

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBORAH BOHLER,)
)
 Petitioner,)
)
 vs.) Case Nos. 09-2842
) 09-3350RX
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to proper notice, this matter came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Jacksonville, Florida, on August 11, 2009. The appearances were as follows:

APPEARANCES

For Petitioner: T. A. Delegal, Esquire
Delegal Law Offices, P.A.
424 East Monroe Street
Jacksonville, Florida 32202

For Respondent: Elizabeth Regina Stevens, Esquire
Department of Management Services
Office of the General Counsel
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32327

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner, as a surviving spouse, is entitled to a continuing benefit from the Florida Retirement System (FRS) based on the retirement account of her deceased husband, George S. Bohler. More specifically, it must be determined whether the forgery of the spousal acknowledgement form renders the member's election of the "Option 1" retirement benefit payment, which precludes a survivor's benefit for his spouse, invalid and void.

PRELIMINARY STATEMENT

This dispute arose upon the death of FRS member George S. Bohler, on October 18, 2007. Immediately after his death, the Petitioner, his surviving spouse, requested that her late husband's retirement benefits be paid to her as a survivor's benefit. Because of its view that the member, Mr. Bohler, had validly elected "Option 1" for receipt of FRS benefits upon his retirement (and entry into the DROP arrangement) the Agency took the position that there was no survivor's benefit to be paid to his surviving spouse, the Petitioner. Consequently, by letter of March 19, 2009, the Division of Retirement (Division) advised the Petitioner of its denial of her request.

The Petitioner availed herself of a right to a formal administrative proceeding to contest that initial Agency action.

She seeks to resolve the issue of whether her spouse's option selection was valid, could be changed or, in any event, whether she was entitled to a survivor retirement benefit. The matter was transferred to the Division of Administrative Hearings and, in due course, to the undersigned Administrative Law Judge for conduct of a formal proceeding, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

The Petitioner has 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. This is the Rule which provides for the form for spousal acknowledgement of a retirement system member's election of Option 1. It indicates that the spouse is aware of the election of the retirement benefit option which precludes any survivor benefit being available to a surviving spouse. This Rule was enacted pursuant to Section 121.091(6)(a), Florida Statutes, which states that the spouse of a member shall be notified and shall acknowledge any such election of one of the two options which result in divesting a spouse of a survivor's benefit.

The Rule Challenge Petition was assigned Case No. 09-3350RX and was consolidated for hearing purposes with the instant case. It, however, will be the subject of a separate final order being entered adjudicating the Rule Challenge Petition and

adjudication of that proceeding is not addressed in this recommended order.

This cause came on for hearing, as noticed. The Petitioner presented her own testimony and offered two exhibits which were admitted into evidence. The Respondent presented the testimony of one witness, Sharlene Fansler, and offered one exhibit which was admitted into evidence. A joint exhibit was also submitted and admitted by the parties. Upon concluding the proceeding, the parties elected to file proposed recommended orders which were timely-filed after conclusion of the final hearing. Those Recommended Orders have been considered in the rendition of this Recommended Order. The parties elected to obtain no transcript of the final hearing.

FINDINGS OF FACT

1. George Bohler, the FRS member at issue, was employed, at times pertinent, as a Professor of Economics at Florida Community College in Jacksonville. The College is an FRS employer and Mr. Bohler was a member of the FRS retirement system. The Division of Retirement is an administrative agency charged with regulation and operation of the Florida retirement system, including calculation of and determination of entitlement to retirement benefits, under various options and member circumstances.

2. On March 22, 1999, Mr. Bohler filed a completed Florida Retirement System Application for service retirement and the Deferred Retirement Option Program (DROP). This was accomplished through his filing of "Form DP-11." The Form provides a retiree with information pertaining to four options by which his retirement benefits may be paid. One full page of that form provides an explanation of each option. Mr. Bohler selected Option 1, a retirement benefit pay-out plan which provides the highest monthly benefit. The Option 1 selection provides that this highest monthly benefit is payable for the lifetime of the retiree only. Upon his death, the benefit would stop and his beneficiary, here his spouse, the Petitioner, would receive only a refund of any contributions the member might have paid into the FRS which exceeds the amount he had received in benefits. Option 1 provides no continuing or survivor benefit to a beneficiary or surviving spouse.

