

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GRADY THOMAS,)
)
 Petitioner,)
)
 vs.) Case No. 98-4550
)
 DEPARTMENT OF MANAGEMENT SERVICES,)
 DIVISION OF RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

An administrative hearing was conducted on January 11, 1999, in Tallahassee, Florida, before Daniel Manry, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Petitioner: Granville E. Petrie, Esquire
1105 North Duval Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner, as a surviving spouse, is entitled to the monthly benefits of his deceased wife pursuant to Chapter 121, Florida Statutes (1995). (All chapter and section references are to Florida Statutes (1995) unless otherwise stated.)

PRELIMINARY STATEMENT

By letter dated September 16, 1998, Respondent denied the Application of Beneficiary for Retirement Benefits submitted by Petitioner. Petitioner timely filed an Amended Petition For Formal Hearing on October 2, 1998.

At the hearing, the parties submitted 15 joint exhibits for admission in evidence. Petitioner testified in his own behalf and called one witness, and Respondent called one witness. The identity of the witnesses and exhibits and any attendant rulings are contained in the Transcript of the hearing filed with the undersigned on February 3, 1999.

Respondent timely filed its Proposed Recommended Order ("PRO") on February 17, 1999. Petitioner timely filed his PRO on March 1, 1999.

FINDINGS OF FACT

1. Mrs. Betty Thomas began participation in the Florida Retirement System ("FRS") on December 19, 1970, when the public school system that employed her as a teacher converted its retirement program from the Florida Teachers Retirement Program to the FRS. At the time, Mrs. Thomas had approximately six years of previous service for which she received credit in the FRS.

2. The designated beneficiaries of Mrs. Thomas in 1970 were Mr. Johnny Brown, her husband at the time, and the couple's

dependent children, Shauna Jackson, Peguena Brown, and Romina Brown. The three daughters were born, respectively, in 1961, 1962, and 1969.

3. The FRS did not become noncontributory until 1975. By 1972, Mrs. Thomas had received \$2,322.75 in three separate refunds representing part of the personal contributions and accrued interest that she made prior to 1975.

4. Mrs. Thomas and Mr. Brown divorced in 1972. Mrs. Thomas met Petitioner sometime in 1975, and the two married in 1990. They remained together until Mrs. Thomas died on September 21, 1996.

5. At the time of her death, Mrs. Thomas was actively employed as an assistant principal with 28.2 years of creditable service in the FRS. If her creditable service had not been reduced by previous refunds of personal contributions, Mrs. Thomas would have held 31.8 years of creditable service.

6. On May 31, 1992, Mrs. Thomas changed her designated beneficiary. She deleted Mr. Johnny Brown, her former husband, and designated her three adult daughters as her beneficiaries using the Form M-10 (the "M-10") required by Respondent for such purposes. Mrs. Thomas did not designate Petitioner as a beneficiary.

7. From the time Mrs. Thomas executed the M-10 on May 31, 1992, and thereafter, none of the daughters of Mrs. Thomas

qualified as a "joint annuitant" or a "dependent beneficiary" within the meaning of Section 121.021(28). None of the daughters was under age 25, physically or mentally disabled or incapable of self-support, or otherwise financially dependent on Mrs. Thomas for at least one-half of their support.

8. From the time Petitioner married Mrs. Thomas in 1990, Petitioner qualified as a "joint annuitant" within the meaning of Section 121.021(28)(a). He was the spouse of a member of the FRS and is now the surviving spouse.

9. Shortly after the death of Mrs. Thomas on September 21, 1996, Petitioner requested the monthly benefits of his deceased wife. By letter dated November 1, 1996, Respondent advised Petitioner that the "only benefit" available was a refund of personal contributions. In relevant part, the letter stated:

Unless one of the beneficiaries qualified as a joint annuitant of the member at the time of death . . . , a refund of retirement contributions is the only benefit payable from this account. (emphasis supplied) Each beneficiary is entitled to an equal portion of the \$2,354.05 on deposit and should complete Form FST-11g, APPLICATION OF BENEFICIARY FOR REFUND. (emphasis not supplied)

If all the designated beneficiaries wish to disclaim interest in this account, you, as the surviving spouse would qualify as a joint annuitant. You would be eligible to receive the Option 3 monthly retirement benefit. The monthly benefit would be payable for your lifetime and is estimated to be \$1,617.95 effective October 1, 1996. (emphasis supplied) For you to receive this benefit, we need the following (emphasis supplied):

1. Forms DIS-1 completed by Shauna B. Jackson, Peguena Brown, and Romina Brown. Disclaimer forms must be filed and recorded in Circuit Court within two years of the member's date of death. . . .

