STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RENEÉ RADICELLA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-5491
	)	
DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,	)	
	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On January 25, 2012, a final administrative hearing was held in this case by video teleconference at sites in Tampa and Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward K. Kim, Esquire
Law Office of Edward K. Kim
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Tampa, Florida 33606-1530

For Respondent: Larry D. Scott, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is entitled to change the type of her retirement benefits from early service retirement to disability retirement.

PRELIMINARY STATEMENT

By certified letter dated June 15, 2011, Respondent, Department of Management Services, Division of Retirement (Respondent or Division), notified Petitioner, Reneé Radicella (Petitioner or Ms. Radicella) that the Division was unable to honor Ms. Radicella's request to receive disability retirement benefits. According to the Division's records, Ms. Radicella was already receiving early service retirement benefits, and by Division rule, she could not change the type of retirement benefits after having cashed or deposited benefit payments. The letter notified Ms. Radicella of her right to an administrative hearing to contest the decision.

Ms. Radicella timely submitted a request for a disputed-fact administrative hearing, and this case was forwarded to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner.

At the final hearing, Edward K. Kim, Esquire, entered his appearance on the record to represent Ms. Radicella. Mr. Kim

had been informally assisting Ms. Radicella prior to the final hearing, but this was his first record appearance on her behalf.

Also at the beginning of the final hearing, the parties placed on the record several stipulations regarding material facts, for which no evidence would be required.[1/] These stipulations are incorporated into the Findings of Fact below.

Petitioner testified on her own behalf and also presented the testimony of Pat Beals and Alvin Ellenwood. Petitioner's Exhibit A, her request for an administrative hearing, was admitted in evidence for the limited purpose of establishing that she requested a disputed-fact hearing and not for the truth of the disputed facts identified in the letter. Petitioner's Exhibits B through H were initially offered, but after discussion about the use and limitations on the use of hearsay, these exhibits were ultimately withdrawn by counsel for Petitioner without proffer, and, therefore, are not part of the record. Respondent presented the testimony of Debra W. Roberts and Respondent's Exhibits 1 through 5, 7, 8, and 10 were admitted in evidence. Respondent's Exhibits 6 and 9 were initially offered, but were ultimately withdrawn without proffer, and therefore, are not part of the record. In addition, at the Division's request, without objection, official recognition was taken of Florida Administrative Code Rule 60S-4.002(4).

A court reporter was in attendance at the hearing to preserve the testimony; however, a transcript was not ordered. Both parties timely filed Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is charged with managing, governing, and administering the Florida Retirement System (FRS).

2. The FRS is a public retirement system as defined by Florida law. Nearly 1,000 public employers participate in the FRS, including state agencies, local governments, and district school boards. There are more than 600,000 individual active members in the FRS.

3. Petitioner was an employee of the Pasco County School Board until she submitted her resignation on February 28, 2011, in order to retire. By reason of her employment with the Pasco County School Board, Petitioner is a member of the FRS.

4. After Petitioner resigned, she met with Michael Hudson, the director of Employee Benefits for the Pasco County District School Board, on March 4, 2011, to complete the paperwork for her retirement.

5. At the March 4, 2011, meeting, Petitioner completed and signed the form application for service retirement. The information filled out on the form in Petitioner's clear

handwriting included her name, position, address, telephone number, social security number, birth date, and service termination date.

6. The following statement appears on the application form immediately above Petitioner's notarized signature:

> I understand I must terminate all employment with FRS employers to receive a retirement benefit under Chapter 121, Florida Statutes. I also understand that I **cannot** add service, change options, change my type of retirement (Regular, Disability, and Early) or elect the Investment Plan once my retirement becomes final. My retirement becomes final when any benefit payment is cashed or deposited. (Bold in original).

7. Petitioner also filled out the payment option selection form, selecting Option 1 as the option for how her retirement benefits are to be paid out. Immediately above Petitioner's signature on the option selection form is this statement:

> I understand I must terminate all employment with FRS employers to receive a retirement benefit under Chapter 121, Florida statutes. I also understand that I **cannot** add service, change options or change my type of retirement (Regular, Disability, and Early) once my retirement becomes final. My retirement becomes final when any benefit payment is cashed, deposited or when my Deferred Retirement Option Program (DROP) participation begins. (Bold in original).

