

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SANDRA MERCIER, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. 96-0812  
 )  
 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 May 1, 1996, in Hollywood, Florida.

APPEARANCES

For Petitioner: Mitchell Soligan, Esquire  
782 Northwest 42nd Avenue, No. 430  
Miami, Florida 33126

For Respondent: Larry D. Scott, Esquire  
Division of Retirement  
Cedars Executive Center, Building C  
2639 North Monroe Street  
Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUES

Whether Petitioner qualifies for retirement benefits as a joint annuitant of the late Roy Hartley, Jr.

PRELIMINARY STATEMENT

Prior to his death on June 11, 1994, Roy Hartley, Jr., was a police officer and a member of the Florida Retirement System with more than ten years of service. Petitioner and Mr. Hartley lived together in a long standing relationship, but they were not married. On October 29, 1993, Mr. Hartley designated Petitioner as the beneficiary of his retirement benefits on Florida Retirement System Form M-10. At the time of his death, Mr. Hartley had contributions of \$655.38 on deposit with the Florida Retirement System.

By letter dated December 26, 1995, the Director of the Division of Retirement notified Petitioner that in accordance with its records and its Rule 60S-6.001(34), Florida Administrative Code, she was not qualified as the joint annuitant of Roy Hartley because she had not provided proof Mr. Hartley had contributed at least half of her financial support. By this final agency action letter, Respondent asserted that Petitioner was only entitled to receive a

refund of Mr. Hartley's deposit in the amount of \$655.38. Petitioner timely challenged this agency action by asserting that Mr. Hartley had provided more than half of her financial support and that, consequently, she was entitled to monthly retirement benefits as a joint annuitant. The matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, the parties stipulated to certain facts, which have been incorporated in this Recommended Order. The Petitioner testified on her own behalf and presented the additional testimony of her sister, two Metro Dade Police Officers, and her Certified Public Accountant. Petitioner offered four exhibits, three of which were admitted and one of which was rejected. Respondent presented the testimony of Stanley H. Colvin, the Retirement Administrator of the Respondent, who was accepted as an expert witness as to survivor benefits under the Florida Retirement System. Respondent offered five exhibits, each of which was admitted into evidence.

A 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 filing of the transcript. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the transcript is filed. 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. Roy Hartley, Jr., died on June 11, 1994, with more than ten years of service as a member of the Florida Retirement System (FRS). Mr. Hartley was employed as a police officer with the Metro Dade Police Department. His Social Security Number was 267-70-3906. At the time of his death, Mr. Hartley had personally contributed the sum of \$655.38 to the FRS.

2. On October 29, 1993, Mr. Hartley designated Petitioner as the beneficiary of his retirement benefits on FRS Form M-10.

3. After Mr. Hartley's death, Petitioner applied to the State of Florida, Division of Retirement, for benefits as Mr. Hartley's designated beneficiary. To be entitled to monthly retirement benefits, Petitioner must establish that she was a dependent of Mr. Hartley so as to qualify as a joint annuitant of his monthly retirement benefits.

4. Section 121.091(7)(g), Florida Statutes (1994), contains the option that Petitioner seeks to exercise:

(7)(g) The designated beneficiary who is the surviving spouse or other dependent of a member whose employment is terminated by death subsequent to the completion of 10 years of credible service but prior to actual retirement may elect to receive a deferred monthly benefit as if the member had lived and had elected a deferred monthly benefit, as provided in paragraph (5)(b), calculated on the basis of the average final compensation and creditable service of the member at his death and the age the member would have attained on the commencement date of the deferred benefit elected by his beneficiary, paid in accordance with option 3 of paragraph (6)(a).

5. Section 121.021(28)(c), Florida Statutes, contains the definition of the term "dependent beneficiary" that is pertinent to this proceeding:

(28) Dependent beneficiary means any person designated by the member to receive a retirement benefit upon the member's death who is either:

\* \* \*

(c) A person who is financially dependent for no less than one-half of his support from the deceased at retirement or at time of the death of such member, whichever occurs first.

6. Rule 60S-6.001(34), Florida Administrative Code, defines the term "joint annuitant" as follows:

JOINT ANNUITANT -- Means . . . any other person who is financially dependent where the other person is someone who is receiving one-half or more of his support from the member or is eligible to be claimed as a dependent or exemption on the Federal income tax return of the member.

7. Petitioner and Mr. Hartley were not married, but they were living together at the time of his death. Except for a relatively short breakup, they had lived together for thirteen years.

