

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VIVIAN RENAUD,

Petitioner,

vs.

Case No. 15-1528

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on May 21, 2015, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Vivian Renaud, pro se
2759 Sharpes Court
Orange Park, Florida 32065

For Respondent: Joe Thompson, Esquire
Assistant General Counsel
Department of Management Services
4050 Esplande Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's husband's selection of Option 1 for his pension plan benefits could be changed.

PRELIMINARY STATEMENT

By letter dated July 10, 2014, Respondent, Department of Management Services/Division of Retirement (the "Department"), issued a letter to Petitioner, Vivian Renaud ("Mrs. Renaud"), stating that her request to receive monthly benefits from the retirement account of her late husband, Edward W. Renaud, Jr. ("Mr. Renaud"), was denied. Mrs. Renaud requested an informal administrative hearing to contest the decision. Subsequently, the parties determined that there were disputed issues of material fact, and the case was referred to the Division of Administrative Hearings (DOAH). Pursuant to notice, a final hearing was scheduled on the date and time set forth above. Mrs. Renaud was assisted at final hearing by her son, Ed Renaud. Mrs. Renaud is deaf, so a certified sign interpreter was provided for her at final hearing as well.

At the final hearing, Mrs. Renaud appeared pro se, with assistance from her son. Each of them testified at the final hearing. Mrs. Renaud offered three exhibits into evidence, but they were rejected due to objections from the Department as to authenticity, relevance, and hearsay. Mrs. Renaud's exhibit

entitled "General Effective Communication Requirements Under Title II of the ADA" was not admitted; however, it was allowed as a demonstrative exhibit and leave was given to make legal arguments concerning the content of the document as part of the proposed recommended order (PRO).

The Department called one witness, David Heidel, survivor benefits administrator for the Division of Retirement. The Department's Exhibits 1, 5-7, 9-11, 13, and 15 were accepted into evidence. The parties advised that a transcript of the final hearing would be ordered. By rule, parties are allowed 10 days from the filing of the transcript at DOAH to file PROs. The Transcript was filed on June 5, 2015. Each party timely submitted a PRO and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mrs. Renaud, who is deaf, was married to Mr. Renaud for approximately 40 years. Mr. Renaud was employed by the State of Florida as a correctional officer at all times relevant hereto. He entered the State retirement program (in the pension plan) in November 1994. Mr. Renaud was in the "special risk" category of retirement class based on his position as a correctional officer.

2. On October 24, 2013, Mr. Renaud signed and submitted a "Florida Retirement System Pension Plan Application for Service

Retirement" form to the Department, indicating his intent to retire. The application was signed and notarized; it designated Mrs. Renaud as the sole beneficiary of his retirement benefits. On the same day, Mr. Renaud signed an "Option Selection" form, wherein he designated which of four payment options he wanted to utilize for payment of his retirement income. He selected Option 1, which states:

A monthly benefit payable for my lifetime. Upon my death the monthly benefit will stop and my beneficiary will receive only a refund of any contributions I have paid which are in excess of the amount I have received in benefits. This option does not provide a continuing benefit to my beneficiary.

3. The form also contains the following statement:

"I understand that 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 . . . 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."

4. The option selection form was signed by Mr. Renaud and notarized by a certified notary public. Inasmuch as Mr. Renaud selected Option 1, it was necessary that he and his designated beneficiary (Mrs. Renaud) also fill out form SA-1, the "Spousal Acknowledgement" form. On the acknowledgement form, Mr. Renaud

indicated that he was married. Mrs. Renaud then signed the "spousal acknowledgement" portion of the form. The acknowledgement statement included this statement: "I, Vivian Renaud, being the spouse of the above named member [Mr. Renaud], acknowledge that the member has selected either Option 1 or 2." Option 2 provides for continued benefits during the retiring person's lifetime. However, benefits to the person's spouse will continue for only a 10-year period. If the retiring person dies within the first 10 years of retirement, the spouse would only receive benefits for the balance of the 10-year period starting at the retirement date. The benefits under Option 2 are, therefore, limited in nature. The state retirement system requires a person selecting Option 1 or Option 2 to have their spouse acknowledge that selection choice because those benefits have finite ending dates, whereas retirement benefits under the other options continue as long as either the retiree or his/her beneficiary is living.

5. By letter dated October 30, 2013, the Department acknowledged receipt of Mr. Renaud's retirement application. The letter referenced the date the application was received (October 24, 2013) and the option Mr. Renaud had selected (Option 1). The letter was mailed to Mr. Renaud's address of record, the same address he listed in his retirement application. The letter was sent to Mr. Renaud some 30 days

before the first retirement benefit check was deposited in his account. Mrs. Renaud does not remember seeing the letter, but inasmuch as it was addressed to Mr. Renaud, her recollection of its receipt is not relevant. After Mr. Renaud's death, his family found numerous un-opened letters in his car; the acknowledgement letter from the Department could well have been in that group.

