

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN HASKO,

Petitioner,

vs.

CITY OF DANIA BEACH POLICE AND
FIREFIGHTERS RETIREMENT SYSTEM,

Case No. 18-0559

Respondent.

_____ /

RECOMMENDED ORDER

A hearing was conducted in this case before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on April 16, 2018, in Dania Beach, Florida.

APPEARANCES

For Petitioner: Paul E. Parrish, Esquire
GrayRobinson, P.A.
1795 West Nasa Boulevard
Melbourne, Florida 32901

For Respondent: Gregg Rossman, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, John Hasko ("Petitioner"), is entitled, pursuant to the City of Dania Beach Code of Ordinances ("Code") section 18-49(4), to be paid retirement pension benefits under the City of Dania Beach Police and Firefighters Retirement

System's ("Respondent" or "System") "100 Percent Joint and Last Survivor Annuity" ("Last Survivor Annuity") or the "Modified Cash Refund Annuity" ("Life Annuity").

PRELIMINARY STATEMENT

On January 11, 2016, Respondent, through its Board of Trustees, took action to deny Petitioner's request to change the retirement plan option in which he is enrolled, the Life Annuity, to the Last Survivor Annuity, which is the retirement plan he claims he elected when he retired in 2001. This action was memorialized in a letter from Respondent to Petitioner, dated February 8, 2016, advising Petitioner of his right to appeal Respondent's action.

On February 25, 2016, Petitioner appealed Respondent's action. On or about January 28, 2018, the matter was referred to DOAH to conduct an evidentiary hearing and render a recommendation to Respondent regarding this matter.

The final hearing was held on April 16, 2018. Petitioner testified on his own behalf and tendered Petitioner's Exhibits 1 through 43, which were admitted into evidence without objection. Respondent did not present any witnesses in its case in chief. Respondent tendered Respondent's Exhibits 1 through 6, which were admitted into evidence without objection.

The two-volume Transcript was filed at DOAH on June 21, 2018. Pursuant to agreement, the deadline for the parties to

file proposed recommended orders was set for August 13, 2018. Both parties timely filed their proposed recommended orders, which have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner is a retired police officer who was employed by the City of Dania Beach Police Department ("Police Department") and who has qualified for, and is receiving, retirement pension benefits under the System.

2. Pursuant to chapter 18, article IV of the Code, Respondent is the retirement pension system provided for the benefit of firefighters and police officers, including Petitioner, who are or previously were employed by the City of Dania Beach.

II. Evidence Adduced at Final Hearing

Background

3. Petitioner was hired by the Police Department on December 18, 1980, and, upon being employed, began accruing credit toward a pension under the System.

4. Petitioner was employed by the Police Department for 20 years.

5. On October 1, 1988, the City of Dania Beach Police Department merged with the Broward County Sheriff's Office

("BCSO"). At that time, Petitioner was given the option whether to remain in the System or to retrieve his contributions and become enrolled in the Florida Retirement System ("FRS"), which was and is the retirement program in which BSCO employees are eligible to enroll. At that time, Petitioner elected to remain enrolled in the System rather than enrolling in the FRS.

6. On August 28, 2000, Petitioner executed a retirement benefits election form to select the type of pension under which he would receive pension benefits from the System starting on January 1, 2001.

7. Petitioner retired from the Police Department effective December 31, 2000.

8. In April 2001, Petitioner began receiving monthly pension payments under the System, and also received back payments for January through March 2001.

9. Immediately upon retiring from the Police Department, Petitioner began working with the BCSO.

10. At that time, he enrolled in the FRS and began accruing credit under a life annuity plan provided through the FRS.

11. Petitioner was employed by the BCSO for slightly over 14 years. As the result of a series of work-related injuries, attendant surgeries, and permanent restrictions on his activities, Petitioner retired from the BCSO on April 14, 2014.

12. In the 2006-to-2007 timeframe, Petitioner was diagnosed with a cardiac condition that ultimately necessitated placement of a stent in 2012. Petitioner remains under the regular care of a cardiologist and is on medication to treat his cardiac condition. He credibly testified that since 2012, his condition has remained stable.