3. The DP-11 Form filed with the retirement application contained an apparent spousal acknowledgement purportedly signed by Deborah T. Bohler, the spouse of member George Bohler. It appears to acknowledge that the member had elected either Option 1 or Option 2, which provide no survivor/spouse benefit.

4. The DP-11 Form indicated to the Division that the member was married. The parties have stipulated, however, that

the Petitioner's signature on the FRS application for service retirement and the DROP program was actually forged.

5. George Bohler, the member, was an FRS member from August 19, 1968, to March 31, 2005. He received FRS retirement benefits based upon the above-referenced application from the Division from April 1, 2000, to October 31, 2007.

6. The Form DP-11 contained a statement to the effect that the retiree member understood that he could not add additional service, change options, or change his type of retirement once his retirement became final.

7. Mr. Bohler began participation in the DROP program on April 1, 2000. Thereafter, his last date of employment was March 31, 2005, and he passed away on October 18, 2007. He received FRS benefits from April 1, 2000, until October 31, 2007. For 28 years, until his death on that date, Mr. Bohler was legally married to the Petitioner, Deborah Bohler, during which time they were never separated or divorced. On March 10, 1999, Mr. Bohler executed the FRS Application for Service Retirement and the DROP program. He had his signature notarized as required for that form. Joint Exhibit 1, in evidence.

8. Mr. Bohler designated the Petitioner as his primary beneficiary on the DROP Application. He elected to begin participation in the DROP program as of April 1, 2000, and to

retire from state employment effective March 31, 2005, which he did.

9. There are four options which an FRS member may select for his or her retirement benefits to be paid to the member or to the survivors/beneficiaries. Mr. Bohler selected "Option 1" on his DROP Application form. This results in a significantly higher retirement monthly benefit than does Options 3 or 4, which have survivorship rights.

10. The acknowledgement section on the DROP Application form requires that a member's spouse be notified and must acknowledge a member's selection of Option 1 or Option 2 by signing that DROP Application form, so that the FRS is thus informed that the spouse made a knowing, intelligent waiver of survivorship rights to benefits. The spousal acknowledgement provision or section does not require that the member's spouse's signature be notarized. The form also does not require a member to swear under oath that the spouse was notified.

11. The parties have stipulated that the Petitioner's apparent signature shown on Mr. Bohler's retirement application form was forged. The Petitioner had no knowledge that her name had been placed on the form by some other person, nor did she have any knowledge that Mr. Bohler had selected Option 1 prior to his death. The Petitioner first learned that her husband had selected Option 1 when she contacted the Respondent, after his

death, to request that his retirement benefits now be paid to her. She believed that she was entitled to survivorship benefits. Her husband never informed her that he had selected a retirement option which would not pay her survivorship benefits, nor had they discussed the matter before or since his retirement. In their marital and family relationship, the Bohlers had divided certain duties in such a way that Mr. Bohler, the FRS member at issue, handled all financial matters himself. The Petitioner, Mrs. Bohler, dealt with any tax issues or filings the couple was required to make during the years of their marriage. The Petitioner is a certified public accountant. The Petitioner was simply aware that her husband received retirement benefits, and knew the amount of them, but did not know that they represented benefits for Option 1 rather than Option 3 or 4.

12. The Petitioner's signature on the spousal acknowledgment section of the DROP Application form is stipulated to have been forged. The fact of the forgery, and the Petitioner's un-refuted testimony, establishes that she was never notified, nor did she ever acknowledge that her husband had selected Option 1. She was not aware that an attempt to waive or extinguish her survivor's benefits had been made. She believed, during his lifetime, that she was to be accorded survivor benefits.

