STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES B. ANDERSON,

Petitioner,

vs. Case No. 15-5416

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent.
_____/

RECOMMENDED ORDER

On December 7, 2015, a disputed fact hearing was held in this case by video teleconferencing, with sites in Tampa and Tallahassee, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Joe M. Thompson, Esquire
Department of Management Services
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STATEMENT OF THE ISSUE

The issue in this case is whether James B. Anderson, a deceased retiree in the Florida Retirement System Pension Plan,

selected Option 1 (maximum retiree's monthly benefit without any spousal benefit after death of the retiree) or Option 3 (a reduced retiree's monthly benefit with continued spousal benefit after death of the retiree).

PRELIMINARY STATEMENT

Mr. Anderson was a retiree in the Florida Retirement System Pension Plan when he died in February 2015. In March 2015, his widow, Mitzi Anderson, contacted the Department of Management Services, Division of Retirement, which informed her that she was not due a spousal benefit.

In August 2015, Mrs. Anderson sent the Division of Retirement a certified letter requesting a spousal benefit, which was denied.

In September 2015, Mrs. Anderson filed a Petition for Review in the name of her deceased husband to challenge the intended denial. The Division of Retirement forwarded the petition to DOAH for a hearing.

On November 13, the Respondent filed a Notice of Filing Motion for Attorney Fees with Petitioner's Counsel. On November 24, the Petitioner filed a response in opposition and a motion to strike for filing the motion without complying with the "safe harbor" provision in section 57.105(5), Florida Statutes (2015). The motion to strike was denied because the motion was

not yet filed at DOAH, but only served on the Petitioner in compliance with the safe harbor provision.

The parties filed separate pre-hearing statements instead of a joint pre-hearing stipulation, supposedly because they could not agree on a joint pre-hearing stipulation. However, a comparison of the two pre-hearing statements revealed that the disputes between the parties were narrow.

One difference between the parties' pre-hearing statements was the Petitioner's statement that the Respondent's motion for attorney fees was pending and required action, compared to the Respondent's statement that only the Petitioner's motion to strike the motion for attorney's fees was pending. Two days after the Respondent's pre-hearing statement, the Respondent filed a Notice of Filing Second Motion for Attorney Fees with Petitioner's Counsel. However, no motion was attached, and none has been filed by the Respondent to date.

The DOAH hearing confirmed that the dispute between the parties was indeed narrow. At the outset of the hearing, the Petitioner sought to admit all of the Respondent's Exhibits in evidence, but the Respondent objected and insisted that the Petitioner move exhibits into evidence during the Petitioner's case-in-chief. The Petitioner then made an opening statement that admitted virtually every fact asserted by the Respondent.

The Petitioner called Donna Pepper and Mitzi Anderson to testify and moved the Respondent's Exhibits 1, 6, and 7 into evidence. The Respondent called Theresa Bach, Allison Olson, Todd Gunderson, and David Heidel to testify. The Respondent's Exhibits 2, 3, 4, 9, 11, 12, 13, 15, 18, and 19 were admitted into evidence without objection. The Respondent also had pertinent statutes and rules, a reference manual for Florida notaries, and a 2006 retirement guide officially recognized and admitted into evidence.

The Transcript of the final hearing was filed on December 15, 2015. The parties filed proposed recommended orders that have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. On June 30, 2007, the named Petitioner, James B. Anderson, terminated his employment with the University of South Florida (USF) at the age of 69 years and 9 months. At the time, his tenure at USF spanned 27 years and entitled him to receive pension benefits under the Florida State Retirement System Pension Plan.

2. Also on June 30, 2007, Mr. Anderson completed an application for retirement. By applying Mr. Anderson, who was USF's Director of Insurance and Risk Management, acknowledged that he would not be able to add service, change options, change

his type of retirement (regular, disability, and early) or elect the Investment Plan once his retirement became final, which would be when he cashed or deposited any benefit payment.

3. Also on July 2, 2007, Mr. Anderson and his wife, Mitzi Anderson, executed a Statutory Official Form FRS 110 before a notary public. By doing so, they selected Option 1, which provides the maximum pension benefits to Mr. Anderson until his death and no pension benefits to his wife after his death. The form stated clearly, in bold print, that Option 1 did not provide a continuing benefit after Mr. Anderson's death and that the selection of Option 1 would be final when Mr. Anderson cashed or deposited any benefit payment.

4. The next day, Mr. Anderson faxed the executed form to the Division of Retirement, which mailed Mr. Anderson an acknowledgement of receipt of the executed form. The acknowledgement included a clear statement, in bold print, that Mr. Anderson would not be able to change his benefit option selection after retirement and that his retirement would become final when he cashed or deposited any benefit payment.

5. Mr. Anderson had second thoughts about his benefit option selection and contacted Donna Pepper, a retirement specialist employed by USF, to discuss changing to Option 3, which would give him a reduced pension benefit that would continue and be paid to his wife after his death.

6. On July 6, 2007, Ms. Pepper sent an email to Mr. Anderson stating: "Here is another option selection form so that you can change your option." The email attached a blank Statutory Official Form FRS 110. Ms. Pepper's email also stated: "As we discussed, you may want to indicate that this form should supersede the previously submitted form." It also advised the Petitioner to keep a copy for his records and send the original to the Division of Retirement as soon as possible.