13. In June 2014, Petitioner applied for pension benefits under the FRS. Petitioner testified, credibly, that he had four options from which to choose,^{1/} and that he selected the Ten Year Certain option. Under this plan, Petitioner receives monthly payments for the rest of his life. If Petitioner were to predecease his beneficiary—in this case, his wife—before the 120-month period ends, she would continue to receive payments through the end of the 120-month period; however, if Petitioner were to predecease his wife after the end of the 120-month period, she would not receive any further payments. Petitioner testified that, based on his belief that he had enrolled in the Last Survivor Annuity under the System, he selected the FRS Ten-Year Certain Option so that if he predeceased his wife, she would receive benefits payments from two sources for the remainder of her life—the Last Survivor Annuity and Social Security. Petitioner receives benefit payments through the FRS to date.

14. Petitioner has received monthly retirement benefit payments through the System since April 2001, including back

payments for January through March 2001. He continues to receive monthly retirement benefit payments from the System to date.

Evidence Regarding Petitioner's Election of Benefits Under the System

15. The City of Dania Beach Police and Firefighters Retirement System Summary Plan Description ("SPD") summarizes the System's available pension plan options. The section titled "Forms of Benefits Payment," on page 16 of the SPD, states under the "Normal Form of Benefit Payment" subsection: "[u]nless you elect otherwise before your retirement, your pension is payable as a Single Life Annuity with a guaranteed refund of your contributions. This is a series of monthly payments for your life." This provision effectively makes the "Normal Form" the "default" form of benefits payments if the employee does not elect another form of benefit payments before retiring.

16. The "Election of Optional Forms of Benefit Payments" subsection of the SPD states: "You have the right at any time before your retirement date to elect not to have your retirement benefit paid in the Normal Form." This subsection identifies other forms of benefit payments available that the employee may choose as an alternative to the Normal Form. These forms are the Joint and Last Survivor Annuity, the Ten Year Certain and Life Thereafter Annuity, and another optional form actuarially equivalent to the Normal Form.

17. Petitioner decided to retire from City of Dania Beach Police Department at the end of 2000. On August 28, 2000, he met with Sonia Brown, then the plan administrator for the System, to fill out an application for retirement benefits. He completed a form titled "City of Dania Beach Police and Firefighters' Retirement System Application for Benefits" ("Application Form"). Section 1 of the Application Form, titled "For Retirement or DROP Benefits," contained a section to identify the beneficiary for the Joint and Survivor and Ten Year Certain options. Petitioner completed this portion of the form, naming his wife as his beneficiary and providing pertinent information about her. He also completed section 4 of the form, designating his wife as his beneficiary for all purposes under the System. He signed and dated the Application Form.

18. Petitioner testified that he met with Brown again in early December 2000, to finalize his election of his benefits that he would be paid under the System. According to Petitioner, at that time, he told Brown that he chose the Last Survivor Annuity option. He testified that Brown gave him paperwork to fill out, that he completed the paperwork, and that she told him that he would receive benefit payments of between \$2,400 and \$2,500 per month based on his chosen option.

19. Petitioner testified that Brown did not give him the "City of Dania Beach Police and Firefighters Retirement System

Notification of Benefits Payable as a Result of Retirement" form ("Notification of Benefits Form") to complete at the December 2000 meeting.

20. Petitioner testified that he did not specifically remember what documents he completed that day, and that he did not receive a copy of those documents.

21. Respondent's file regarding Petitioner's benefits election does not contain either the original or a copy of the documents that Petitioner claims he signed in December 2000. In short, there is no physical evidence substantiating the existence of these documents.

22. Petitioner testified that based on the December 2000 meeting with Brown, he believed he had selected the Last Survivor Annuity and that the payments under that option would start in January 2001.

23. After Petitioner retired from the Police Department, he did not receive his benefit payments under the System for January, February, and March 2001. He testified that he assumed that this delay was due to the time involved in processing the paperwork he claims to have completed in December 2000.

24. On January 23, 2001, Brown sent correspondence to the System's actuarial services firm requesting that Petitioner's early retirement benefit be calculated according to the various benefits options available to police plan participants who are

eligible for early retirement with 20 years of service.

Petitioner is shown as having been copied on this letter, and he acknowledges having received the letter.