8. Petitioner was aware that she could seek to qualify for disability retirement benefits, but that in order to apply for disability retirement, she would have to submit certifications

by two doctors that she was totally and permanently disabled, meaning that she was unable to work.

9. Petitioner also knew that she could apply for early service retirement, which would not require proof of total, permanent disability. However, because Petitioner would be retiring early, her benefits would be discounted, so she would receive less.

10. Petitioner understood, when she completed the application on March 4, 2011, that the type of retirement for which she applied was early service retirement. At retirement, she was 52 years and nine months old.

11. In Petitioner's view, she was "forced" to retire. Petitioner had been employed as an adult education-health instructor at Marchman Technical Education Center, which she described as a stressful job. In 2010, she had to undergo three major abdominal and pelvic reconstructive surgeries. As she dealt with the challenges of complications and slow recoveries, she developed psychological issues that caused her to seek treatment from a psychiatrist. She was depressed and cried a lot, felt anxious and stressed, and experienced panic attacks. Petitioner took medication prescribed by her psychiatrist for her panic attacks and depression. She testified that the medication helped and that when she took her medication, she no longer cried all the time. However, she experienced side

effects, including some drowsiness and difficulty processing information.

12. By early 2011, Petitioner felt unable to return to her stressful job and had been attempting, without success, to find an appropriate job that she thought she could do with her limitations. She was worried and felt pressure, as a single mother who was supporting herself and her 17-year-old son, who lived with her. She was particularly concerned about ensuring a stream of income to pay for health insurance.

13. Before Petitioner met with Mr. Hudson to apply for early service retirement, she discussed the different types of retirement with her good friend, Pat Beals. Ms. Beals had worked at Marchman Technical Education Center with Ms. Radicella.

14. Both Petitioner and Ms. Beals testified that in discussing the different types of retirement, Petitioner believed at the time that she would not qualify for disability retirement. At the time in early 2011, Petitioner's belief was that she would be unable to obtain letters from two doctors who would render the opinion that Petitioner was unable to work. Ms. Beals apparently did not disagree with that opinion. Ms. Beals noted that Petitioner had been trying to get another job that she would be able to handle with her limitations.

Ms. Beals said only that she thought Petitioner had tried to go back to work too soon, before she was fully healed.

15. Petitioner went alone to her meeting with Mr. Hudson and did not ask any of her close friends or advisors, such as Ms. Beals or her neighbor, Mr. Edelman, to go with her. Petitioner testified that she had taken her medication to control her depression and her panic attacks that day. Petitioner was in good enough shape, mentally and physically, to safely drive herself to and from the school district administrative offices.

16. Petitioner testified that Mr. Hudson explained Petitioner's choices to apply for early service retirement or to apply for disability retirement. Petitioner testified that Mr. Hudson explained that if she applied for disability retirement, two doctors would have to say she could never work again. This led Petitioner to choose early service retirement because, as she had discussed with Ms. Beals previously, she did not think two doctors would give the opinion that she was unable to work again. Moreover, at the time, Petitioner did not want to say that she would never work again.

17. Petitioner found the meeting with Mr. Hudson to be very sad and embarrassing; she found the prospect of retirement itself to be very embarrassing, as she had always been independent and had always taken care of herself.

18. Petitioner attempted to blame Mr. Hudson for the pressure she was feeling to make a choice and sign the paperwork presented to her, but Petitioner did not prove that Mr. Hudson was to blame for any pressure she felt. Petitioner failed to identify anything specific that Mr. Hudson said or did to create pressure, such as if he had told Petitioner she had to sign all of the paperwork then and there. Indeed, when asked if she felt pressured by Mr. Hudson, Petitioner's response was that "it was strictly business." Petitioner explained that she just "shut down," letting him give her papers, and she just signed them.

19. Petitioner did not claim to misunderstand the different types of retirement benefits--early service retirement versus disability retirement--and indeed, expressed a very clear rationale for making the choice that she did. Petitioner had expressed that same rationale in conversations before March 4, 2011, with Ms. Beals.

20. Petitioner testified that she did not understand the paperwork that Mr. Hudson presented her to sign and that she did not understand that she could not change the type of retirement from early service to disability retirement at a later date. Inconsistently, she testified that she understood that she would not be able to change her payment options after she cashed her first benefit check. That is part of the warning message appearing right above her signature. Petitioner did not

credibly explain how she was able to understand that part of the warning message, while not understanding the other part of the warning message that she also could not "change my type of retirement (Regular, Disability, and Early)" after cashing her first benefit check. The notice appeared on both forms she signed that day in plain, clear language.