7. On July 20, 2007, at 12:53 p.m., a comment was entered on the Integrated Retirement Information System (IRIS) telephone log, documenting that Mr. Anderson was considering changing his benefit option selection and would "either FAX a form with a change of option on it or call to let them know he would not make the change." The comment also documented that Jan Steller in retirement payroll was asked to hold Mr. Anderson's first check until "this is resolved." Later the same day, at 2:30 p.m., another comment was added to document that Mr. Anderson had called back to say he had decided to stay with Option 1 and that Jan Steller had been called back and asked "to release his check."

8. On July 31, 2007, an initial pension check was sent to Mr. Anderson in the amount of $4,188.45, in accordance with his selection of benefit Option 1, which was about $1,200 more than

it would be under Option 3. This check was not immediately cashed.

9. On August 31, 2007, a second Option 1 pension check in the same amount was sent to Mr. Anderson.

10. On September 4, 2007, Mr. Anderson deposited the first two benefit checks into his Bank of America account. He continued to receive and cash or deposit monthly Option 1 benefit checks through January 2015.

11. Mr. Anderson died on February 14, 2015. His wife notified the Division of Retirement, which stopped benefit payments in accordance with Mr. Anderson's Option 1 selection.

12. In March 2015, Mrs. Anderson found among her husband's papers a copy of an executed Form FRS 110 that selected Option 3. Notwithstanding the telephonic communications with the Division of Retirement on July 20, 2007, the executed form indicates that it was notarized on July 23, 2007. Included in handwriting at the bottom of the executed form was the language, as suggested by Ms. Pepper: "This option supersedes option dated 7-02-07." Mrs. Anderson also found a copy of Donna Pepper's e-mail dated July 6, 2007, with instructions on how to change the selection of pension payments. Mrs. Anderson sent copies to the Division of Retirement and requested Option 3 spousal benefit payments.

13. The Division of Retirement denied Mrs. Anderson's request because it did not receive an Option 3 benefit selection

before the copy Mrs. Anderson sent in March 2015. There was no evidence that the form was sent to the Division of Retirement before then. This, together with the fact that Mr. Anderson received and cashed or deposited seven and a half years' worth of monthly Option 1 benefit checks, which were each over $1,200 more than the Option 3 benefit would have been, support a finding that Mr. Anderson actually selected Option 1 and never switched to Option 3. It is not clear from the evidence why Mr. Anderson kept a copy of an executed change from Option 1 to Option 3 after deciding not to send it to the Division of Retirement.

CONCLUSIONS OF LAW

14. The Respondent administers the Florida Retirement System under chapter 121, Florida Statutes (2015).

15. Section 121.091(6)(a)1. and 3. set out the Option 1 and Option 3 benefit options. The statutes, rules, and retirement guide are clear that the benefit option must be selected before retirement and is "final and irrevocable at the time a benefit payment is cashed or deposited . . . ." § 121.091(6)(h), Fla. Stat. (2015).

16. In this case, the Petitioner--nominally Mr. Anderson, but actually his widow--has the burden to prove entitlement to Option 3 benefits. See Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981);

Balino v. Dep't of Health, etc., 348 So. 2d 349 (Fla. 1st DCA 1977)(unless otherwise provided by statute, the party asserting the affirmative of an issue has the burden of proof). The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

17. The Petitioner did not prove that Mr. Anderson chose Option 3 before retirement. To the contrary, the evidence was that he chose Option 1 and received monthly benefits accordingly for over seven years.

18. The Petitioner takes the position that he chose Option 3 because he executed a notarized change to Option 3 even if he never filed it with the Division of Retirement. To maintain this position, he must argue from the absence of an explicit statement in the statutes, rules, and retirement guide that an executed option selection form must be sent to and received by the Division of Retirement, that it is unnecessary to do so to change a benefit option selection. This tortured reading of the statutes, rules, and retirement guide is unreasonable and untenable. It would mean that the Division of Retirement would never know what benefit option a retiree selected because there always would be the possibility of an executed and notarized option change form that was not sent to or received by the Division of Retirement. See Dep't of Hwy. Safety v. Patrick, 895 So. 2d 1131, 1135 (Fla 5th DCA 2005) ("Courts ought to avoid an

interpretation of a statute that would lead to an unreasonable, absurd, or ridiculous result, provided the language of the statute is susceptible of an alternative interpretation.").

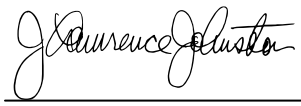
19. This case is similar to Hylton-Julius v. Department of Management Services, Division of Retirement, DOAH Case 11-4534 (RO Feb. 9, 2012; FO May 2, 2012), aff'd per curiam, 110 So. 3d 463 (Fla. 4th DCA 2013). There, an employee retired early and cashed or deposited benefit checks for almost a year, then attempted to change to disability benefits. The Respondent held that the choice of early retirement benefits was final and irrevocable, and could not be changed to disability benefits. An agency's interpretations of statutes it administers and rules it promulgates are given deference and will not be overturned by a court unless clearly erroneous. See Republic Media, Inc. v. Dep't of Transp., 714 So. 2d 1203, 1205 (Fla. 5th DCA 1998); Atlantic Outdoor Advertising v. Fla. Dep't of Transp., 581 So. 2d 384, 386 (Fla. 1st DCA 1987); Natelson v. Dep't of Ins., 454 So. 2d 31, 32 (Fla. 1st DCA 1984). Here, the Respondent's interpretations of its statutes and rules are very reasonable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order finding that Mr. Anderson selected benefit Option 1, finally and

irrevocably and that Mrs. Anderson is not entitled to Option 3 spousal benefits.

DONE AND ENTERED this 22nd day of January, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 22nd day of January, 2016.

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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.