6. Mr. Renaud retired on November 1, 2013. His first payment of retirement benefits was transferred to his bank by way of electronic fund transfer, commonly referred to as direct deposit, on November 27, 2013. The gross amount of his monthly retirement benefit was \$1,987.85; the net amount was \$1,937.75 after \$30.09 had been deducted for taxes. At that time, Mr. Renaud had not signed form W4P, the form which showed how many dependents the retiree was claiming for tax purposes. After later filling out that form (in which he indicated he would prefer to file as "single" for tax purposes), his monthly net benefit was reduced to about \$1,735. Mr. Renaud received a direct deposit of retirement benefits on December 31, 2013; on January 31, 2014; and again on February 28, 2014.

7. Mr. Renaud passed away on March 26, 2014, only five months after commencing his retirement. In accordance with the provisions of Option 1, Mr. Renaud's retirement benefits ceased at that time. His beneficiary was entitled to payment for the

entire month that he expired, but was not to be provided any further retirement benefits. Thus, a final payment was deposited in Mr. Renaud's account on March 31, 2014.

8. Mrs. Renaud was provided notice of the cessation of retirement benefits due to Mr. Renaud's death. She timely filed a protest, seeking to have the payment of benefits reinstated. The Department denied her request, resulting in the instant matter.

9. It is clear from the evidence that Mr. Renaud selected Option 1, Mrs. Renaud acknowledged that Mr. Renaud had selected either Option 1 or Option 2, and that retirement benefits were directly deposited to Mr. Renaud's bank account for several months. Mr. and Mrs. Renaud's signatures were duly notarized and have a presumption of legitimacy.

10. Mrs. Renaud disagrees as to whether Mr. Renaud's selection of Option 1 was legitimate, legal, or proper under the circumstances as she views them.

11. First, Mrs. Renaud contends that Mr. Renaud was not mentally well at the time he signed the option selection form. The basis for her contention is that Mr. Renaud had experienced some seizure-related behavior during the year prior to signing the form. He had driven his car north on US Highway 301 one day in July 2012, "heading to work," but ended up in Georgia without remembering why or how he got there. He later apparently lost

his driver's license because of the seizures (although the testimony on that issue was not clear).^{1/} Mr. Renaud worked for approximately 15 more months after his inexplicable drive to Georgia.

12. Mrs. Renaud also argued that Mr. Renaud's signatures on the three different forms he signed on October 24, 2013, were not similar to each other, indicating in her mind that he was having some sort of medical or psychological difficulty at that time. Inasmuch as there could have been any number of reasons the signatures were different (whether he was in a hurry, what base existed under the paperwork, etc.), there is insufficient evidence to determine why the signatures did not match. Mrs. Renaud's testimony regarding the signatures is not persuasive.

13. Ed Renaud said Mr. Renaud had been forced to retire due to his medical condition, i.e., that he had lost his driver's license due to having seizures and the Department of Corrections would not let him work if he could not drive. However, Ed Renaud also said Mr. Renaud was able to continue working even when he was "forced" to retire. Again, the testimony on these facts was not clear.

14. Mrs. Renaud said she should have been provided an interpreter on the day she signed the acknowledgement form. She did not state whether she requested an interpreter or whether

the agency employee who provided her the form was aware of her disability.^{2/} Again, no one from Mr. Renaud's employer, the Department of Corrections, testified at final hearing as to what happened on the day the forms were signed.

15. Mrs. Renaud stated that she could read and write English, so she knew what she was signing.^{3/} She did claim to be confused as to whether her husband had selected Option 1 or Option 2, but candidly admitted that Mr. Renaud never told her one way or the other which option he had chosen. He only told her that he would "continue to provide for her in the future." She believed the amount which was to be deposited in their account each month under Option 2 would be approximately \$1900. The first check was in that approximate amount (due to the fact that Mr. Renaud had not established the amount of taxes to be deducted from his check at that time). The next five checks were in a lesser amount, approximately \$1700. There is no evidence that Mrs. Renaud questioned the amount of the later checks. However, once the first check had been deposited in Mr. Renaud's bank account, he would not have been allowed to change his option anyway.

16. Lastly, Mrs. Renaud said her husband's medical and mental condition was not conducive to making the option selection in October 2013. However, there was no competent evidence to support her claim. There was no direct testimony as

to Mr. Renaud's condition on the day he signed, nor as to whether he was or was not capable of understanding what he was signing. The only statement about his condition that day was that he wanted to park the car far enough away from the building that his co-workers could not see that Mrs. Renaud had driven the car. Ed Renaud also pointed out the issue of Mr. Renaud's three signatures that day looking different from each other, but his lay opinion is not evidence upon which a finding of fact can be made as to Mr. Renaud's mental condition.