10. The daughters of Mrs. Thomas did not disclaim their interest in the personal contributions that remained in the FRS account of their deceased mother. Rather, they applied for a refund. On December 9, 1997, Respondent refunded the remaining personal contributions of Mrs. Thomas to her three daughters.

11. Petitioner continued his attempts to obtain the monthly benefits of his deceased wife. By letters dated January 30 and May 2, 1997, Respondent provided Petitioner with responses substantially the same as the response contained in the letter dated November 1, 1996.

12. On July 17, 1998, Petitioner filed an Application of Beneficiary for Retirement Benefits. Respondent advised Petitioner that the "benefits" had already been paid to the three daughters of Mrs. Thomas, and Respondent requested an administrative hearing.

13. The purpose of the M-10 signed by Mrs. Thomas was to designate beneficiaries of the retirement benefits earned by Mrs. Thomas during her years of service. The M-10 executed by Mrs. Thomas on May 31, 1992, stated, in relevant part:

. . . I CHOOSE TO HAVE BENEFITS PAID . . . AS
FOLLOWS . . .

3. . . . JOINTLY . . . BENEFITS SHALL BE
DIVIDED AND PAYABLE AS INDICATED BELOW. . . .

Shauna Brown Jackson	Daughter	11/15/61	F
Peguena Brown	Daughter	12/10/61	F
Romina Brown	Daughter	3/9/69	F

14. The term "benefits" is not defined in Section 121.021. However, Respondent's own rule, in relevant part, defines the term to mean a "monthly payment." Florida Administrative Code Rule 60S-6.001(10). (Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.)

15. After Mrs. Thomas died on September 21, 1996, Respondent did not pay "benefits" to anyone, as Respondent defines the term "benefit" in Rule 60S-6.001(10). On December 9, 1997, Respondent distributed three lump sum payments totaling \$2,354.05, to the designated beneficiaries who were entitled to the personal contributions of Mrs. Thomas pursuant to Section 121.091(7)(b)2. Respondent distributed one lump sum payment of \$784.69 to Ms. Romina Brown and two equal lump sum payments of \$784.68 to Ms. Peguena Brown and Ms. Shauna Brown.

16. Section 121.091(7)(b)2 authorizes Respondent to pay only the personal contributions of Mrs. Thomas to her designated beneficiaries who do not qualify as joint annuitants within the meaning of Section 121.021(28). However, nothing in Chapter 121 or the evidence of record requires Respondent to withhold monthly

benefits from a surviving spouse who is entitled in Section 121.091(8) to receive retirement benefits.

17. The attempt by Mrs. Thomas to designate beneficiaries on the M-10 was, in part, effective and, in part, ineffective. It was an effective attempt to designate the beneficiaries entitled to a refund of her personal contributions. However, it was an ineffective attempt to name a beneficiary entitled to the monthly benefits that accrued independently of any personal contributions.

18. An ineffective attempt to designate a beneficiary who is entitled to monthly benefits fails to name a beneficiary entitled to those benefits. When no beneficiary is named, Petitioner, as the surviving spouse, is the beneficiary designated in Section 121.091(8) who is entitled to the monthly benefits.

19. When Respondent refunded \$2,322.75 in personal contributions to Mrs. Thomas in 1972, the refund reduced the monthly benefit from \$1,617.95 to \$1,279.54. The refund resulted in a reduction in monthly benefit of approximately \$338.41.

20. There is no evidence that a \$2,354.05 refund of the remaining contributions in 1997 should have any different effect on the monthly benefit. In the absence of some legal reason not to do so, a refund of \$2,354.05 in 1997 should reduce the monthly benefit in the same proportion that the previous refunds in 1972

reduced the monthly benefit. The \$2,354.05 refund in 1997 should reduce the monthly benefit of \$1,279.54, by \$341.79, to \$937.75.

21. Sections 121.091(7)(e) and (f) authorize a surviving spouse to modify monthly benefits by repaying contributions refunded to the member. Petitioner can restore the monthly benefit either to \$1,279.54 or to \$1,617.95 by electing to pay either \$2,354.05 or \$4,676.05 in personal contributions previously refunded plus accrued interest at the statutorily prescribed rate.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto. The parties were duly noticed for the formal hearing.

