STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARLENE RENY, for the ESTATE of ANNE M. BIRCH,

Petitioner,

Final Order No. DMS – 18-0050

v.

DOAH # 16-7617
OGC # 16-35127

STATE OF FLORIDA,
DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

FINAL ORDER

THIS MATTER has come before the undersigned for the purpose of issuing a Final Order, in accordance with Section 120.569(1), Florida Statutes. On January 16, 2018, Administrative Law Judge (ALJ) Robert E. Meale issued a Recommended Order recommending that the Department of Management Services, Division of Retirement (Respondent), enter a Final Order denying Petitioner Carlene Reny for the Estate of Anne M. Birch's (Petitioner) request for benefits under Option 3 from Ms. Birch's Florida Retirement System (FRS) account and dismissing Petitioner's Request for Administrative Hearing. Petitioner identified seven exceptions to the Recommended Order. Respondent did not identify any exceptions to the Recommended Order.

RULING ON EXCEPTIONS

Standard of Review: A Final Order shall include an explicit ruling on each exception. *See* § 120.57(1)(k), Fla. Stat. An agency may not reject or modify an ALJ's findings of fact unless the agency first determines after a review of the entire record that the findings were not supported by competent substantial evidence. *See* § 120.57(1)(l), Fla. Stat. The agency may reject or modify an ALJ's conclusions of law over which it has

jurisdiction, but if it does so, it must state with particularity why it is doing so and why its conclusion is more reasonable than that in the recommended order. *See id.*

Petitioner's Exception 1.

Petitioner takes exception with the ALJ's Finding of Fact in paragraph 5 of the Recommended Order: "Three or four years after Goodridge, Ms. Birch and Petitioner visited Massachusetts, but did not exercise their right to enter into a lawful marriage at that time." Respondent argues that the ALJ mischaracterized the couple's declining to marry in Massachusetts during a visit in 2006 or 2007 as a failure to exercise a "right," because Massachusetts did not allow out-of-state same sex couples to marry legally at that time.

Review of the record shows that the ALJ's finding is based on Petitioner's testimony on cross-examination on pages 75 and 76 of the trial transcript. Petitioner testified that when she and Ms. Birch visited Massachusetts in approximately 2007, they were aware that Massachusetts had legalized same-sex marriage by court decision in 2003, but did not get married at that time.

Petitioner essentially takes issue with a conclusion of law contained within the finding of fact, namely that Petitioner and Ms. Birch did not have the "right" to marry in Massachusetts in 2007. An agency may not reject or modify an ALJ's findings of fact unless, after a review of the entire record, the findings were not based upon competent substantial evidence. *See* § 120.57(l)(1), Fla. Stat. Competent substantial evidence is that "as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

Because the record is silent as to whether the couple's decision not to marry in Massachusetts in 2007 constituted failure to exercise a right, Petitioner's Exception number 1 is sustained. The relevant sentence of paragraph 5 of the Findings of Fact in

the Recommended Order is amended to read: "Three or four years after Goodridge, Ms. Birch and Petitioner visited Massachusetts, but did not enter into a lawful marriage at that time."

Petitioner's Exception 2.

Petitioner takes exception with the ALJ's Finding of Fact in paragraph 8 of the Recommended Order: "Less persuasive is Petitioner's testimony that, in October 2012, Ms. Birch would have elected Option 3, if this option had been available to her, and it is impossible to find on this record that she would have done so." Petitioner argues that she presented sufficient evidence to refute this conclusion, including numerous documents including, *inter alia*, an FRS beneficiary designation, Ms. Birch's will, and Ms. Birch's durable power of attorney.

Where an ALJ's finding of fact is supported by competent, substantial evidence, the Department is not permitted to reweigh evidence or judge the credibility of witnesses. *See Gross v. Dep't of Health*, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002). Since the ALJ's finding of fact in paragraph 8 is based in part on his determination of the persuasiveness of Petitioner's testimony as to what the deceased Ms. Birch intended, the Department may not alter this finding.

Petitioner's Exception number 2 is denied.

Petitioner's Exception 3.

Petitioner takes exception with the ALJ's Findings of Fact in paragraphs 12 and 13 of the Recommended Order, that the Information Release 2015-184 grants the one-time election to change from retirement Option 1 or 2 to Option 3 or 4 only to members of FRS.

The plain language of Information Release 2015-184 states that it is directed to "FRS Retirees." Further, the first sentence of the Information Release states: "Florida

Retirement System (FRS) retirees and Deferred Retirement Option Program (DROP) participants . . . will have an opportunity to change benefit payment options in light of the U.S. District Court's Order in *Brenner et al.*" The Information Release goes on to state: "If interested in changing benefit payment options, the retiree must submit the request in a letter to the Division of Retirement." Since the ALJ's Finding of Fact with respect to the content of the Information Release is supported by competent substantial evidence in the record, the Department may not alter this finding.