21. Petitioner did not testify that she was given any misinformation or that she asked for explanations that were not forthcoming. Petitioner did not testify that she asked to delay signing the paperwork presented to her at the March 4, 2011, meeting, until she had had a chance to review it with one of her friends and advisors. Instead, Petitioner did not want to wait; she was in a hurry to sign the paperwork because the sooner she signed the paperwork, the sooner the payments would start.

22. Petitioner attempted to disavow her March 4, 2011, early service retirement application on the theory that she lacked the mental capacity to understand the nature and consequences of her actions that day. Petitioner offered no competent medical opinion testimony or medical records to support her claim. Petitioner's two friends tried to support her theory, but they lacked the medical expertise to offer an opinion that Petitioner did not understand the nature or consequences of her actions that day. To the contrary, their testimony tended to confirm that Petitioner not only understood

what she did on March 4, 2011, but that she acted as she did for a very rational, logical reason.

23. The evidence did not establish that Petitioner was impaired to any great extent because of her physical or mental conditions or because of her medication taken to control her conditions. Petitioner may lack confidence and doubt herself; she may seek out opinions of her close friends when making important decisions because she did not trust her own ability to make decisions. However, as she acknowledged and certainly exhibited at the hearing, she is intelligent and capable. Petitioner was capable of functioning independently, living alone with her 17-year-old son and taking care of him. Petitioner was able to drive alone and did so. Petitioner took care of her own paperwork, writing out checks, and paying her own bills. Petitioner was not hospitalized or adjudicated incompetent because of her mental condition, nor was there any suggestion that her psychiatrist or good friends thought such steps were necessary for Petitioner's competency to manage her own affairs.

24. After Petitioner returned from her meeting with Mr. Hudson on March 4, 2011, she called Ms. Beals to tell her about the paperwork she completed in her meeting with Mr. Hudson. Ms. Beals testified that she could tell Petitioner was anxious, because she was talking very fast. Nonetheless,

Petitioner understood the nature and consequences of her actions on March 4, 2011, well enough to tell Ms. Beals that she had applied for early service retirement benefits. Ms. Beals was concerned and said that she may have made a mistake by not applying for disability retirement. While Ms. Beals expressed surprise that Petitioner did not ask her to go with her on March 4, 2011, she admitted that they had talked about the retirement issue previously and that Petitioner's actions on March 4, 2011, were consistent with what they had previously discussed.

25. Petitioner's neighbor, Alvin Ellenwood, also testified that Petitioner called him later on March 4, 2011, and reported to him that she had completed the paperwork for early service retirement benefits. Mr. Ellenwood testified that he, too, was concerned and told Ms. Radicella that she may have made a mistake by not applying for disability retirement.

26. Despite the concerns of both Ms. Beals and Mr. Ellenwood, apparently no steps were taken in the days after March 4, 2011, to review the forms that Petitioner had signed or to seek out any information from the Division regarding whether Petitioner could try to change the type of retirement benefits from early service retirement to disability retirement.

27. On March 9, 2011, the Division issued and transmitted to Petitioner the following documents related to her

application: Acknowledgement of Service Retirement Application (Acknowledgement); Estimate of Retirement Benefits (Estimate); an information sheet entitled, "What Retirement Option Should You Choose" (Option); and a FRS booklet published by the Division entitled, "Preparing to Retire" (Booklet).

28. The Acknowledgement document confirmed receipt of Petitioner's service retirement application and repeated a similar warning as those appearing above Petitioner's signature on the forms she signed on March 4, 2011; this time, the notice was in all capital letters and in all bold print: **"ONCE YOU RETIRE, YOU CANNOT ADD SERVICE, CHANGE OPTIONS, CHANGE YOUR TYPE OF RETIREMENT OR ELECT THE INVESTMENT PLAN. RETIREMENT BECOMES FINAL WHEN ANY BENEFIT PAYMENT IS CASHED OR DEPOSITED."**

29. Detailed information was provided about FRS retirement in the 15-page Booklet. The Booklet's first four pages are devoted to information for contacting the Division, including how to access the Division's website, and how to contact individuals, via numerous toll-free telephone numbers and e-mail addresses, to ask questions. And yet another warning message appears on page 11 of the Booklet, set apart from the rest of the text by a bold text box:

> Remember, once you cash or deposit any benefit payment or after the first payment is credited during your DROP participation period, you cannot add service credit, change your retirement benefit option

> selection, change your type of retirement from early to normal or from service to disability retirement, transfer to the FRS Investment Plan or cancel your DROP participation.