23. Petitioner has the burden of proof in this proceeding. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue unless the burden is otherwise established by statute. Young v. State, Department of Community Affairs, 567 So. 2d 2 (Fla. 3d DCA 1990); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

24. Petitioner must demonstrate by a preponderance of the evidence that he is entitled to the monthly benefits not paid by Respondent to the designated beneficiaries of his deceased wife.

Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990); Agrico Chemical Co. v. State, Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Petitioner satisfied his burden of proof.

25. The attempt by Mrs. Thomas to designate her three daughters as the beneficiaries of her personal contributions was effective. However, the attempt by Mrs. Thomas to designate her three daughters as beneficiaries of her monthly benefits was ineffective. Where an attempt to direct payment to others is ineffective, there is no basis for denying the benefits to the surviving spouse. Eaves v. Division of Retirement, 704 So. 2d 140, 143 (Fla. 1st DCA 1997).

26. Respondent unsuccessfully attempts to distinguish the facts in Eaves from the facts in this proceeding. Respondent argues that, in Eaves, all of the personal contributions had been refunded to the member before his death. However, Eaves did not hold that the designation of beneficiary was ineffective solely because no contributions were available for distribution to the designated beneficiaries. Eaves also held that the designation of beneficiaries was ineffective because the entitlement to monthly benefits was nonexistent for the beneficiaries designated by the member.

27. Respondent acknowledges only part of the decision in Eaves. Respondent notes that the court stated, inter alia:

Because there are no "member's personal contributions" to be returned, none of the

three [designated beneficiaries] is entitled to receive benefits under section 121.091(7)(b)2. . . .

Eaves, 704 So. 2d at 142.

28. The court cited another reason why the designation of beneficiary was ineffective in Eaves. The court said:

The Division must, in any event, determine whether persons named as beneficiaries are in fact eligible to receive death benefits either as "joint annuitants" or otherwise. Designations may prove ineffective . . . , as here, because persons named as beneficiaries do not qualify for benefits under Section 121.091(7)(b). (emphasis supplied)

* * *

The Division proposes to deny substantial benefits (possibly in excess of nine hundred dollars a month) to the widow because three people entitled to nothing refuse to disclaim nonexistent entitlements. (emphasis supplied)

Id.

29. The court did not engage in a tautology when it recognized that the Division of Retirement was attempting to deny benefits because, ". . . three people entitled to nothing refuse to disclaim nonexistent entitlements." (emphasis supplied) An existing entitlement to nothing is not synonymous with a nonexistent entitlement.

30. Section 121.091(7)(b)2 creates an entitlement to a member's personal contributions for a designated beneficiary who does not qualify as a joint annuitant. If there are no personal contributions in the member's FRS account, either because the contributions were previously refunded to the member or because

the member began participation in the FRS after the system became noncontributory in 1975, the entitlement that exists pursuant to Section 121.091(7)(b)2 entitles the designated beneficiary to nothing. In comparison, an entitlement to monthly benefits is nonexistent in Section 121.091(7)(b)2 for a designated beneficiary who does not qualify as a joint annuitant.

31. The distinction between an "existing entitlement to nothing" and a "nonexistent entitlement" is not unique to Section 121.091(7)(b). Similar distinctions appear in Sections 121.091(5)(a) and 121.091(7)(a).

32. Entitlements to a member's accumulated contributions exist in Sections 121.091(5)(a) and 121.091(7)(a), respectively, for members who do not complete 10 years of creditable service and for the designated beneficiaries of members who die before completing 10 years of creditable service. A member's accumulated contributions are defined in Sections 121.021(26) and 121.071, inter alia, to mean the member's personal contributions between 1970 and 1975 plus accrued interest at the statutorily prescribed rate. The entitlements to accumulated contributions that exist in Sections 121.091(5)(a) and 121.091(7)(a) entitle members who began service after 1975 and the beneficiaries of such members to nothing. In comparison, an entitlement to monthly benefits is a nonexistent entitlement in Sections 121.091(5)(a) and 121.091(7)(a).

33. In Eaves and in this proceeding, it is the nonexistence of the entitlement to monthly benefits for the designated beneficiaries that renders ineffective the member's attempt to direct monthly benefits to those beneficiaries. Eaves, 704 So. 2d at 142-143. Entitlement to monthly benefits was nonexistent for the designated beneficiaries of Mrs. Thomas pursuant to Section 121.091(7)(b)2. None of the three daughters qualified as a joint annuitant within the meaning of Section 121.021(28). Section 121.091(7)(b)2 entitled the designated beneficiaries of Mrs. Thomas to receive only her personal contributions.