Petitioner's Exception number 3 is denied.

Petitioner's Exception 4.

Petitioner takes exception with the ALJ's Findings of Fact in paragraphs 14 and 15 of the Recommended Order. Petitioner claims that the ALJ impermissibly "draws the factual conclusion" that Ms. Birch failed to comply with the instructions contained in a letter from the Department dated May 26, 2015. Petitioner takes specific exception to the ALJ's finding that the letter required Ms. Birch to make a choice as to the manner in which she wished to repay excess sums received under Option 1 if she opted to change to Option 3 or 4. Petitioner argues a repayment would only be necessary in the event a member chose to change her option retrospectively, rather than prospectively.

With respect to the representations in the May 26, 2015 letter, the ALJ's Finding of Fact in paragraph 14 states:

> By letter dated May 26, 2015, Respondent calculated monthly benefit amounts under Options 1 through 4, but the letter warns: "Your benefit option will not be changed unless you complete and return the required forms noted in this letter" and indicate a choice of repaying in a single payment or installments the excess benefits of Option 1 over the smaller benefits paid under Option 3 or 4.

The ALJ further states in paragraph 15: "The May 26 letter requires further action on Ms. Birch's part and predicates any right to a second election upon a lawful marriage at the time of retirement." One of the May 26, 2015 letter requirements to complete the

election change was submission of a completed Spousal Acknowledgment Form, SA-1. The Release 2015-184, dated April 14, 2015, required a marriage in a state or country recognizing same-sex marriage at the time retirement or DROP participation began.

Since the Release 2015-184 preceded the May 26, 2015 letter, there is record evidence from which the ALJ could infer that the Spousal Acknowledgment form required by the May 26 letter must reflect a lawful marriage on the date of retirement. Competent substantial evidence is that "as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *DeGroot v*, 95 So. 2d at 916. Since there is competent substantial evidence in the record supporting the ALJ's Finding of Fact in paragraph 15, Petitioner's Exception 4 is denied as to that paragraph.

With respect to the other part of Petitioner's exception, Petitioner is correct that the letter indicated repayment of an overpayment would only be required if the member chose to make a retroactive change, in which case the letter stated a repayment must be made within 60 days. The letter did not set forth any sort of payment plan option. Petitioner's exception is sustained with respect to the ALJ's Finding of Fact in paragraph 14.

Petitioner's Exception number 4 is sustained in part and denied in part. The relevant sentence in paragraph 14 of the Recommended Order is amended to read: "By letter dated May 26, 2015, Respondent calculated monthly benefit amounts under Options 1 through 4, but the letter warns: 'Your benefit option will not be changed unless you complete and return the required forms noted in this letter.'" The remainder of paragraph 14 after this sentence is deleted.

Petitioner's Exception 5.

Petitioner takes exception with the ALJ's Finding of Fact paragraph 16 of the Recommended Order:

> Additionally, Ms. Birch was not requesting a right to make a second election; at most, she was gathering information to prepare to decide whether to ask to change her election. By June 26, 2015, pursuant to a note documenting a telephone conversation between Ms. Birch and a representative of Respondent, Ms. Birch decided to keep Option 1 rather than make a second election of Option 3.

Petitioner argues that the ALJ correctly determined the note referenced in this finding is inadmissible double hearsay and therefore should not have used it to form the basis for this Finding of Fact.

In footnote 11, the ALJ acknowledges that the note memorializing the June 26, 2015 telephone conversation between Ms. Birch and Respondent is double hearsay. However, this finding does not render it inadmissible for all purposes. The ALJ further states in footnote 11 that he did not receive it in evidence for the truth of Ms. Birch's statement as detailed in the note, namely that she intended to keep option 1. Instead, the ALJ states he received the note as evidence to impeach Petitioner's testimony that Respondent informed Ms. Birch that she could change her election, or that Ms. Birch would have elected Option 3 if the option had been available in October 2012.

When viewed in the context of the entire record, the ALJ used the June 26, 2015 telephone conference to supplement the finding made in the first sentence of paragraph 16. The ALJ's finding in the first sentence is a permissible inference based on other competent substantial evidence in the record dated both before and after the June 26, 2015 date. "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." § 120.57(1)(c), Fla. Stat.; *Dieguez v. Dep't of Law Enforcement, Crim. Justice Standards & Training Comm'n*, 947 So. 2d 591, 594 (Fla. 3d DCA 2007).

Since the ALJ could permissibly use the June 26, 2015 telephone conversation to supplement or explain the earlier finding in paragraph 16, Petitioner's Exception number 5 is denied.