13. Testimony presented by the Respondent shows that the Respondent Division will not accept a retirement application form, or process it, if a member fails to complete the spousal acknowledgement section or, alternatively, to submit a signed statement explaining why that section is left blank, or the signature of the spouse has not been obtained. The fact that the Division will not accept a retirement or DROP Application form or process the related benefits if the acknowledgement section is unsigned or blank establishes the mandatory nature of the requirement that a spouse acknowledge a member's election to receive benefits under an option which would preclude a spouse's survivorship benefits. The acknowledgement is thus not an optional requirement. 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 acknowledgement that the spouse has a vested or property right in such benefits, which must be knowingly and intelligently waived. The Statute says, in fact, that the spouse of any member "shall be notified of and shall acknowledge any such election." Therefore, obtaining a spouse's signature is not the only desired result set forth by the legislature (and under the rule adopted pursuant thereto) because it requires actual notification of the spouse, not merely the obtaining of a

spouse's signature, whether genuine or forged. Actual notification is what must be accomplished. The required notification and indeed the obtaining of the Petitioner's signature was not accomplished in the facts of this case.

14. In light of these facts, the act of declaring and accomplishing retired status, and selection of the related benefit option, was never completed. The Option selection was obviously a nullity and void ab initio because the mandatory condition precedent never was accomplished by the member.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

16. The Petitioner in this matter has the burden of proving by a preponderance of evidence that she is entitled to the relief and retirement benefits sought. See Florida Department of Transportation v. J.W.C., Co., 396 So. 2d 778, 789 (Fla. 1st DCA 1981).

17. When an FRS member retires, there are four benefit payment options available. The first is Option 1, which pays the maximum retirement benefit payable to the member during his lifetime, but by which retirement benefits are extinguished upon the member's death. Option 2 provides a retirement benefit payable during the member's lifetime and, in the event of his

death within a period of 10 years after retirement, the same monthly benefit amount will be payable to the beneficiary for the balance of the 10-year period only.

18. Option 3 provides a retirement benefit to be payable during the joint lifetimes of both the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in the same amount (except as provided in Florida Administrative Code Rule 60S-4.0101 (1)(e).) Option 4 provides for a retirement benefit payable during the joint lifetimes of the member and his joint annuitant, and which shall continue after the death of either during the lifetime of the survivor, in an amount equal to 66 and 2/3 percent of the amount which was payable during the joint lifetime of the member and his joint annuitant (here again, except as provided in Rule 60S-4.010(1)(e), concerning joint annuitants who are under the age of 25 or disabled, who receive a different amount of benefit).

19. Section 121.091(6)(a), Florida Statutes (2008), states that the spouse of any member "shall be notified of and shall acknowledge any such election" which would divest a spouse of a survivor's benefit. This provision applies to the retiree's selection of "Option 1" in this case. Therefore, a spouse must mandatorily be actually notified and must actually acknowledge the option selection of the member, before the survivor's

benefit can be divested. This requirement is carried forward in Florida Administrative Code Rule 60S-4.010. This statute and related rule do not require that a signature on the acknowledgement form be obtained. Rather, actual notification of the spouse and actual acknowledgement by the spouse must be accomplished. The unrefuted evidence of record in this de novo proceeding reveals that the Petitioner, the surviving spouse, was never notified of the retiree husband's option election which would have served to extinguish her survivor's benefits.

20. A spouse's survivorship benefit has been recognized in the Department's rules and in the statute, as well as case law. Florida Administrative Code Rule 60S-4010(9); Eaves v. Division of Retirement, 704 So. 2d 140 (Fla. 1st DCA 1997); Russell v. Russell, 922 So. 2d 1097, 1099 (Fla. 4th DCA 2006); Ganzel v. Ganzel, 770 So. 2d 304 (Fla. 4th DCA 2000). It is a vested property right.

21. A mandatory notification and acknowledgement of a member's spouse is required in order to divest the spouse's survivorship rights, as a "joint annuitant." The Petitioner herein has that status because she is a continuous spouse and surviving spouse. Such notification and acknowledgment is a condition precedent to making the option selection effective and to processing the retirement application or payment of benefits. Because the purported spousal acknowledgement was, admittedly, a

forgery, the benefit option selection made by Mr. Bohler was void ab initio.