34. The attempt by Mrs. Thomas to designate beneficiaries for her monthly benefit was ineffective regardless of whether, as in Eaves, all of the personal contributions of the member were refunded to the member during his life; or, as in this proceeding, all of the personal contributions of the member were refunded, in part, during the member's life and, in part, after the member's death. In either event, the attempt to direct monthly benefits to a designated beneficiary is ineffective if an entitlement to monthly benefits is nonexistent for the beneficiary.

35. The entitlements in Section 121.091(7)(b) exist for a "designated beneficiary." Section 121.091(7)(b)1 entitles the "designated beneficiary" who is a joint annuitant to the monthly benefits prescribed in Section 121.091(6)(a)3. Section 121.091(7)(b)2 limits the entitlement of the "designated

beneficiary" who is not a joint annuitant to the member's personal contributions.

36. Respondent defines the term "designated beneficiary" to mean only the beneficiary designated by a member on the M-10. Respondent ignores the designated beneficiary prescribed in Section 121.091(8).

37. A member's ineffective attempt to designate a beneficiary who is entitled to monthly benefits fails to name such a beneficiary. When no beneficiary is named, Section 121.091(8), in relevant part, makes the surviving spouse the designated beneficiary. As a designated beneficiary in Section 121.091(8) and a surviving spouse, Petitioner is entitled in Section 121.091(7)(b)1 to the monthly benefits prescribed in Section 121.091(6)(a)3.

38. The definition of a joint annuitant in Section 121.021(28) lends some support to Respondent's definition of a designated beneficiary in Section 121.091(7)(b). Section 121.021(28), in relevant part, defines a joint annuitant as a "person designated by the member."

39. If the "designated beneficiary" in Section 121.091(7)(b) is limited to a person designated by the member, that definition would lead to a slightly different result in this proceeding. Under such a definition, the scope of Section

121.091(7)(b) would prescribe death benefits only for a beneficiary designated by a member and would not prescribe death benefits for an undesignated beneficiary.

40. Death benefits for an undesignated beneficiary would be prescribed in Section 121.091(8). See, e.g., Section 121.091(6)(a)(2) (authorizing payment in accordance with "subsection (8) as though no beneficiary had been named"). When no beneficiary is named, Section 121.091(8) provides, in relevant part, that death benefits are to be paid to the surviving spouse.

41. Section 121.091(8) would not limit death benefits for an "undesignated beneficiary" to the benefits payable to a "designated beneficiary" pursuant to Section 121.091(7)(b). Section 121.091(8) makes it clear that the death benefits payable to an "undesignated beneficiary" include any of the "benefits . . . payable in the event of . . . death pursuant to the provisions of this chapter." Death benefits payable pursuant to Chapter 121 are not limited to those prescribed in Section 121.091(7)(b) but include any of the monthly benefits authorized in Chapter 121 for a surviving spouse.

42. Monthly benefits authorized in Chapter 121 for a surviving spouse include monthly benefits prescribed in Sections 121.091(6)(a)2-4. Section 121.091(6)(a) prescribes monthly benefits for: a beneficiary, without limitation to a designated beneficiary; a survivor; and a joint annuitant. Sections

121.091(7)(e)-(f) entitle a surviving spouse to similar monthly benefits.

43. The legislature intends for the monthly benefits earned by a deceased member to be distributed when the member does not designate a beneficiary entitled to those benefits. Section 121.091(8) states that the beneficiary is the person who "shall" receive the benefits.

44. Section 121.091(8) designates several persons as contingent beneficiaries of a member's retirement benefits. If a "designated beneficiary" is limited to a person designated by a member and if a member's spouse does not survive a deceased member, the "undesignated beneficiary" in Section 121.091(8) who "shall" receive the benefits payable pursuant to Sections 121.091(6)(a)2-4 and 121.091(7)(e)-(g) may be the surviving children, the parents, or the member's estate. If the "designated beneficiary" in Section 121.091(7)(b) includes a person designated in Section 121.091(8), the surviving children, parents, or estate who may be such a "designated beneficiary" are entitled to receive the benefits prescribed in either Sections 121.091(7)(b)1 or 2, depending on whether the person qualifies as a joint annuitant.