8. Petitioner was not claimed as a dependent on Mr. Hartley's federal income tax return.

9. At the times pertinent to this proceeding, Petitioner worked part-time as a bartender.

10. Respondent requires a person who is claiming to be a dependent of a deceased member pursuant to Section 121.021(28)(c), Florida Statutes, to document that the member contributed more than half of the alleged dependent's support.

11. Stanley Colvin, the administrator of Respondent's retirement section, established that the Respondent typically reviews financial data for the year preceding the member's death in determining whether the deceased member contributed half of the alleged dependent's support. In making this determination, the Respondent determines the amount that the alleged dependent has to contribute to his or her own support and thereafter requires the alleged dependent to establish that the member contributed an amount equal to or more than that amount. Since the member died in June of 1994, Respondent in this case examined the W-2 statements for Petitioner and for Mr. Hartley for several years preceding his death and for the year 1994. The 1993 W-2 statements reflect that Mr. Hartley had income from his employment of \$67,360.23 while Petitioner had income from her employment of \$9,450.00. Based on the differences between their earnings, it did not appear that there would be a problem with Petitioner's claim when Respondent's staff first reviewed the claim.

12. The house in which Petitioner and Mr. Hartley lived at the time of his death was titled solely in the name of the Petitioner. This house was purchased in 1992. The fact that Petitioner owned the house only in her name caused Respondent's staff to question this claim.

13. After learning about the house, Respondent's staff asked Petitioner to document that Mr. Hartley contributed more than half of her support and requested that she provide copies of cancelled checks and tax returns. In response to that request, Petitioner provided copies of certain cancelled checks and copies of her tax returns for 1992 and 1993. 1/

14. Mr. Hartley and Petitioner routinely gambled at Seminole Bingo. The down payment for the house came from their bingo winnings.

15. Although they both gambled at bingo, Petitioner usually sat in the chair so that she would be the one to claim any bingo winnings. These winnings were reported on Petitioner's income taxes for the years 1992 and 1993. For 1992, Petitioner claimed bingo winnings in the amount of \$60,531 and wagering losses in the amount \$45,850. For 1993, Petitioner claimed bingo winnings in the amount of \$21,860 and wagering losses in an equal amount.

16. Petitioner's federal income tax return for 1993 reflected an adjusted gross income of \$31,508. This sum included bingo winnings of \$21,860.

17. Petitioner testified, credibly, that they did not go to bingo as frequently in 1994 because Mr. Hartley had become interested in racing automobiles, but there was no evidence as to whether Petitioner or Mr. Hartley won at bingo during 1994 prior to Mr. Hartley's death.

18. After reviewing the documentation provided by Petitioner, the Respondent denied monthly benefits to her. Respondent's denial was based on its interpretation of its rule that all income, including gambling winnings, should be considered as being available for the support of a person claiming to be a dependent of a member of the FRS. 2/ Respondent is not concerned with whether the alleged dependent loses his or her winnings at bingo or uses the winnings to pay bills.

19. Respondent allocated the house payments, household expenses, and grocery costs paid by Mr. Hartley to have been one-half for Petitioner's support and the other half for his own support. 3.

20. Respondent determined, correctly, that the documentation did not support a findings that Mr. Hartley contributed more than half of Petitioner's support when the bingo winnings were considered. Respondent advised Petitioner that she was entitled to a refund of Mr. Hartley's contribution to the FRS in the amount of \$655.38.

21. Petitioner established that Mr. Hartley paid the house payment (\$683.00 per month in 1994), that he paid most of the household expenses, and that he routinely gave Petitioner cash for food, clothes, and miscellaneous expenses. The only bill routinely paid by Petitioner was the utility bill. She also paid her car bill and her auto insurance bill. Mr. Hartley occasionally assisted her with those bills.

22. Based on the totality of the evidence, 4/ including the discrepancy between Mr. Hartley's earned income and Petitioner's earned income, 5/ the fact that Mr. Hartley paid the housing expenses, except for utilities, and the fact that he routinely gave Petitioner cash to use for her support, it is found that Mr. Hartley contributed more than \$10,000 a year toward Petitioner's support. The evidence does not, however, support a finding that Mr. Hartley contributed more than \$31,000 a year toward Petitioner's support. 6/

## CONCLUSIONS OF LAW

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

24. If Petitioner qualifies as a dependent beneficiary, she would be entitled to a lifetime payment as a joint annuitant of the deceased member. If she does not qualify as a dependent beneficiary she is only entitled to a return of the member's personal contribution, which, in this case, is \$655.38.