30. The two other documents sent on March 9, 2011, the Estimate and Option documents, specifically addressed the retirement payment option choice. These two documents warned that Petitioner had selected Option 1 and could not change that option after cashing or depositing her first benefit check.

31. Petitioner did not say what she did upon receipt of March 9, 2011, package of materials, whether she reviewed the material or whether she asked her friends to review it. Had these documents been reviewed, it would have been clear that once Petitioner cashed or deposited the first benefit payment, she could no longer change the type of retirement from early service retirement to disability retirement.[2/]

32. At any point in time before Petitioner received and cashed or deposited her first retirement benefit check, she could have sought to change the type of retirement benefit from early service to disability retirement. However, no such steps were taken. As Petitioner testified and Ms. Beals acknowledged, Petitioner did not believe at that time that she would qualify for disability retirement. In any event, it would have taken longer to seek disability retirement benefits because of the

need to obtain verification by two doctors that Petitioner was unable to work, and Petitioner did not want to wait.

33. Petitioner received her first retirement benefit check at the end of March 2011, and the state warrant was paid (cashed or deposited) on April 8, 2011. As of the hearing date, Petitioner had received an additional nine monthly payments for her early service retirement benefit.

34. For some reason, it was not until June 2011, after receiving and cashing or depositing three early service retirement benefit payments, that Petitioner decided to submit an application for disability retirement benefits. The parties stipulated that Petitioner's disability retirement application was mailed to the Division on June 14, 2011.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2011).[3/]

36. As the party asserting the affirmative of the issue, Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to change the type of retirement benefits she has been receiving, from early service retirement to disability retirement.[4/] § 120.57(1)(j)(standard of proof is by a preponderance of the evidence); Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989)

(petitioner challenging the Division's denial of credit for prior service bears the burden of proving entitlement to prior service credit, as the party asserting the affirmative of the issue).

37. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

38. This case is governed by the provisions of rule 60S-4.002, which states in pertinent part:

> (4) After a retirement benefit payment has been cashed or deposited or after a DROP payment is credited:
>
> (a) No additional service, which remained unclaimed at retirement, may be claimed or purchased;
>
> (b) The selection of an option may not be changed; and
>
> (c) The type of retirement, i.e. normal, early, or disability, may not be changed, except for the following:
>
> 1. When a member recovers from disability and subsequently applies for normal or early retirement as provided in subsections 60S-4.007(7) and (8), F.A.C.,
>
> 2. When a member begins receiving normal or early service retirement benefits while appealing a denial of his application for disability retirement and such disability application is subsequently approved as provided in paragraph 60S-4.007(3)(g), F.A.C., or

> 3. When an elected officer requests, prior to July 1, 1990, that his benefit be suspended and recalculated as provided in paragraph 60S-4.012(6)(b), F.A.C. (emphasis added).

This rule has been in force at all times material to the facts presented here.

39. There is no dispute that Petitioner applied for early service retirement benefits in March 2011, that Petitioner's first benefit check was cashed or deposited by April 8, 2011, and that Petitioner did not submit an application for disability retirement benefits until she mailed an application to the Division on approximately June 14, 2011, after she had already received and accepted three monthly payments of her early service retirement benefits.

40. None of the three exceptions enumerated in the rule apply in this case, nor does Petitioner contend that one of the enumerated exceptions applies. Thus, according to the plain language of the rule, Petitioner cannot change the type of her retirement benefits from early service to disability.

41. Notwithstanding the rule's clear terms, Petitioner raises three "defenses," which she argues should excuse application of the rule. First, Petitioner contends that she was legally incapacitated on March 4, 2011, because she suffered from a mental disability that rendered her incapable of understanding the nature or consequences of her acts. Second,

Petitioner contends that she was under duress, because she felt pressured by the Pasco County School Board employee benefits coordinator to make a decision and sign the paperwork. Finally, Petitioner contends that she should be entitled to the equitable remedy of rescission because she made a unilateral mistake of fact under circumstances that would make it inequitable for the Division to have the benefit of their "agreement."

