STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

DEBORAH BOHLER,

Petitioner,

vs.

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

Final Order No. DMS – 10-0001

DOAH Case No. 09-2842
OGC Case No. 09-17361

FINAL ORDER

PRELIMINARY STATEMENT

After being formally notified of the Division of Retirement's ("Division") intent to deny her request for continuing retirement benefits from the account of her deceased husband, George S. Bohler, Petitioner timely filed a petition for hearing and the case was referred to the Division of Administrative Hearings ("DOAH"). Petitioner also filed a rule challenge petition pursuant to Section 120.56, Florida Statutes, challenging Florida Administrative Code Rule 60S-9.001(2)(s) as an invalid exercise of delegated legislative authority. The cases were consolidated for hearing, but the rule challenge petition was the subject of a separate order.

Pursuant to notice, DOAH, by its duly designated administrative law judge, P. Michael Ruff, held a formal hearing in the above-styled case on August 11, 2009, in Jacksonville, Florida.

At the formal proceeding, Petitioner testified on her own behalf and offered two exhibits which were admitted into evidence. Respondent offered the testimony of Charlene Fansler, a Division Benefits Administrator, and offered one exhibit which was admitted into evidence. A joint exhibit was also submitted by the parties and admitted.

The parties filed proposed Recommended Orders and a Recommended Order was issued November 10, 2009, which is incorporated by reference into this Final Order. No exceptions to the Recommended Order were filed by either party. A transcript of the hearing and all exhibits have been reviewed in the preparation of this Final Order.

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is entitled to receive a continuing retirement benefit from the Florida Retirement System ("FRS") account of her deceased husband, George S. Bohler.

STANDARD OF REVIEW

Subsection 120.57(1)(l), Florida Statutes, provides that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as such evidence as is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of fact. See Friends of Children v. Dep't of Health & Rehabilitative Servs., 504 So. 2d 1345, 1347-1348 (Fla. 1st DCA 1987).

Subsection 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretations are "as or more reasonable" than the interpretation made by the administrative law judge. Florida courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the administrative law judge's application of legal concepts such as collateral estoppel and hearsay; but not from reviewing conclusions of law containing the administrative law judge's interpretation of statutes or rules over which the

Legislature has provided the agency administrative authority. Hoffman v. State, Dep't of Mgmt. Servs., Div. of Ret., 964 So. 2d 163, 165 (Fla. 1st DCA 2007); Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-1142 (Fla. 2d DCA 2001); Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). Further, an agency's interpretation of the statutes and rules that it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. See State Bd. of Optometry v. Fla. Soc'y of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA 1998).

FINDINGS OF FACT

The Department of Management Services ("Department") accepts the findings of fact set forth in the Recommended Order with the following exceptions:

1. The Department rejects a portion of finding of fact 10, specifically the phrase "so that the FRS is thus informed that the spouse made a knowing, intelligent waiver of survivorship rights to benefits" because it relies on an incorrect statement of law. Chapter 121 of the Florida Statutes, in which the FRS is codified, does not provide the spouse of an FRS member with any inherent right to a survivorship benefit. Therefore, there can be no waiver of that right.

2. The Department rejects a portion of finding of fact 12, specifically the sentence "[s]he was unaware that an attempt to waive or extinguish her survivor's benefits had been made" because it relies on an incorrect statement of law and is not based on competent substantial evidence. Chapter 121 of the Florida Statutes, in which the FRS is codified, does not provide the spouse of an FRS member with any inherent right to a survivorship benefit. Therefore, there can be no waiver of that right.

3. The Department rejects a portion of finding of fact 13, specifically the phrase "which would preclude a spouse's survivorship benefit" and the sentences:

> In fact, the legislature clearly placed that requirement in the statute, Section 121.091(6)(a), Florida Statutes, as a mandatory requirement so a spouse would know of any such attempt to waive the spouse's survivorship rights and benefits. It is an acknowledgment that the spouse has a vested or property right in such benefits, which must be knowingly and intelligently waived.

These sections rely on incorrect statements of law. Chapter 121 of the Florida Statutes, in which the FRS is codified, does not provide a FRS member's spouse with any inherent right to a survivorship benefit. Therefore, there can be no waiver of that right.

4. The Department rejects finding of fact 14 because it fails to contain any finding of fact. It is instead an erroneous statutory interpretation that is within the substantive jurisdiction of this agency.[1]

CONCLUSIONS OF LAW

The Department accepts the conclusions of law set forth in the Recommended Order, which are incorporated herein by reference, with the exception of conclusions 19 through 26, which are hereby rejected as incorrect. The conclusions offered by the administrative law judge lead to an unsound result that leaves every retirement application executed by any member who chooses Option 1 or Option 2 nonfinal and subject to challenge, while thwarting the meaning of Section 121.091 and the actuarial soundness of the FRS Trust Fund required by Article X, Section 14 of the Florida Constitution and Part VII, Chapter 112 of the Florida Statutes. Further, conclusions of law 19 through 26 interpret statutes and rules implemented and enforced by the Department and address matters within this agency's substantive jurisdiction and can therefore

[1] The labels assigned by an administrative law judge to paragraphs in a recommended order are not dispositive as to whether those paragraphs are actually "findings of fact" or "conclusions of law," and reviewing agencies and courts are not bound by such labels. Goin v. Comm'n on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995); Battaglia Properties v. Fla. Land & Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993).

be modified or rejected. Hence, based on the record evidence, the following conclusions of law are substituted and adopted:

19. The FRS is codified in Chapter 121, Florida Statutes. Pursuant to Section 121.1905, Florida Statutes, the Division was created to administer the FRS. The Division is guided by its own rules found in Chapter 60S, Florida Administrative Code. See, e.g. Prince v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 09-2582, 2009 WL 2477585 (F.O. 09/15/09).