25. The resolution of this proceeding turns on whether the bingo winnings reported on the 1993 income tax return should be considered as funds available for Petitioner's support. This issue has not been addressed by Respondent before this case.

26. Respondent correctly asserts that its interpretation of its own rules and regulations is entitled to deference. It is settled that an agency's interpretation of its own rules and regulations will not be overturned even if such interpretation is not the sole possible interpretation, the most logical interpretation, or the most desirable interpretation. An agency's interpretation of its rules and governing statutes will not be overturned unless the interpretation is clearly erroneous. *Health Quest Corporation, et al. v. Department of Health and Rehabilitative Services and Arbor Health Care Co., et al.*, 11 FALR 5427 (1989), *ABC Liquors, Inc. v. Department of Business Regulation*, 397 So.2d 696 (Fla. 1st DCA 1981); *Department of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815 (Fla. 1983).

27. Section 121.021(28), Florida Statutes, and Rule 60S-6.001(34), Florida Administrative Code, focus on whether the deceased member contributed half of the "support" required by the alleged dependent. In making this determination, the Respondent determines the amount that the alleged dependent has to contribute to his or her own support and thereafter determines whether the member contributed an amount equal to or more than that amount. In determining that the gross amount of the bingo winnings should be considered in making this determination, Respondent has assumed that the bingo winnings reported on Petitioner's 1993 federal income tax return were available for her support. This assumption lacks reason and fails to comport with common experience. These bingo winnings were not available for Petitioner's support because those winnings were offset by losses. While it would be appropriate for Respondent to consider net gambling winnings in determining the dependency issue, the record in this proceeding fails to justify its use of gross gambling winnings to determine whether a deceased member contributed half or more of an alleged dependent's support. Consequently, it is concluded that Respondent's agency action was premised on an erroneous interpretation of its statute and rule.

28. Petitioner established that Mr. Hartley contributed more than half of her support in 1993 and in 1994 until his death.

## RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order that adopts the findings of fact and conclusions of law contained herein and approves Petitioner's application for monthly benefits as a joint annuitant of Roy Hartley, Jr.

DONE AND ENTERED this 1st day of August, 1996, in Tallahassee, Leon County, Florida.

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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 1st day of August, 1996.

ENDNOTES

1/ Under the rules of the Internal Revenue Service, Petitioner and Mr. Hartley could not file a joint income tax return.

2/ This interpretation has not been adopted by rule.

3/ This reasonable method of allocating these payments is not at issue in this proceeding.

4/ Respondent correctly asserts that the documentation provided by Petitioner fails to establish that Mr. Hartley contributed at least half of her support. In this de novo proceeding, the undersigned, as the trier of fact, is not limited to relying on documentary evidence. The testimony as to Mr. Hartley's practice of giving Petitioner cash to pay for his and her support was established by testimony, which the undersigned finds to be credible. See, Section 120.58(1)(a), Florida Statutes.

5/ Discrepancy between the earnings of a deceased member and a person claiming to be that member's dependent is a factor that Respondent considers. Had it not been for the house being titled solely in Petitioner's name, this claim would likely have been approved based on the discrepancy between their earnings as reflected on their W-2s.

6/ Mr. Hartley's 1993 W-2 reflects that his income from employment was \$67,360.23, and that his FICA withholding was \$14,908.33, his Social Security withholding was \$3,571.20, and his Medicaid tax withholding was \$1,014.40. There was no evidence that these withholdings were refunded to Mr. Hartley. It is inferred that the amounts of these withholdings, totaling \$19,493.93, were not available for him to contribute to Petitioner's support.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 96-0812

The following rulings are made as to the proposed findings of fact submitted by the 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 paragraph 4 are adopted in part by the Recommended Order or are subordinate to the findings made.

3. The remaining proposed findings of fact submitted by Petitioner consists of recitation of testimony that is subordinate to the findings made.

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

1. The proposed findings of fact under the heading "Stipulated Facts" are adopted in material part by the Recommended Order with the exception of those in paragraph four, which are irrelevant.

2. The proposed findings of fact in paragraphs 1-8 under the heading "Proposed Findings of Fact" are adopted in material part by the Recommended Order with the exception of those in paragraph nine, which are contrary 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.