45. The "designated beneficiary" in Sections 121.091(7)(b) and 121.091(8), whenever possible, should be construed to maximize the scope of benefits payable pursuant to Chapter 121. Statutory provisions regarding pension benefits should be

liberally construed in favor of the person claiming the benefits. City Of Tampa v. State, 19 So. 2d 697 (Fla. 1944); State ex rel. Holton v. City Of Tampa, 159 So 292 (Fla. 1934); Adams v. Dickinson, 264 So. 2d 17 (Fla. 1st DCA 1972); City Of West Palm Beach v. Holaday, 234 So. 2d 24 (Fla. 4th DCA) affirmed, 240 So. 2d 152 (Fla. 1970); City Of Hialeah v. Willey, 189 So. 2d 194 (Fla. 3d DCA 1966); Fairbank v. Schlesinger, 533 F.2d 586 (D.C. Cir. 1975).

46. Respondent defines the term "benefits" to mean only the personal contributions of Mrs. Thomas. In Respondent's letter to Petitioner dated November 1, 1996, Respondent states, in relevant part, that, ". . . a refund of retirement contributions is the only benefit payable from this account. Joint Exhibit 2.

47. Respondent incorrectly limits the term "benefits" to the lump sum payment of personal contributions. By restricting the term "benefits" to a lump sum payment and by excluding any monthly payment, Respondent deviates from Rule 60S-6.001(10); which defines the term "benefit" to mean a monthly payment. Respondent has no authority to deviate from its own valid existing rule. Section 120.68(12)(b); Boca Raton Artificial Kidney Center, Inc., v. Department Of Health And Rehabilitative Services, 493 So. 2d 1055, 1057 (Fla. 1st DCA 1986); Gadsden State Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977); Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977).

48. Respondent's limited definition of "benefits" not only deviates from Respondent's own rule but also ignores the "monthly benefits" described in Sections 121.071, 121.091(1), 121.091(5), 121.091(6), and 121.091(7)(e)-(g). For example, Section 121.091(1) describes the normal retirement benefit as a monthly benefit. Section 121.071 describes the retirement benefits for members who began service in the FRS before it became noncontributory in 1975, to include both personal contributions and monthly benefits. For members who began service in the FRS after 1975, however, the term "benefits" can mean only monthly benefits. By ignoring these statutory provisions, Respondent reduces each provision to a nullity.

49. The legislature does not intend any enactment to be a nullity. The legislature should never be presumed to pass a purposeless and useless piece of legislation. Sharer v. Hotel Corporation of America, 144 So. 2d 813, 817 (Fla. 1962). Significance and effect must be accorded each section in Chapter 121 in a manner that gives effect to Chapter 121 as a whole. Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107, 111 (Fla. 1980); State v. Gale Distributors, Inc., 349 So. 2d 150, 153 (Fla. 1977); Ozark Corporation v. Pattishall, 185 So 333, 337 (Fla. 1938); Topeka Inn Management v. Pate, 414 So. 2d 1184, 1186 (Fla. 1st DCA 1982).

50. Retirement benefits include personal contributions and monthly benefits. Both types of retirement benefits were enacted

in the same act and relate to the same subject matter. 1970 Laws Of Florida, Chapter 70-112. Such statutes must be considered in pari materia in a manner that harmonizes them and gives effect to legislative intent for the entire act. Major v. State, 180 So. 2d 335, 337 (Fla. 1965); Abood v. City of Jacksonville, 80 So. 2d 443, 444-445 (Fla. 1955); Tyson v. Soutamire, 140 So 454, 456 (Fla. 1932). Such statutes are imbued with the same spirit and actuated by the same policy. Pfeiffer v. City of Tampa, 470 So. 2d 10, 15 (Fla. 2d DCA 1985).

51. Respondent attempts to justify a forfeiture of the monthly benefits Mrs. Thomas earned during 31.8 years of service to the public school system on the grounds that Mrs. Thomas did not intend for Petitioner to receive those benefits. Respondent argues that there is no evidence that Mrs. Thomas wanted Petitioner to receive her "retirement benefits." Respondent's PRO at 7. According to Respondent:

After her marriage to him, she removed her former husband as beneficiary, and named her daughters as beneficiaries. For whatever reasons, she did not designate him as a beneficiary. There was no evidence of oversight, incapacity, illiteracy, or contrary intent. Likewise, there no [sic] evidence in the Division's file that she intended for [Petitioner] to receive her retirement benefits.

Respondent's PRO at 7-8.

