested a formal hearing and subsequently filed an Amended Petition for Formal Hearing with the Division of Retirement challenging the intended action. The matter was forwarded to the Division of Administrative Hearings for appointment of a Hearing Officer.

By Order dated January 12, 1995, the case was assigned to Hearing Officer James E. Bradwell, who set the matter for final hearing May 8, 1995, in Tampa, Florida. However, prior to the final hearing, the matter was transferred to the undersigned.

At the final hearing, the Division of Retirement's Motion for Official Recognition of Rule 22B-4.010, Florida Administrative Code, (1990) was granted.

The Petitioner testified on her on behalf and presented the testimony of Thomas Scott, pastor of the church which Petitioner is a member, and Sabrina Christie, daughter of Petitioner. One exhibit was offered into evidence by Petitioner. Respondent presented the testimony of Stanley Colvin, an administrator for the Division of Retirement, and offered two exhibits into evidence. The Petitioner and Respondent stipulated to the admission of all the exhibits.

Explicit rulings on the proposed findings of fact contained in the parties' proposed recommended orders may be found in the attached Appendix to Recommended Order, Case No. 95-0059.

FINDINGS OF FACT

Based upon my observation of the witnesses and their demeanor while testifying, the documentary evidence received and the entire record compiled herein, I make the following findings of fact.

1. Petitioner is the surviving spouse of Lamar W. Whaley, Jr., deceased. From 1972 to 1990, Mr. Whaley was employed by the Hillsborough County Board of County Commissioners (Board) and as such was a member of the Florida Retirement System. Mr. Whaley retired from his position as a minibus driver with the Board on June 29, 1990.

2. In anticipation of his retirement, Mr. Whaley filed an FR-9 Form with the Division of Retirement (Division). The FR-9 Form, entitled "Request for Audit," was signed by Mr. Whaley and dated November 6, 1989. The FR-9 Form is used by members of the Florida Retirement System who want estimates of the monthly payments which they will receive after they retire.

3. The FR-9 Form provided a space where Mr. Whaley could list the name and birthdate of a joint annuitant. On the FR-9 Form, Mr. Whaley named the Petitioner and the Petitioner's birthdate in these spaces. On the line immediately after the spaces provided for name and birthdate of the joint annuitant, the FR-9 expressly states that "This is not an official beneficiary designation." By listing a joint annuitant and that individual's birthday on the FR-9 Form, the Division is able to calculate the monthly benefits that would be payable to a member under each of the four retirement options available.

4. In response to Mr. Whaley's audit request, the Division calculated the amount of the monthly payments he and/or his survivor would receive under the four retirement options available. On or about November 22, 1989, the Division sent Mr. Whaley information which reflected an estimate of the monthly benefits he and/or his survivor would receive under each of the four retirement options from which he was eligible to select.

5. Included with the estimate of retirement benefits sent to Mr. Whaley, was a document entitled, "What Retirement Option Should I Choose?". This information sheet listed sent to Mr. Whaley listed and described the four different options.

6. In 1990, members of the Retirement System contemplating retirement were provided a Division Form FR-11, Florida Retirement System Application for Service Retirement (Application). The application listed the four different options and provided a brief description of each. Next to Option 1 was the following: "Benefit for the Member Only." A further notation on the application read, "SEE THE REVERSE SIDE FOR AN EXPLANATION OF THESE OPTIONS." The

Application adequately described the consequences of the election of each option. The explanation read as follows:

Option 1: A monthly benefit payable to you for your lifetime. This option does not provide continuing benefit to a beneficiary. Upon your death, the monthly benefit will stop and you beneficiary will receive only a refund of any contributions you paid which are in excess of the amount you received in benefits. If you wish to provide a beneficiary with a continued 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 factors to the option 1 benefit.

Option 2: A reduced monthly benefit payable to you for your lifetime. If you die before receiving 120 monthly benefit payments, your designated beneficiary will receive a monthly benefit payment in the same amount as you were receiving until the total monthly benefit payments to both you and your beneficiary equal 120 monthly payments. No further benefits are then payable.

Option 3: A reduced monthly benefit payable to you for your lifetime. Upon your death, your joint annuitant (spouse or financial dependent), if living, will receive a lifetime monthly benefit payment in the same amount as you were receiving. No further benefits are payable after both you and your joint annuitant are deceased.

Option 4: An adjusted monthly benefit payable to you while both you and your joint annuitant (spouse or financial dependent) are living. Upon the death of either you or your joint annuitant, the monthly benefit payable to the survivor is reduced to two-thirds of the monthly benefit you were receiving when both were living. No further benefits are payable after both you and your joint annuitant are deceased. (Emphasis in original text.)