20. Effective 1992, the spouse of a FRS member must be notified of and acknowledge his or her spouse's selection of Option 1 or Option 2 pursuant to Section 121.091(6)(a), Florida Statutes.[2] This section does not, however, require that a spouse *agree* with the member's option selection.

21. Since it is impossible for the Division to independently know whether a spouse is married, the Division has, by rule, delegated the responsibility of notifying a spouse of the member's selection of Option 1 or Option 2 to the member. Fla. Admin. Code. R. 60S-4.010(9).

22. In an effort to ensure the member's compliance with the requirement of spousal notification, the Division requires retirement applications to be signed by a spouse when a member indicates that he or she is married on his or her retirement application and has selected either Option 1 or Option 2. Fla. Admin. Code. R. 60S-4.010(9)(a). In the case at bar, when the Division received the member's retirement application, it appeared to bear the signature of Petitioner, the member's spouse. The parties have since stipulated that Petitioner's signature was forged.

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[2] An FRS member may choose Option 3 or Option 4 and select a joint annuitant other than his or her spouse. When this occurs, there is no requirement that a spouse be notified of this election although the spouse will not receive a continuing retirement benefit after the member's death.

23. Petitioner seeks to amend the option selection to an option that provides a continuing benefit to her (Option 3 or Option 4). However, only a member can select an option under which he or she will receive retirement benefits – a spouse has no right to the member's retirement benefits under Chapter 121. See § 121.091(6)(a), Fla. Stat.; See Fla. Admin. Code R. 60S-4.010(1); See § 121.011(3)(d), Fla. Stat. ("[T]he rights of members of the [FRS] established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.") [Emphasis added.]; See also § 121.091(5)(f), Fla. Stat. (providing that a member's entire right and benefit under the FRS may be forfeited without regard for the member's spouse); Ellis v. Dep't of Mgmt. Servs., Div. of Ret., DOAH Case No. 97-1357, 1997 WL 1053269 (F.O. 10/08/97), *aff'd,* 731 So. 2d 652 (Fla. 1st DCA 1999) (stating a wife's interest in her husband's FRS retirement benefit was a contingent interest that could be terminated by her husband at any time). The member in this case chose Option 1, and Petitioner presented no evidence supporting the position that the member mistakenly chose this option, or was incapacitated and therefore unable to understand in a reasonable manner the nature and consequences of his selection. See Hodan v. Supreme Camp of Am. Woodmen, 1 So. 2d 256 (Fla. 1941); See also Smith v. Lynch, 821 So. 2d 1197 (Fla. 4th DCA 2002).

24. Moreover, there is no provision in law that permits an option selection to be changed after a retirement benefit check has been deposited. Rather, there is a statutory prohibition. Section 121.091(6)(h), Florida Statutes, provides, "[t]he option selected or determined for payment of benefits as provided in this section shall be final and irrevocable at the time a benefit payment is cashed or deposited." The member deposited more than seven years of monthly retirement benefits.

25. Although a member's spouse is required to be notified by the member of his or her selection of Option 1 or Option 2, it is not a condition precedent to a valid option selection. As a general rule, conditions precedent are not favored, and courts will not construe provisions to be such unless required to do so by plain, unambiguous language or by necessary implication, neither of which apply in this case. Covelli Family, L.P. v. ABGS, L.L.C., 977 So. 2d 749 (Fla. 4th DCA 2008); See Raban v. Fed. Express, 13 So. 3d 140 (Fla. 1st DCA 2009). Instead, if the Division has received evidence that a spouse has been notified, the Division can accept the option selection. See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S.Ct. 865 (U.S. 2009) (holding that under the "plan document rule" found in the Employee Retirement Income Security Act, plan administrators can determine the correct beneficiary of a retirement account by looking solely to the plan documents on file).

26. Petitioner's assertion that the Division is under a legal obligation to contact each spouse or otherwise verify the signature of each spouse on the retirement applications received in the Division's normal course of business is without foundation in law or in fact. Carpenter v. Dep't of Mgmt. Servs., Div. of Ret., DOAH Case No. 01-1618, 2001 WL 789905 (F.O. 08/22/01). Based on testimony presented at the hearing regarding the current number of FRS members and yearly retirement applications received by the Division, requiring the Division to take this action would force the Division to hire a team of investigators to investigate the marital status of nearly one million members. Clearly, this is a budget expense that can only be appropriated by the legislature, and to judicially direct this action would be a violation of the constitutional requirement of the separation of powers. See Fla. Const., art. II, § 3.; See Hoffman v. State, Dep't of Mgmt. Servs., Div. of Ret., 964 So. 2d 163 (Fla. 1st DCA 2007).

27. Since it is the member's responsibility to notify his or her spouse, and the Division does not have the resources to identify or notify members' spouses, and was presented with evidence that Petitioner had been notified, recourse is proper against the member who allegedly committed felony forgery or the member's estate – not the Division.

ORDER

Based on the foregoing, it is hereby ORDERED AND DIRECTED that the Petitioner's request for a continuing retirement benefit from her husband's Florida Retirement System account is hereby DENIED.

DONE AND ORDERED this 19 day of January, 2010, in Tallahassee, Leon County, Florida.

Linda South
Secretary
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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 DEPARTMENT OF MANAGEMENT SERVICES, 4050 ESPLANADE WAY, SUITE 160, TALLAHASSEE, FLORIDA 32399-0950, AND A SECOND COPY, ACCOMPANIED BY 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.

I HEREBY CERTIFY that this Final Order was filed in the official records of the Division of Retirement, and copies distributed by U.S. Mail to the parties below, on the 20th day of January, 2010.

Debbie Shoup
Clerk
Department of Management Services

Copies furnished to:

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