

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AUBRIE PEREZ, as Personal
Representative of the Estate of
EDWARD PEREZ,

Petitioner,

vs.

Case No. 16-1101

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing on September 8, 2016, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Lee P. Teichner, Esquire
Holland & Knight LLP
701 Brickell Avenue, Suite 3300
Miami, Florida 33131

For Respondent: Richard Swank, Esquire
Department of Management Services
Suite 160
4050 Esplanade Way
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STATEMENT OF THE ISSUES

Whether Respondent, Department of Management Services, Division of Retirement ("Respondent"), is entitled to a deduction of the retirement benefits to be paid to Aubrie-Elle Perez, and if Respondent is entitled to a deduction, whether the deduction should be in the amount of the gross disbursements of \$19,833.21 or the net payments to Edward Perez ("Lt. Perez") in the amount of \$17,017.80.

PRELIMINARY STATEMENT

On January 13, 2016, Respondent issued a final agency action letter to Petitioner, Aubrie Perez, as Personal Representative of the Estate of Edward Perez ("Petitioner"), informing Petitioner that her request for Florida Retirement Systems ("FRS") benefits from Lt. Perez's disability retirement account was denied. Dissatisfied with Respondent's determination, Petitioner timely filed a request for an administrative hearing.

On February 24, 2016, Respondent referred this matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. On March 1, 2016, the parties filed an Agreed Motion for Abeyance based on their ongoing settlement discussions. On March 4, 2016, the undersigned entered an Order denying the motion and set this matter for final hearing on May 9, 2016. On April 19, 2016, Respondent filed a motion to continue the final hearing. On

April 22, 2016, the undersigned entered an Order granting the motion and reset the final hearing for August 9, 2016.

On July 7, 2016, Petitioner filed a Motion for Summary Final Order or, Alternatively for Judicial Determination of Undisputed Facts. On July 14, 2016, Respondent filed its response in opposition to the motion. On July 15, 2016, Petitioner filed a reply to Respondent's response. On July 22, 2016, a telephonic hearing was held on the motion. On July 25, 2016, the undersigned entered an Order denying the motion.

On July 29, 2016, counsel for the parties filed a Joint Motion for Status Conference. On July 29, 2016, a telephonic status conference was held between the undersigned and counsel for the parties. Following the telephonic status conference, the undersigned entered an Order on August 1, 2016, resetting the final hearing for September 8, 2016. The Parties' Joint Stipulation was filed on August 30, 2016.

The final hearing occurred as scheduled on September 8, 2016. Petitioner did not appear at the final hearing. However, Petitioner's counsel was present at the hearing on behalf of Petitioner. Respondent appeared at the hearing through a representative and counsel. Neither party presented any live testimony at the hearing. Joint Exhibits 1 and 2 and Respondent's Exhibits 2 through 7 and 10 through 16 were received into evidence.^{1/}

On October 3, 2016, the parties filed a Joint Motion for Abeyance for Approval of Settlement. On October 3, 2016, the undersigned entered an Order denying the motion. On December 1, 2016, the parties filed a Joint Motion to Relinquish Jurisdiction to the Department of Management Services based on a potential settlement. On its face, the motion was ambiguous as to whether the parties had actually reached the terms of a settlement agreement. A telephonic hearing on the motion was held on December 2 and 15, 2016. On December 16, 2016, the undersigned entered an Order denying the motion and requiring proposed recommended orders to be filed by 5:00 p.m., on December 22, 2016.

The final hearing was recorded, but only a seven-page excerpt of the final hearing Transcript was filed at DOAH on December 19, 2016. The parties timely filed their proposed recommended orders.

Following the undersigned's review of the file and the parties' proposed recommended orders, a post-hearing telephonic conference was held on January 13, 2017, between the undersigned and counsel for the parties. The undersigned scheduled the post-hearing conference to address a discrepancy in the amount of the payments made to Lt. Perez and the sum total of such payments, as identified in the Parties' Joint Stipulation and proposed recommended orders. The Parties' Revised and Amended Joint

Stipulation was filed on January 18, 2017, to alleviate the discrepancy.

The Parties' Joint Stipulation, filed August 30, 2016, the Parties' Revised and Amended Joint Stipulation, filed January 18, 2017, and the stipulations by counsel for the parties during the final hearing have been incorporated into this Recommended Order, to the extent indicated below.

FINDINGS OF FACT

1. The FRS is a public retirement system as defined by Florida law. There are approximately 400,000 active members within the FRS. Respondent is charged with managing, governing, and administering the FRS.

2. In 1997, Lt. Perez began employment with the Miami-Dade County Fire Department. For over 16 years, Lt. Perez served as a fire fighter with the Miami-Dade County Fire Department, his last position being a Lieutenant.