7. On January 12, 1990, Mr. Whaley executed an Application. The Application listed the Petitioner as beneficiary and indicated that the retirement option selected was Option 1.

8. In selecting Option 1, Mr. Whaley rejected all other options. The fact that Petitioner was listed on the application as a beneficiary is of no consequence given that Mr. Whaley chose Option 1. An explanation on the back of the retirement application expressly states, "This option does not provide continuing benefit to a beneficiary." Because Mr. Whaley chose Option 1, Petitioner, as his beneficiary, would have been entitled only to a refund of Mr. Whaley's contributions in the event that Mr. Whaley's contribution exceeded the amount of monthly benefits paid to him before prior to his death. Petitioner

did not assert, nor did the evidence establish that the refund provision in Option 1 applies in the instant case.

9. Petitioner stated that Mr. Whaley could read and was not mentally impaired at the time he completed the retirement application, yet Petitioner testified that the agency did not explain to Mr. Whaley the benefits of the plan which he selected. According to the testimony of Stanley Colvin, administrator and supervisor of the Division's Survivor Benefits Section, staff members are available to provide counseling to members who come in or call with questions relative to their retirement. There is no record that Mr. Whaley ever contacted the Division with questions regarding the various options.

10. The pastor of the church which Petitioner is a member testified that Mr. Whaley may have needed help to understand the ramifications of legal documents. Mr. Whaley's daughter also testified that her father may not have understood the retirement option he chose. Both the pastor and Mr. Whaley's daughter testified further that in conversations with Mr. Whaley, he had indicated to them that he had taken care of the legal work necessary to ensure that his was family was taken care of in the event of his death.

11. Notwithstanding the testimony of Petitioner and others, there is no evidence that at the time Mr. Whaley selected Option 1 he did not fully understand the nature and effect of his selection. Neither does the evidence support the claim that the selection of Option 1 by Mr. Whaley was inconsistent with his desire or intention at the time the choice was made.

12. At the time of Mr. Whaley's retirement, he was in good health. Given this fact it is not unusual that he selected the option that would provide him with the maximum monthly benefit. Statements by Mr. Whaley that he had taken care of matters and that "things were in order" do not provide substantial evidence that the selection of Option 1 by Mr. Whaley was made only because he did not fully understand the consequences of his choice.

13. The testimony revealed that upon Mr. Whaley's death, the Petitioner was the beneficiary of his life insurance policy and also the recipient of benefits under his social security. Under these circumstances, Mr. Whaley's selection of Option 1 was not necessarily inconsistent with his statement that things "were in order" or his listing Petitioner as beneficiary on the Application.

14. On several documents provided to and/or completed by Mr. Whaley, it was clearly stated that once a member begins to receive his benefit, the option selection cannot be changed. The information sheet, "What Retirement Option Should You Choose?," mailed to Mr. Whaley on or about November 22, 1989, contained the following provision:

Option Choice Cannot Be Changed

Once you begin to receive your benefit your option selection cannot be changed. Therefore, it is important to carefully study your personal circumstances before making your decision

The Application submitted to the Division by Mr. Whaley on or about January 25, 1990, contained a statement that "[o]nce you retire, you cannot add additional service nor change options." Finally, the Acknowledgment of Retirement

Application sent to Mr. Whaley by the Division on or about February 8, 1990, provided in relevant part the following:

ONCE YOU RETIRE, YOU CANNOT ADD ADDITIONAL SERVICE
OR CHANGE OPTIONS. RETIREMENT BECOMES FINAL WHEN
ANY BENEFIT CHECK IS CASHED OR DEPOSITED!

15. Mr. Whaley received his first retirement check on or about the last working day in July 1990. Petitioner testified that Mr. Whaley cashed this check in July or August of that same year. By cashing that check, Mr. Whaley was precluded from thereafter changing his retirement option.

16. By selecting Option 1, Mr. Whaley received the maximum benefits payable to him during his lifetime. However, under the provisions of retirement Option 1, upon Mr. Whaley's death, his beneficiary, the Petitioner is not entitled to receive any benefits.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes (1993).

18. Chapter 121, Florida Statutes (1993), also known as the Florida Retirement System Act, established the Florida Retirement System. Current statutory provisions which are relevant in this case are identical to those in effect in 1990 when Mr. Whaley selected Option 1 in 1990.