42. Based on the credible evidence presented, Petitioner failed to prove that she was incapacitated and incapable of understanding the nature and consequences of her acts on March 4, 2011, or within the approximately 35 days thereafter before the state warrant for her first benefit payment was cashed. Instead, the evidence showed that Petitioner made a knowing and rational decision on March 4, 2011, by signing the application for early service retirement benefits. Petitioner had discussed her choice with her friend before that day and was consistent in explaining her choice.

43. The evidence established that Petitioner was not incapacitated, but instead, was generally capable of managing her own affairs. Petitioner lived alone with her 17-year-old son, and Petitioner worried about taking care of him, not vice versa. Petitioner dealt with her own paperwork and wrote checks to pay her own bills. She obtained assistance, as needed, from

her friends, but there was no evidence to suggest Petitioner was not capable of managing her own affairs.

44. The fact that Petitioner suffered from a myriad of medical challenges and related emotional challenges, such as stress, anxiety, and depression, was not shown to render Petitioner incapacitated. Indeed, as Petitioner acknowledged, she is intelligent, even though she sometimes has difficulty processing things. By taking medication, Petitioner gained sufficient control over her emotions to be able to function quite well during the pertinent time: she discussed the matter of retirement and the choice she thought she had to make with her friend; she wrote and submitted a letter of resignation to her employer; she arranged for a meeting with Mr. Hudson to go through the paperwork; she drove herself to and from that meeting; and she reported her actions to two different friends immediately thereafter.

45. Petitioner's good friends testified on her behalf for the purpose of supporting her incapacity defense, but neither friend had the expertise to provide medical opinions regarding Petitioner's mental capabilities, nor did either witness provide credible, unbiased testimony on the material issues. They were trying to be good friends.

46. The evidence of Petitioner's medical and emotional challenges does not come close to the level that would be

necessary for civil proceedings to declare Petitioner incompetent and appoint a guardian to manage her affairs. See Ch. 744, Part V, Fla. Stat.

47. It is not entirely clear that, without an adjudication of legal incapacity, such a "defense" could excuse the otherwise binding effect of a duly-promulgated and unchallenged rule. But it is clear that if such authority exists, it would have to be limited to rare, extraordinary cases, with compelling evidence of circumstances much more extreme than were shown to be Petitioner's circumstances.

48. In the few cases in which incapacity was raised in an effort to overcome an adverse result under the FRS, the "defense" was rejected. For example, in Reeber v. Division of Retirement, Case No. 92-0215 (Fla. DOAH July 21, 1992; Fla. Div. of Ret. July 7, 1992), a daughter was unsuccessful in her attempt to have her mother's designation of a new beneficiary declared void based on the mother's asserted incapacity. The evidence in that case established that the mother may have been under emotional stress and unable to manage some of her property, but she was not legally incapacitated when she filed a new designation of beneficiary with the Division.

49. Similarly, in Holland v. Division of Retirement, Case No. 98-3886 (Fla. DOAH June 29, 1999; Fla. Div. of Ret. Sept. 9, 1999), a surviving spouse attempted to change her deceased

husband's selection of payment options, after benefit checks had been paid and deposited, by claiming that her husband was incapacitated when he made the selection. The surviving spouse testified that at the time he completed the form, the husband had had a stroke, was still strapped in a wheelchair, was mentally confused, and could only briefly converse with others. However, the determination was that the deceased husband, who had never been adjudicated incompetent by a court, was sufficiently competent to understand the nature and consequences of his actions when he filled out the option selection form and during the following time period until the first benefit check was deposited.

50. In an analogous context, the subject of invoking mental incapacity for equitable tolling of a limitations period was recently analyzed in Steadman v. Department of Management Services, Division of Retirement, Case No. 10-8929 (Fla. DOAH April 14, 2011). The conclusion in Steadman was that in cases in which a party has attempted to invoke mental incapacity as a basis for equitable tolling, courts have required a showing of extreme circumstances, such as hospitalization or such complete and total incapacity as to render the party claiming equitable tolling completely unable to function in society.[5/] In this case, Petitioner has not claimed or proven such complete inability to function.