52. It is spurious to suggest that Respondent seeks to carry out the intent of Mrs. Thomas by forfeiting her monthly benefits to the state. The suggestion relies on the silent

premise that if the children were not entitled to the monthly benefits authorized in Chapter 121, Mrs. Thomas preferred for the state, rather than for Petitioner, to receive those benefits in the form of a forfeiture. There is no evidence that Mrs. Thomas wanted the state to receive either type of her "retirement benefits." After Mrs. Thomas married Petitioner, she named her daughters as beneficiaries. For whatever reasons, she did not designate the state as a contingent beneficiary. There is no evidence that Mrs. Thomas intended to designate the state as a beneficiary of the monthly benefits she worked 31.8 years to earn.

53. A forfeiture of the monthly benefits authorized in Chapter 121 is not clearly required by statute. Where forfeiture of retirement benefits is not clearly required by statute, no forfeiture should be inferred. Ireland v. Thomas, 324 So. 2d 146, 147 (Fla. 1st DCA 1975). See also Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976) (statutes should be liberally construed to avoid forfeiture and liberally construed to avoid and relieve from forfeiture).

54. Respondent has only that power which is expressly or by necessary implication granted by legislative enactment. Lewis Oil Co, Inc., v. Alachua County, 496 So. 2d 184, 187 (Fla. 1st DCA 1986); Department of Highway Safety & Motor Vehicles v. German, 451 So. 2d 1013 (Fla. 3d DCA 1984); State, Department of Environmental Regulation v. Falls Chase Special Taxing District,

424 So. 2d 787, 793 (Fla. 1st DCA 1983). Any reasonable doubt as to the lawful exercise of a particular power should be resolved in favor of arresting the further exercise of that power.

Edgerton v. International Company, 89 So. 2d 488 (Fla. 1956);

State v. Atlantic Coast Line R. Co., 47 So 969 (Fla. 1908);

Fraternal Order of Police, Miami Lodge v. City of Miami, 492 So.

2d 1122, 1124 (Fla. 3d DCA 1986).

55. The whole of retirement benefits is divided into two parts. One part consists of personal contributions made by members before 1975. The other part consists of monthly benefits earned before and after 1975.

56. Respondent's proposed agency action rests on the fallacious, albeit silent, premise that Chapter 121 requires Respondent to distribute only those benefits to which the beneficiary designated by the member is entitled in Section 121.091(7)(b). If that beneficiary is entitled in Section 121.091(7)(b) to only the personal contributions of the member, Respondent erroneously assumes that Chapter 121 requires Respondent to retain the monthly benefits.

57. Respondent's silent premise ignores the designated beneficiary in Section 121.091(8) and the legislative intent expressed therein. In effect, Respondent reduces Section 121.091(8) to a nullity and effectuates a forfeiture of those retirement benefits comprised of monthly benefits; in contravention of legislative intent and applicable case law.

Such a result has significant consequences for members who began service after 1975 and are entitled to retirement benefits comprised solely of monthly benefits.

58. The better course of action is to construe Sections 121.091(7)(b) and 121.091(8) in pari materia so as to maximize the retirement benefits which are payable pursuant to Chapter 121. When a member designates a beneficiary who is entitled in Section 121.091(7)(b)2 to only the member's personal contributions, Section 121.091(8), in relevant part, makes the surviving spouse the designated beneficiary entitled to the monthly benefits which are payable pursuant to Sections 121.091(7)(b)1 and 121.091(6)(a)3. Alternatively, if a member designates a beneficiary who is entitled in Section 121.091(7)(b)2 to only the member's personal contributions, Section 121.091(8), in relevant part, makes the surviving spouse the undesignated beneficiary entitled to the monthly benefits which are payable pursuant to Sections 121.091(6)(a)2-4 and 121.091(7)(e)-(g).

RECOMMENDATION

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

RECOMMENDED that Respondent enter a Final Order awarding to Petitioner, for the remainder of his life, the monthly benefits earned by Mrs. Thomas during 31.8 years of service in an amount that may range from \$937.75 to \$1,617.95, depending on the amount

of personal contributions repaid by Petitioner, and shall include a lump sum payment of all monthly benefits plus accrued interest from October 1, 1996, to the date of the first payment.

DONE AND ENTERED this 29th day of April, 1999, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 1999.

COPIES FURNISHED:

Robert B. Button, Senior Attorney
Department of Management Services
Division of Retirement
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

Granville E. Petrie, Esquire
1105 North Duval Street
Tallahassee, Florida 32303

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

Emily Moore, Esquire
Division of Retirement
Cedars Executive Center, Building C
2639 North Monroe Street
Tallahassee, Florida 32399-1560

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.