3. Lt. Perez was a vested member of the FRS. Upon his initial employment and enrollment with the FRS in 1997, Lt. Perez entered the Investment Plan and made a retirement benefits election designating that if he died before his retirement and chose not to designate a beneficiary, retirement benefits would be paid in accordance with section 121.091(8), Florida Statutes. Lt. Perez chose not to designate a beneficiary. Thus, according to this statute, retirement benefits would first be paid to

Lt. Perez's spouse, and if no spouse, then to his only child, the Petitioner.

4. Tragically, on April 7, 2013, Lt. Perez collapsed at the fire station. Subsequently, Lt. Perez was diagnosed with a grade-four malignant brain tumor known as a glioblastoma multi-forming--a very aggressive and generally terminal form of brain cancer. There is no cure and the median survival rate for adults with this form of brain cancer is 9 to 14 months.

5. Due to his terminal brain cancer and the treatments he had undergone and was undergoing, Lt. Perez was unable to continue his duties with the Miami-Dade County Fire Department.

6. On February 19, 2014, a two-page FRS Investment Plan Application for Disability Retirement Form PR-13 ("application for disability retirement"), and an FRS Investment Option Selection Form PR-110 ("option selection form"), were submitted to Respondent for Lt. Perez. They were sent to Respondent by mail by Lt. Perez's sister, Alecs Perez-Crespo.

7. The effect of the application for disability retirement and the selection of Option 1 on the option selection form would be to transfer the monies from the Investment Plan into the Pension Plan, and convert Lt. Perez's accumulated Investment Plan retirement benefits to monthly disability retirement benefits during his lifetime. Then, upon his death, the monthly benefit payments would stop, and the beneficiary would receive only a

relatively small amount, if any--a refund of contributions Lt. Perez had paid into the Investment Plan retirement account, which are in excess of the amount he received in benefits, not including the transferred Investment Plan account balance.^{2/}

8. The two-page application for disability retirement was not completed by the member, Lt. Perez, and was not signed by Lt. Perez in the presence of a notary public.

9. The option selection form was not completed by the member, Lt. Perez, and was not signed by Lt. Perez in the presence of a notary public.

10. Affirmative medical and factual evidence establishes, and rebuts any legal presumption to the contrary, that Lt. Perez was not mentally, physically, cognitively, or legally competent to execute the option selection form or the application for disability retirement in February 2014, or to understand their legal nature and effect.

11. Nevertheless, Respondent processed the application for disability retirement and option selection form. As a result, Lt. Perez was deemed to have retired effective April 1, 2014, and he forfeited approximately \$238,000, which was transferred from the Investment Plan to the Pension Plan.

12. Subsequently, two disability retirement benefit warrants were issued by the State of Florida, Department of Financial Services, to Lt. Perez, via the Pension Plan, in care

of Alecs Perez-Crespo, POA. The dates of these warrants are April 30, 2014, and May 30, 2014. Both warrants were endorsed by Ms. Perez-Crespo, "POA For Edward Perez." Respondent made these disability retirement gross benefit disbursements resulting in net payments to Lt. Perez on the following dates and in the following amounts: April 30, 2014: gross disbursement of \$4,950.63, less deducted taxes of \$413.20, for a net payment to Lt. Perez of \$4,537.43; May 30, 2014: gross disbursement of \$4,950.63, less taxes of \$413.20 and less a medical insurance deduction of \$386.00, for a net payment to Lt. Perez of \$4,151.43.^{3/}

13. A direct deposit authorization for electronic transfer of future retirement benefit warrants into a checking account solely in the name of Lt. Perez was signed by Alecs Perez Crespo, "POA for Edward Perez," on May 9, 2014.

14. Two additional disability retirement gross benefit disbursements resulting in net payments to Lt. Perez were sent to the checking account of Lt. Perez on the following dates and in the following amounts: June 30, 2014: gross disbursement of \$4,950.63, less taxes of \$413.20 and less a medical deduction of \$386.00, for a net payment to Lt. Perez of \$4,151.43; July 31, 2014: gross disbursement of \$4,981.32, less taxes of \$417.81 and less a medical insurance deduction of \$386.00, for a net payment to Lt. Perez of \$4,177.51, bringing the total sum of the gross

disbursements for the four payments made to Lt. Perez \$19,833.21, and the total sum of the net disbursements for the four payments made to Lt. Perez \$17,017.80.

15. The net sum of \$17,017.80 issued by the Pension Plan as disability retirement benefits to Lt. Perez was deposited into Lt. Perez's checking account. Accordingly, \$19,833.21 (gross)/\$17,017.80 (net), was received by Lt. Perez.