51. Petitioner also raised the "defense" of duress, arguing that she felt pressured to sign the paperwork on March 4, 2011. Although Petitioner attempted to attribute the source of this pressure to Mr. Hudson, that effort was unconvincing. Petitioner failed to prove that Mr. Hudson pressured her in any way to sign the early service retirement application that day. In any event, even if Petitioner had felt pressure that day--from whatever source--she still would have had approximately 35 days after her meeting with Mr. Hudson to review the paperwork with her friends and change her decision before her retirement was rendered final by her acceptance of her first benefit check. Petitioner failed to prove that she was subjected to duress that forced her to accept early service retirement benefits.

52. Petitioner's third "defense" attempts to invoke the equitable remedy of rescission based on a claim of unilateral mistake of fact under circumstances where it would be inequitable to allow the other party to benefit from the mistake. In rare cases, the defense of equitable estoppel has been allowed in administrative proceedings, but Petitioner did not attempt to raise or prove equitable estoppel. Petitioner offered no authority to support the exercise of equitable powers in administrative proceedings to allow the remedy of rescission based on a claim of unilateral mistake. The authority appears

to be to the contrary. See, e.g., Valdez v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 05-1991 (Fla. DOAH Sept. 26, 2005; Fla. Div. of Ret. Nov. 21, 2005).[6/]

53. Even if Petitioner's application for and receipt of early service retirement benefits could be rescinded based on a proven unilateral mistake and appropriate equitable circumstances, Petitioner did not prove that grounds exist for such a remedy. The only apparent mistake was Petitioner's assumption that she would not be able to obtain letters from two doctors certifying that she was permanently unable to work. Petitioner could have, notwithstanding her assumption, attempted to qualify for disability retirement benefits first. Her choice to proceed with early service retirement was a reasonable one at the time and allowed her to satisfy her goal of quickly receiving a stream of income. Her hindsight regret that she was in a hurry to receive benefit payments is understandable, but does not make her initial decision a mistake.

54. To the extent Petitioner's "mistake" argument is based on her claim that she did not understand that she could not change the type of retirement after receiving benefit checks, Petitioner's claim is not credible or reasonable. Petitioner was plainly put on notice that she could not change from early service retirement to disability retirement after receiving the first benefit check.

55. Finally, Petitioner raised a new argument in her Proposed Recommended Order: that she should be entitled to a "rehearing," because she did not understand what kind of evidence she needed to present to meet her burden of proof. In particular, Petitioner's counsel claims that although he was informally assisting Petitioner to prepare her theories, Petitioner, as a technically self-represented party, could not have been expected to understand the hearsay evidence rule in administrative proceedings. Apparently, Petitioner's argument for a "rehearing" is that Petitioner should be given a do-over of the entire evidentiary hearing, now that the limitations of hearsay are understood.

56. Petitioner's new argument is directed to the fact that Petitioner offered no competent medical opinion testimony at the final hearing to establish that she was legally incapacitated. Petitioner's counsel initially offered a letter from a psychiatrist, but the Division objected to the hearsay nature of the document. After discussion on the record about the fact that the letter could not be the sole basis for a finding of fact and could not be used to supplement or corroborate other non-hearsay evidence because there was no witness qualified to render a medical opinion, ultimately, Petitioner's counsel withdrew the exhibit. No proffer of the letter was made; hence, it is not part of the record.

57. Petitioner's new argument must be rejected for several reasons. First, self-represented parties are subject to the same evidentiary standards as parties represented by counsel. Petitioner was on notice of the statutes and rules governing this proceeding. Section 120.57(1)(c) codifies the limitation on the use of hearsay evidence in administrative proceedings, as follows: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Reiterating and elaborating on what the rule says, Florida Administrative Code Rule 28-106.213, the uniform rule of procedure regarding evidence in disputed-fact administrative hearings, provides as follows in paragraph (3):

> Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

58. The evidentiary standards codified in the governing statute and rule were explained to Petitioner at the opening of the hearing. While every effort is made to explain the standards to self-represented parties, it is not the role of the Division of Administrative Hearings to offer legal advice to parties as to how they need to go about proving their cases.

That is particularly true here, where Petitioner had the benefit of counsel, informally before the hearing and formally at the hearing.