Petitioner's Exception 6.

Petitioner takes exception with the ALJ's conclusion in the Findings of Fact paragraph 17 of the Recommended Order that Ms. Birch's "letter dated May 20, 2016 (Exhibit 28)" did not demonstrate a clear intent to select Option 3.

In her Amended Notice of Filing Amended Witness List and Exhibits, Petitioner lists Exhibit 28 as "Letter to DOR from Birch, beneficiary, dated May 12, 2016." In paragraph 17, the ALJ noted that Petitioner's May *12*, 2016 letter included language concerning a change in her pension beneficiary, but found that the "breakdown of monetary options" language showed that she had not at that time made a decision as to which option to choose. Later in paragraph 17, the ALJ found that Ms. Birch signed an option election form on May *20*, 2016, selecting Option 3.

Petitioner's exception appears to be based on confusion between the two different documents. The ALJ's findings in paragraph 17 with respect to the May 12, 2016 letter are a permissible inference based on the record.

Petitioner's Exception number 6 is denied.

Petitioner's Exception 7.

Petitioner takes exception with the ALJ's analysis in paragraphs 43 to 45 of his Conclusions of Law that Petitioner could not state a claim under a theory of equitable estoppel. Petitioner argues that she instead sought to apply promissory estoppel, as set forth in her pre-hearing statement. Petitioner also takes exception with the ALJ's observation in paragraph 45 that the equitable estoppel doctrine is generally defensive.

Petitioner's pre-hearing statement argues that "promissory estoppel should apply," and cites the case of *Tome v. State Farm & Cas. Co.*, 125 So. 3d 864 (Fla. 4th DCA 2013) for the proposition that "the elements of an estoppel claim are here." The *Tome* case sets forth the elements of promissory estoppel as "'(1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.'" 125 So. 3d at 867 (quoting *Lloyds Underwriters at London v. Keystone Equip. Fin. Corp.*, 25 So. 3d 89, 93 (Fla. 4th DCA 2009)).

While the case the ALJ cites in the Recommended Order, *Hamilton Downs Horsetrack, LLC v. Dep't of Bus. & Prof'l Reg.*, 226 So. 3d 1046 (Fla. 1st DCA 2017), does not specifically address promissory estoppel, the elements the ALJ sets forth in paragraph 44 of the Recommended Order are identical to those presented in the *Tome* case Petitioner cites. In paragraph 45, applying the facts to those elements, the ALJ found that Petitioner had proven neither a misstatement of fact on the part of Respondent, nor detrimental reliance. The characterization of the estoppel doctrine analyzed is immaterial since the ALJ found the Petitioner failed to prove two elements, which are identical under either version of the doctrine.

Petitioner is correct that promissory estoppel is an exception to the general rule that estoppel is a defensive doctrine. *See, e.g.*, *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 661-62: (Fla. 1987). However, the ALJ did not, as Petitioner argues, make the statement that the doctrine cannot be used offensively. The ALJ stated in paragraph 45 that estoppel "typically may not be invoked offensively, except to avoid an opposing party's defense."

Petitioner's Exception number 7 is denied.

FINDINGS OF FACT

With incorporation of the amendments to paragraphs 5 and 14 as set forth herein, Respondent hereby adopts the Findings of Fact contained in the Recommended Order as its findings in this Final Order.

CONCLUSIONS OF LAW

Respondent hereby adopts the Conclusions of Law contained in the Recommended Order as its conclusions in this Final Order.

ORDERED AND ADJUDGED:

1. The Recommended Order issued in this case is adopted as described herein and is incorporated herein by reference.

2. Based upon the Findings of Fact and Conclusions of Law contained in the Recommended Order and adopted by the Respondent in this Final Order, Petitioner Carlene Reny for the Estate of Anne M. Birch's request for benefits under Option 3 from Ms. Birch's Florida Retirement System account is **DENIED** and Petitioner's Request for Administrative Hearing is **DISMISSED**.

3. This final order shall become effective on the date of filing with the agency clerk of the Respondent.

DONE and ORDERED on this 6 day of April, 2018.

ERIN ROCK, Secretary
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NOTICE OF RIGHT TO APPEAL

Unless expressly waived by a party such as in a stipulation or in other similar forms of settlement, any party substantially affected by this final order may seek judicial review by filing an original notice of appeal with the agency clerk of the Department of Management Services, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate district court of appeal. The notice of appeal must be filed within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and Section 120.68, Florida Statutes.

Certificate of Clerk:

Filed in the Office of the Agency
Clerk of the Department of Management
Services on this 10th day of
April, 2018.

Diane Wint
Diane Wint, Agency Clerk