16. Lt. Perez died on July 16, 2014, from the cancer. At the time of Lt. Perez's death, Petitioner was, and remains, his sole surviving child (natural or adopted). Lt. Perez was not married at the time of his death and, thus, left no surviving spouse.

17. Because of the receipt of the four payments during his lifetime, which are applied first to the personal contributions made by Lt. Perez into the Investment Plan during his lifetime, the amount of Lt. Perez's small contributions into the plan were exhausted by the time of his death. Therefore, if the option selection form is valid, Petitioner, as the sole beneficiary and child of Lt. Perez, would receive nothing.

18. Respondent concedes that notwithstanding the facial appearance of the option selection form and application for disability retirement, the documents are void and invalid because they failed to comply with the statutory, rule, and manual requirements applicable to properly effectuate the Option 1

selection, in that they were not completed by the member, Lt. Perez, and not signed by Lt. Perez in the presence of a notary public.

19. Respondent concedes that due to Lt. Perez lacking the mental, cognitive, physical, and legal capacity to understand the nature and legal effect of executing the option selection form and application for disability retirement, the purported execution by Lt. Perez of the option selection form and of the application for disability retirement are void and invalid.

20. Respondent concedes that the option selection form is invalid and void ab initio, and Lt. Perez's earlier selection in 1997, pursuant to section 121.091(8), should be reinstated under the FRS Investment Plan. Respondent concedes that with Lt. Perez having died in 2014 with no surviving spouse, and with Petitioner being his sole surviving child at the time of his death, that the full retirement benefits of \$234,035.81, to which Lt. Perez was entitled under his Investment Plan designation of beneficiary should be paid directly to Petitioner.

21. Respondent asserts, however, that the payment of the retirement benefits to which Petitioner is entitled should be reduced by the amount of the four payments made by Respondent to Lt. Perez, which gross disbursements total \$19,833.21, or net disbursements total \$17,017.80, making the retirement benefits to

which Petitioner is entitled to be \$214,202.60 or \$217,018.01, not \$234,035.81.

22. Respondent's position is correct because the gross benefits in the amount of \$19,833.21 were received by Lt. Perez when the four payments, after applicable required deductions, were deposited into his personal checking account.

23. At hearing, no persuasive and credible evidence was presented indicating whatever happened, if anything, to the net payments of \$17,017.80 deposited into Lt. Perez's checking account. No persuasive or credible evidence was presented indicating whether any of the monies were withdrawn from the checking account before or after Lt. Perez's death. No persuasive or credible evidence was presented indicating that Ms. Perez-Crespo used, diverted, or withdrew any of the funds from the checking account. No bank statements were offered into evidence. Petitioner, who is the personal representative of the estate, did not testify. No accounting of the assets of Lt. Perez's estate was presented.

24. Even if any of the \$17,017.80 was used or diverted by Ms. Perez-Crespo after being deposited into Lt. Perez's checking account, Petitioner, as personal representative of the estate of Lt. Perez, might have a remedy in another forum to recover such funds from Ms. Perez-Crespo. In any event, such a potential claim, not borne by the evidence presented in the instant

proceeding, is beyond the scope of this administrative proceeding.

25. Based on the evidence adduced at hearing and the stipulations of the parties, it is clear that \$19,833.21 was received by Lt. Perez when \$17,017.80 (after the required deductions) was deposited into his personal checking account. To require Respondent to pay the entire amount of \$234,035.81 would result in overpayment of \$19,833.21. Respondent is, therefore, entitled to a deduction in the amount of the gross disbursement of \$19,833.21.^{4/}

CONCLUSIONS OF LAW

26. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

27. Section 121.091(8), Florida Statutes (2014), provides in pertinent part as follows:

(8) DESIGNATION OF BENEFICIARIES.-

(a) Each member may, on a form provided for that purpose, signed and filed with the division, designate a choice of one or more persons, named sequentially or jointly, as his or her beneficiary who shall receive the benefits, if any, which may be payable in the event of the member's death pursuant to the provisions of this chapter. If no beneficiary is named in the manner provided above, or if no beneficiary designated by the member survives the member, the beneficiary shall be the spouse of the deceased, if living. If the member's spouse is not alive

at his or her death, the beneficiary shall be the living children of the member. If no children survive, the beneficiary shall be the member's father or mother, if living; otherwise, the beneficiary shall be the member's estate. The beneficiary most recently designated by a member on a form or letter filed with the division shall be the beneficiary entitled to any benefits payable at the time of the member's death, except that benefits shall be paid as provided in paragraph (7)(d) when death occurs in the line of duty

28. Respondent has the burden of proving by a preponderance of the evidence that it is entitled to a reduction of the full amount of retirement benefits to which Petitioner is otherwise entitled to receive under the FRS Investment Plan. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989).