25. By letter dated February 19, 2001, Respondent sent Petitioner "several forms to be completed by you and returned to this office for further processing of your early retirement benefit." The letter identified these forms as the Notification of Benefits Form, a W-4P form for specifying the amount to be withheld from the benefit payments for federal income tax, and a form to authorize direct deposit of the benefit payments into Petitioner's bank account. Petitioner claims that he did not receive this letter.

26. Petitioner testified that in March 2001, Brown contacted him to complete a "verification of beneficiary form." On March 8, 2001, Petitioner went to Brown's office, where she presented him with what he characterized as a "verification of beneficiary form." According to Petitioner, Brown "asked him to make sure my beneficiary information was correct" and to sign and date the form where she had placed check marks.

27. The "verification of beneficiary form" Petitioner signed actually consists of the second page of the Notification of Benefits Form.

28. The second page of the Notification of Benefits Form that Petitioner executed contains a table that identifies

Petitioner's wife (whose name is redacted) as his beneficiary. Portions of the table consist of spaces in which to state information regarding the amount of the nontaxable portion of monthly benefits for the various annuity options, which are identified by number and listed on the first page of the form. There are no amounts listed in those spaces on the form that Petitioner signed; those spaces have been left blank.

29. A paragraph below the table states: "[t]he Survivor Annuity benefit amounts shown above are based on the beneficiary named above and are payable only to this beneficiary. Should you wish to change your beneficiary before your payments begin, new amounts have to be calculated."^{2/} Near the bottom of the form is the sentence "I accept the terms above, including my choice of annuity form, and confirm the information shown above to be correct."^{3/}

30. Immediately below the above-referenced sentence is a "Participant's Signature" line. Petitioner signed the form on this line and dated it "3/08/01."

31. Petitioner testified that at the time he signed this form, the spaces for the signature by the Board of Trustees representative and the date of signature were blank. The form subsequently was executed by the Board of Trustees, through Eugene H. Jewell, on March 13, 2001.

32. Petitioner testified that in November 2015, he became aware, through checking his various beneficiary designations as the result of a bank error,^{4/} that the System was paying his retirement benefits pursuant to the Life Annuity rather than the Last Survivor Annuity.

33. Petitioner testified that on November 6, 2015, he went to the System office to verify that his wife was correctly designated as his retirement pension beneficiary. He met with Cathy David,^{5/} the current system plan administrator, to review the documents in his retirement pension file.

34. Petitioner testified that, he saw, for the first time, the first page of the Notification of Benefits Form contained in his file. This page had a check mark next to the "Modified Cash Refund"—i.e., the Life Annuity—option. He testified that he did not make the check mark next to the "Modified Cash Refund" option on the form.

35. Petitioner obtained documents contained in the Salem Trust ("Salem")^{6/} file regarding his retirement pension. Among these documents was a letter dated March 13, 2001, from Brown to Livia Nixon, with Petitioner shown as copied, transmitting the completed forms to enable Salem to process Petitioner's retirement pension, and requesting that Salem expeditiously issue retroactive checks to Petitioner for January through March 2001.

36. Petitioner testified that he had not previously received a copy of the March 13, 2001, letter or the attached forms, and that he did not see them until he obtained the documents in the Salem file.

37. Petitioner also testified that he did not receive a December 6, 2001, letter from Respondent notifying him that the System's auditors, S. Davis & Associates, P.A. ("SDA"), were conducting an annual audit of Respondent's financial statements.^{7/} This letter contained information regarding Petitioner's pension—including information expressly identifying the type of benefit Petitioner was receiving as the "Life Annuity." The letter requested that Petitioner review the information contained in the letter and correct any errors by providing the correct information to SDA. Petitioner testified that he first saw this letter during his November 6, 2015, review of the documents in the System's file, so he did not respond to SDA in 2001.

38. In sum, Petitioner claims that at a December 2000 meeting with Brown, he selected the Last Survivor Annuity as the form in which he would be paid retirement pension benefits under the System. He claims that he did not select the Life Annuity, and that he did not make the check mark by the "Modified Cash Refund" option on the first page of the Notification of Benefits form that was contained in the System file.