17. On October 24, 2013, Mr. Renaud had not been adjudged mentally incapacitated and no guardian had been appointed. Ed Renaud said that Mr. Renaud still believed he could perform his work assignments at that time and did not want to retire. But, other than his wife, no one provided any evidence that Mr. Renaud did not understand what he was signing. Mrs. Renaud, however, could not say which option he had selected because he never told her. Her subsequent presumption that Mr. Renaud did not intend to choose Option 1 is not persuasive.

18. It should be noted that selection of Option 1 by Mr. Renaud set his average pre-tax monthly benefit at around \$1,900.00; had he chosen Option 2, the benefit would have been around \$1,700. Thus, there was incentive to "roll the dice" and select Option 1, hoping that he would survive long enough to

provide for his wife. In this case, sadly, that gamble did not pay off.

19. The facts of this case are sad in that Mr. Renaud had every intention of providing for his wife financially as long as she lived. However, he either made a mistake when he selected his payment option or he attempted to tempt fate and hope for the best. In either case, once he made his selection and began receiving benefits, the die was cast. Based upon the facts as presented, there is no basis for overturning the Department's denial of Mrs. Renaud's requested amendment of the payment option.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014). Unless specifically stated otherwise herein, all references to Florida Statutes will be to the 2014 version.

21. Petitioner has the burden of proof in this matter as she is asserting the affirmative of the issue. Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349 (Fla. 1st DCA 1977). Nonetheless, at final hearing the Department was asked to present its case in chief first. This change in order of proof did not alter the burden of proof. The standard of proof is by a preponderance, or greater weight, of the evidence.

See Osborne Stern & Co. v. Dep't of Banking and Fin., 670 So. 2d 932 (Fla. 1996).

22. In this case, Mrs. Renaud did not meet her burden of proof. There was no persuasive evidence that either Mr. Renaud or Mrs. Renaud was misinformed, given wrong information, prevented from asking questions, or misled in any way on the day they signed the relevant retirement forms.

23. Further, there is no legal basis for changing Mr. Renaud's retirement option decision at this time.

The form he signed contains the following language: "I understand that 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 . . . 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."

Once Mr. Renaud received his first retirement benefit by way of direct deposit, he was estopped from making any changes concerning his option. See, § 121.091(6)(h), Fla. Stat. As the beneficiary of Mr. Renaud's retirement benefits, Mrs. Renaud would also have been unable to alter the option choice once retirement benefits were received.

24. Even if Mr. Renaud's employer, the Department of Corrections, had given him erroneous information (and there is

no evidence this occurred), the Department of Management Services would not be responsible for that error.

See, § 121.021(10), Fla. Stat. Any recourse for such an event would be from the Department of Corrections.

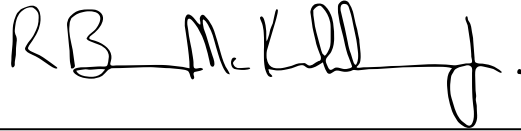
25. There is no legal basis for changing Mr. Renaud's retirement payment option retroactively to meet his survivor's wishes.^{4/}

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Management Services denying Petitioner's request for entitlement to her husband's retirement benefits following his untimely death.

DONE AND ENTERED this 24th day of June, 2015, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of June, 2015.

ENDNOTES

^{1/} For example, it is unclear how Mr. Renaud would have numerous un-opened letters in his car that his family had not seen if he was no longer driving.

^{2/} At final hearing, Ed Renaud attempted to offer into evidence an excerpt from an unidentified book or pamphlet concerning effective communication requirements under Title II of the Americans with Disabilities Act. The excerpt, which Ed Renaud cited as governing this matter, includes this statement concerning assistance for persons with disabilities: "Generally, the requirement to provide an auxiliary aid or service is triggered when a person with a disability requests it." As far as can be determined from the record in this case, Mrs. Renaud never requested any assistance.

^{3/} When asked if she could read and write at the time Mr. Renaud signed his option selection form, Mrs. Renaud replied: "Can I read, write - the same thing? Yeah, I can read and write, but sometimes certain words is confusing. If words - I sometimes, if I don't understand something, I'll look it up in a dictionary. But I had no dictionary to look up the way the wordings were. I assumed it was a 2."

^{4/} Neither the undersigned nor any other employee involved in this decision takes any pleasure that Mrs. Renaud will be denied any further benefits. However, the law in this matter must be upheld in order to protect the integrity of the retirement system.

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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.