29. In its Proposed Recommended Order, Respondent contends that it is prohibited from paying Petitioner the monies already deposited into Lt. Perez's checking account based on Article X, section 14, of the Florida Constitution. Article X, section 14 provides as follows:

SECTION 14. State retirement system benefit changes.- A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to members or beneficiaries of such system unless such unit has made or currently makes provision for the funding of the increase in benefits on a sound actuarial basis.

30. The purpose of Article X, section 14, is to prohibit the government from agreeing to a retirement benefit that will render the retirement fund actuarially unsound unless the agency makes provision for the funding of the benefit on a sound actuarial basis. City of Tall. v. Public Employees Rels. Comm'n., 393 So. 2d 1147, 1151 (Fla. 1st DCA 1981). This provision has no application to the instant case, which involves the unique situation of the state wrongfully processing and paying benefits in response to an individual member's purported application for disability retirement benefits.

31. This case presents a very narrow issue, unique to the particular facts of this case, as to whether the Respondent should be entitled to a deduction of the retirement benefits to be paid to Aubrie-Ellie Perez because of four payments already made and deposited by the state into Lt. Perez's (the individual member's) checking account, and therefore, received by Lt. Perez. The answer to this question must be answered in the affirmative because the four payments were already paid by the state and received by Lt. Perez via deposits into his personal checking account.

32. Petitioner's reliance on Griffin v. ARX Holding Corp., 2016 Fla. App. LEXIS 15240 (Fla. 2d DCA 2016), is misplaced because it is inapposite to the instant case. In Griffin, a former employee whose employment was terminated sought to recover

compensation from his former employer purportedly due under the terms of an employment contract. The court held that the employment contract was void ab initio, and therefore, unenforceable by the former employee, because a statute restricted the former employee from being employed in the first place based on a criminal conviction.

33. In addition, Petitioner's reliance on TTSI Irrevocable Trust v. ReliaStar Life Ins. Co., 60 So. 3d 1148 (Fla. 5th DCA 2011), is misplaced. In that case, a trust was the named owner and beneficiary of an insurance contract procured on the life of Verelee Tennant. However, the trust did not, in fact, have any legally insurable interest in Ms. Tennant's life. There was no relationship between Ms. Tennant and the trust. Because the trust did not, in fact, have any legally insurable interest in Ms. Tennant's life, the court held that the life insurance policy was void ab initio, and therefore, the trust was not entitled to a refund of any life insurance premiums paid.

34. Petitioner has failed to cite any legal authority which would authorize an award to Petitioner of the full amount of retirement benefits (\$234,035.81) without a deduction for the gross amounts already paid to Lt. Perez by the state. Based on the unique facts of this case as detailed above, Respondent is entitled to the deduction in the amount of the gross disbursements of \$19,833.21.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Respondent, Department of Management Services, Division of Retirement, enter a Final Order requiring that that the total sum of \$214,202.60 be returned by Respondent to the FRS Investment Plan for the benefit of Lt. Perez, deceased, and that pursuant to section 121.091(8)(a), Florida Statutes, that Petitioner, Aubrie-Elle Perez, as the sole surviving child of and the sole beneficiary of Lt. Perez, immediately receive the amount of \$214,202.60.

The undersigned reserves jurisdiction to address issues regarding Petitioner's entitlement to, and the amount of, attorneys' fees, costs, and interest.

DONE AND ENTERED this 23rd day of January, 2017, in
Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of January, 2017.

ENDNOTES

^{1/} Joint Exhibits 1 and 2 consist of the transcripts of the deposition testimony of Respondent's representatives, David Heidel and Alvin Black, respectively. Respondent's Exhibits 6, 7, and 10 consist of the transcripts of the deposition testimony of Alecs Perez-Crespo, Dr. Deborah Heros, and Diann Hamilton, respectively. At the hearing, the parties stipulated to the introduction into evidence of these deposition transcripts and exhibits.

^{2/} The amount in an FRS member's Investment Plan account is comprised of employer and employee contributions.

^{3/} In March 2014, Ms. Perez-Crespo obtained a durable power of attorney ("POA") purportedly executed by Lt. Perez. By this time, Lt. Perez was living with Ms. Perez-Crespo. In March or April 2014, Ms. Perez-Crespo submitted to Respondent the POA form purportedly signed by Lt. Perez. However, the notary public who purportedly attested to the signature of Lt. Perez on the POA form did not witness Lt. Perez sign the form and was not present when this document was purportedly signed by Lt. Perez. The POA is therefore invalid. See Fla. Stat. § 117.107(9).

^{4/} To conclude that Respondent is only entitled to a deduction in the amount of \$17,017.80 would ignore the fact that monies were previously withheld for health insurance and taxes.

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.