22. Florida Administrative Code Rule 60S-4.002(4)(b) provides that once a retirement benefit payment has been cashed or deposited, the option selection cannot be changed. In the instant situation, however, the option selection was not effectively made, because of the lack of a spousal acknowledgement. The Respondent has conceded that, in the event of fraud, over-payment or the miscalculation of benefit payments, that the Respondent Agency has the authority to recoup incorrect benefit payments and re-calculate amounts due to beneficiaries. Here, through no fault of its own, the Agency, the Division, relied on the option selection made by Mr. Bohler. However, in the de novo context of the evidence in this case, and even prior to hearing, the Agency learned of and stipulated that the option selection was based on the above forgery. Therefore, the mistaken payment of benefits and divestiture of the spouse's rights as a joint annuitant, because they are based upon fraud, must be corrected.

23. If the acknowledgement section of the relevant retirement application form, adopted in July 2006, along with the above-referenced rule, requiring that a benefit once cashed or deposited cannot be altered, were applied to extinguish the Petitioner/joint annuitant's survivor benefits, the effect would

be to nullify the mandatory spousal notification and acknowledgement requirements of Section 121.091(6)(a), Florida Statutes, a prior-enacted statute. This would violate generally accepted principles of statutory construction and would, based on the effect of unrefuted evidence, in the de novo context of this proceeding, allow a fraudulent act to nullify the surviving spouse's vested rights.

24. An ineffectual designation of beneficiary (analogous to designation of an option plan through the use of forgery in the instant case) cannot serve to defeat a surviving spouse's and joint annuitant's rights to certain death benefits. See Eaves, supra. Certainly, designation of Option 1 benefits by the retiree, for his benefit, cannot be supported by the use of a forged document. Generally speaking, in the field of retirement law, including persuasive cases arising under the Employees Retirement Income Security Act (ERISA), designations of beneficiaries, or other retirement benefit designations by retirees or future retirees cannot be upheld if based upon forged documents. See, for example, Rice v. The Rochester Laborers Annuity Fund, Robert Brown and Shirley J. Jenkins defendants 888 F. Supp. 494 (W.D.N.Y. 1995); Lombardo v. United Technologies Corp., 1997 U.S. Dist. LEXIS 7651 (Dist. Conn. 1997). The Eaves Court also stated that, for a beneficiary who qualifies as a joint annuitant under Florida Administrative Code

Rule 60S-6.001(34), as the Petitioner herein does, the optional form of payment of death benefits, embodied in Section 121.091(6)(a)(3), Florida Statutes (2008), shall be paid for the joint annuitant's lifetime.

25. In summary, because selection of Option 1 was a nullity, because it was based on a forged acknowledgment, then that designation never actually occurred. The Petitioner is a joint annuitant and is entitled to be paid benefits which are based on Option 3.

26. Although benefits have been paid and cashed or deposited, such was based on the forgery. The Division understandably did so because it had no basis for knowing, until this proceeding commenced, that the subject acknowledgement document was a forgery. It, by its own concession, has the authority to correct that mistake, so that benefits can still be paid to the survivor based on Option 3. See Fla. Admin. Code R. 60S-4.008. This should be accomplished but it is also true that the Petitioner has no entitlement to a windfall based upon the fact that Option 1 benefit payments were paid for approximately seven years or during the retiree's DROP period, plus the period of retirement benefits after employment ceased and before death. Consequently, payments to the Petitioner, as a joint annuitant and surviving spouse, should be adjusted so that the Division and the state of Florida recoups what would amount to the excess

amount of benefits paid under the Option 1 regime. The Petitioner should thus be accorded Option 3 level benefits, adjusted for recoupment of the referenced excess amounts previously paid.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is

RECOMMENDED that a final order be entered by the State of Florida, Department of Management Services, Division of Retirement, awarding the Petitioner retirement benefits based upon her status as a surviving spouse and joint annuitant, in the manner described above, adjusted to reflect re-calculation and recoupment of overpayment based upon the amount of benefits already paid from the subject retirement account pursuant to Option 1.

DONE AND ENTERED this 10th day of November, 2009, in
Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
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this 10th day of November, 2009.

COPIES FURNISHED:

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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.