59. Petitioner's argument must also be rejected because it is untimely. At no point throughout the evidentiary hearing was there any suggestion that Petitioner was not prepared to go forward with the witnesses and evidence she had disclosed before hearing. If counsel had legitimate concerns about whether Petitioner needed additional witnesses or evidence, it was incumbent on counsel to make that known before the evidentiary hearing, instead of raising the argument for the first time ten days after the evidentiary record was closed. Counsel could have sought to present testimony of a previously undisclosed witness; or counsel could have asked for a continuance if deemed necessary to adequately prepare. Petitioner cannot now obtain a second evidentiary hearing.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

RECOMMENDED that Respondent, Department of Management Services, Division of Retirement, enter a final order denying the request to change from early service retirement benefits to disability retirement benefits submitted by Petitioner, Reneé Radicella.

DONE AND ENTERED this 27th day of February, 2012, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February, 2012.

ENDNOTES

[1/] Petitioner complained, for the first time in her Proposed Recommended Order, that Respondent violated the Order of Pre-Hearing Instructions by not contacting her for settlement discussions at least seven days before the final hearing. The Order of Pre-Hearing Instructions obligated both parties to confer before the hearing in an attempt to resolve their dispute; thus, any failure to comply falls on both parties. Moreover, any arguable detriment to either party by the omission of settlement discussions before the final hearing could have been cured by a request for such a discussion opportunity before convening the hearing. Indeed, before the undersigned entered the hearing room, the parties did engage in discussions to identify and narrow the issues, as evidenced by their announced stipulations of several material facts. Petitioner waived her opportunity for pre-hearing settlement discussions by not raising the issue pre-hearing.

[2/] Petitioner attempted to argue that the warning messages in the various documents were conflicting, because not every warning repeated that the type of retirement could not be changed after the first benefit check was cashed or deposited. To the contrary, the warning messages were clear and numerous. Both documents signed by Petitioner on March 4, 2011, warned

that Petitioner could not change the type of retirement from early service to disability after cashing the first check. The warning was reiterated in the Acknowledgement document, as well as in the comprehensive Booklet. The mere fact that the two option-specific documents had more limited warnings directed to changing options does not create a conflict with the broader warnings contained in the other documents. Petitioner did not point to anything in writing in any document that remotely suggested or implied that she could change her type of retirement after cashing the first benefit check. Instead, all of the clear warnings were to the contrary.

[3/] Unless otherwise indicated, all references to the Florida Statutes are to the 2011 version.

[4/] The parties acknowledged on the record that the issue in this proceeding is limited to whether Petitioner is not allowed to change the type of retirement benefits she has been receiving, from early service retirement to disability retirement, or whether Petitioner will be allowed to proceed to have the Division consider the merits of Petitioner's application for disability retirement benefits. The Division's initial determination, challenged here, was that Petitioner cannot change the type of retirement benefits she receives, because she has already cashed or deposited early service retirement benefit payments. The Division, therefore, did not consider the merits of Petitioner's disability retirement application, and no determination is made on the question here.

[5/] An example of the type of case cataloged in Steadman, in which mental incapacity was unsuccessfully asserted as grounds for equitable tolling, is Speiser v. U.S. Department of Health and Human Services, 670 F. Supp. 380, 385 (D.D.C. 1986) (rejecting as insufficient to invoke equitable tolling evidence from plaintiff's psychiatrist that plaintiff suffered from atypical depression, manifested by lethargy, excessive sleep, disorientation, appetite changes, and impaired judgment; "While plaintiff may have had impaired judgment, . . . [and] was preoccupied, depressed, and obsessed . . . she has not shown that she was ever adjudged incompetent, signed a power of attorney, had a guardian or caretaker appointed, or otherwise took measures to let someone else handle her affairs" as might be done for someone who is incapable of handling his own affairs or unable to function in society).

[6/] Rescission of an application for early service retirement benefits based on a unilateral mistake was implicitly rejected

in Williams v. Department of Management Services, Division of Retirement, Case No. 08-3326 (Fla. DOAH Oct. 30, 2008), aff'd, 31 So. 3d 838 (Fla. 5th DCA 2010). In Williams, the retiree claimed that he was told by someone at the Division that he could not get disability retirement benefits and that was why he applied for early service retirement benefits. Just as in this case, the retiree apparently later realized that he might be able to qualify for disability retirement and submitted his application. He was not allowed to pursue the change because he had already accepted benefit payments for the early service retirement. Because he could not prove that he was misled by a Division employee, so as to establish grounds for equitable estoppel, his attempt to change the type of benefits was denied pursuant to rule 60S-4.002(4). His mistaken belief that he had not been approved for disability retirement, but could apply later, was deemed insufficient to excuse application of the clear dictates of the rule.

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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.