39. In sum, Petitioner also claims that he did not receive or otherwise was not provided the following documents: (1) the unidentified "paperwork" that he claims he completed at a meeting with Brown in December 2000, at which he selected the Last Survivor Annuity; (2) the letter dated February 19, 2001, from Brown to Petitioner, transmitting forms—including the entire Notification of Benefits Form—that Petitioner needed to complete to enable processing of his early retirement benefit; (3) the first page of the Notification of Benefits Form on March 8, 2001, when he completed the second page of that form confirming his wife as his beneficiary; (4) the March 13, 2001, letter from Brown to Livia Nixon of Salem, transmitting Petitioner's retirement pension forms completed on March 8, 2001, to Salem for processing; and (5) the December 6, 2001, letter to Petitioner from Respondent's outside auditor, SDA, requesting him to verify the accuracy of the information regarding his pension and to correct any errors in that information.

40. Petitioner acknowledges that he did receive a letter from Cathy David dated July 1, 2012, regarding a change in Florida law that could affect retirees. That letter expressly stated "[y]ou chose the life annuity when you retired on January 1, 2001." Petitioner claims that he did not read this letter in its entirety, so he did not see the statement in the letter regarding having chosen the life annuity.

III. Findings of Ultimate Fact

41. Upon careful consideration of the evidence in the record, it is determined that Petitioner did not show, by a preponderance of the evidence, that he selected the Last Survivor Annuity, rather than the Life Annuity, so that, pursuant to section 18-49(4) of the Code, he should be reclassified as being enrolled in the Last Survivor Annuity.

42. First, the undersigned finds implausible Petitioner's testimony that he signed unspecified "paperwork" selecting the Last Survivor Annuity—clearly, a very important decision on his part—but that he does not "remember specifically" what that paperwork was and that he did not receive a copy of that paperwork. Compounding that implausibility is that neither the original nor any copies of that "paperwork" were found in Respondent's file or in Salem's file. Simply stated, there is no physical evidence establishing the existence of this "paperwork"—which Petitioner claims is the instrument through which he elected the Last Survivor Annuity.^{8/}

43. Second, the first page of the Notification of Benefits Form that was contained in Respondent's file on Petitioner's retirement pension shows the "Modified Cash Annuity" option—i.e., the Life Option—as having been selected by the placement of a check mark next to that option. It is undisputed that Petitioner executed the second page of the form. This complete

Notification of Benefits Form contained in Respondent's file constitutes the complete, most credible evidence in the record that Petitioner selected the Life Annuity when he executed the form on March 8, 2001. To this point, Petitioner offered no credible evidence to support his assertion that someone—unknown to him and having unknown motives—must have placed the first page of the Notification of Benefits Form, having the check mark next to the "Modified Cash Refund" option, in Respondent's file without his knowledge.

44. The undersigned does not find credible or persuasive Petitioner's testimony that he was not given the first page of the Notification of Benefits Form on March 8, 2001,^{9/} and that based on the language in the paragraph below the table, quoted in paragraph 29 above, he reasonably believed that the second page of that form constituted a "verification of beneficiary" that simply confirmed his beneficiary for his previous selection of the "survivor annuity." However, in order for the clause "the Survivor Annuity benefit amounts shown above" in that paragraph to make sense, it must be read in conjunction with the table above the paragraph.

45. As discussed above, in the table on page 2 of the Notification of Benefits Form that was executed by Petitioner, no amounts of nontaxable portion of monthly benefit for any of the survivor annuity options have been filled in, even though the

paragraph below the table expressly refers to the "Survivor Annuity benefit amounts shown above." The absence in the table of any "Survivor Annuity benefit amounts shown above" is inconsistent with Petitioner having chosen a survivor annuity option.

46. Thus, the paragraph below the table can only be reasonably read to mean that to the extent the employee has selected one of the different survivor annuity options on the first page of the form, the survivor annuity benefits amounts shown in the table apply to the particular beneficiary identified in the table. Accordingly, if no survivor annuity benefit amounts are "shown above"—i.e., set forth in the table—that would indicate, and only be consistent with, the selection of a retirement option other than a survivor annuity.