19. The Petitioner has the burden of proof in this case. See *Balino v. Department of Health, etc.*, 348 So.2d 349 (Fla. 1st DCA 1977). To meet the burden of proof, the Petitioner must prove by a preponderance of evidence that she is entitled to the action agency she is entitled to the action agency she proposes.

20. Section 121.091(6), Florida Statutes (1989), provides that a member shall elect, prior to the receipt of his first monthly retirement payment, one of four different options. Section 121.091(6)(a), Florida Statutes (1989), provides in relevant part the following description of those options:

1. The maximum retirement benefit payable to the member during his lifetime.

2. A decreased retirement benefit payable to the member during his lifetime and, in the event of his death within 10 years after his retirement, the same monthly amount payable for the balance of such 10-year period to his beneficiary....

3. A decreased retirement benefit payable during the joint lifetime of both the member and his joint annuitant and which, after the death of either, shall continue during the lifetime of the survivor.

4. A decreased retirement benefit payable during the joint lifetime of the member and his joint annuitant and which, after the death of either, shall continue during the lifetime of the survivor in an amount equal to $66 \frac{2}{3}$

percent of the amount which was payable during the joint lifetime of the member and his joint annuitant.

21. Each retirement option has its advantages and disadvantages. The advantage of Option 1 is that it provides the largest monthly payment for which a retiree is eligible. The disadvantage is that it provides no continuing monthly benefit to a spouse or other dependents upon the retiree's death.

22. Section 121.031(1), Florida Statutes (1989), grants the Division authority to promulgate rules for the efficient and effective operation of the system. Pursuant to that grant of authority, the Division promulgated Rule 22B-4.002(3), Florida Administrative Code, which was in effect at all times pertinent hereto. (This rule was subsequently transferred to Rule 60S-4.002, Florida Administrative Code.) According to that provision, after a retirement payment has been cashed or deposited, the selection of an option may not be changed.

23. A similar provision is found in Rule 22B-4.010, Florida Administrative Code, the rule which was effective in 1990. The rule, subsequently transferred to Rule 60S-4.010, Florida Administrative Code, provides the following:

A member shall select an option for receiving benefits and may select a different option prior to the time the first benefit check has been cashed or deposited. Thereafter, the member shall not be permitted to change the option he selected.

Unless the applicable rules are challenged in accordance with Section 120.56, Florida Statutes, which has not been done in the instant case, they are presumed to be valid in any 120.57 proceeding to which they apply.

24. As established by the testimony of Stanley Colvin, a Division administrator, Mr. Whaley selected Option 1 on January 12, 1990 and was added to the payroll in July 1990. Petitioner testified that the first retirement check was negotiated by Mr. Whaley in July or August of 1990. In view of these facts, the relevant law would have prevented the member, Mr. Whaley, from changing his retirement option.

25. The Petitioner contends that Mr. Whaley did not possess the level of reading comprehension skills to make a knowing and intelligent selection of his options. As evidence of this, Petitioner presented testimony that Mr. Whaley indicated prior to his death that he had taken care of the legal work to ensure that his family was taken care of and that "things were in order." The implicit assertion is that, given these statements made by Mr. Whaley, his intention was to select a retirement option that would have provided benefits to Petitioner should she survive her husband. The evidence failed to establish that at the time Mr. Whaley selected Option 1, he did not possess the reading skills and mental capacity to make an informed selection. Neither was it demonstrated by substantial evidence that at the time Mr. Whaley selected Option 1, he did not understand the nature and consequence of that decision. Thus, Petitioner failed to meet her burden of proof.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Division of Retirement enter a final order denying the request of Petitioner to modify the retirement benefits elected by Mr. Whaley, the deceased husband of Petitioner.

RECOMMENDED this 1st day of August, 1995, in Tallahassee, Florida.

CAROLYN S. HOLIFIELD
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 1st day of August, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-0059

To comply with the requirements of Section 120.59(2), Fla. Stat. (1993), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

1a-1c. Rejected as not being supported by competent and substantial evidence.

Respondent's Proposed Findings of Fact.

1-6. Accepted and incorporated herein.

7-8. Accepted.

9-11. Accepted and incorporated herein.

COPIES FURNISHED:

Gladys Whaley
3807 East Norfolk Street
Tampa, Florida 33604

Robert B. Button, Esquire
Division of Retirement
Legal Office
Cedars Executive Center-Building C
2639 North Monroe Street
Tallahassee Florida 32399-1560

A. J. McMullian, III, Director
Division of Retirement
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

Paul A. Rowell, Esquire
General Counsel
Department of Management Services
4050 Esplanade Way, Suite 265
Tallahassee, Florida 32399-0950

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the Final Order in this case concerning their 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.