47. The undersigned also does not find plausible Petitioner's testimony that he did not receive or otherwise was not given copies of five crucial retirement-related documents—four of which clearly informed him that he was enrolled in the life annuity—so that he was not timely informed of the need to correct a mistake in his retirement pension enrollment. That these documents were transmitted by different senders—Respondent, Salem, and SDA—compounds that implausibility.^{10/}

48. For these reasons, it is determined that Petitioner has not sustained his burden in this proceeding to show, by a

preponderance of the evidence, that he has been erroneously classified as being enrolled in the Life Annuity, and that, pursuant to section 18-49(4) of the Code, he should be reclassified as being enrolled in the Last Survivor Annuity.

CONCLUSIONS OF LAW

49. DOAH has jurisdiction over the parties to, and the subject matter of, this proceeding. § 120.65(5), Fla. Stat.

50. This proceeding arises under Code section 18-49(4), titled "Pension Validity." This provision states in pertinent part:

PENSION VALIDITY. The board of trustees shall have the power to examine into the facts upon which any pension shall heretofore have been granted under any prior or existing law, or shall hereafter be granted or obtained erroneously, fraudulently, or illegally for any reason. Said board is empowered to purge the pension rolls of any person heretofore granted a pension under prior or existing law or hereafter granted under this article if the same is found to be erroneous, fraudulent or illegal for any reason; and to reclassify any pensioner who has heretofore under any prior or existing law or who shall hereafter under this article be erroneously, improperly or illegally classified.

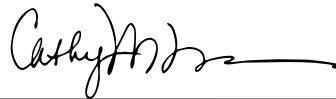
51. Pursuant to this provision, Respondent is authorized to reclassify Petitioner from the Life Annuity to the Last Survivor Annuity upon a showing, by the preponderance of the evidence, that Petitioner was erroneously classified as enrolled in the Life Annuity rather than the Last Survivor Annuity.

52. As discussed above, Petitioner failed to sustain this burden to show that he was erroneously enrolled in the Life Annuity. Accordingly, it is concluded that Respondent is not required to reclassify Petitioner into the Last Survivor Annuity pursuant to Code section 18-49(4).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent enter a final order denying Petitioner's request for reclassification of pension enrollment from Life Annuity to Last Survivor Annuity.

DONE AND ENTERED this 21st day of September, 2018, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of September, 2018.

ENDNOTES

^{1/} These included a single life option, a 100-percent joint and last survivor option, a 50-percent joint and last survivor option, and a ten year certain option.

2/ Petitioner's Exhibit Nos. 21 and 29.

3/ Id.

4/ Petitioner testified that when his bank determined that an error had been made regarding designating one of his children as a beneficiary, the banker noted that mistakes can be made and suggested that he check all of his outside accounts to ensure that the beneficiary information was correct.

5/ Brown retired in 2005.

6/ Salem is an independent financial services institution that pays the monthly benefit payments to persons receiving retirement benefits under the System.

7/ The evidence indicates that this letter was sent by SDA.

8/ The other examples of Notification of Benefits forms for other employees that Petitioner presented as support for his argument that the first and second pages of the form in his file "did not go together" indicate that the means for electing a retirement pension option under the System was to complete a Notification of Benefits Form. Thus, these forms tend to undercut the credibility of Petitioner's testimony that he selected the Last Survivor Annuity option in December 2001 by completing some unspecified and unidentified "paperwork" for which there is no physical evidence of existence.

9/ The undersigned does not find credible Petitioner's claim that he did not make the check mark on the first page of the Notification of Benefits Form in Respondent's file. Further, to the extent Petitioner seeks to rely on the difference in thickness between the check mark on the first page of the form and his signature on the second page of the form to support an argument that they were made by different pens and, therefore, different people, that reliance is misplaced. Florida case law holds that the trier of fact—in this case, the administrative law judge—is not competent to make a handwriting comparison without the aid of expert testimony. Huff v. State, 437 So. 2d 1087 (Fla. 1983); Clark v. State, 114 So. 2d 197 (Fla. 1st DCA 1959) (the comparison of handwriting is an art which can be judicially practiced only by expert or skilled witnesses). Here, expert testimony was not provided to substantiate Petitioner's claim that someone other than him made the check mark on the first page of the form. Moreover, under any circumstances, it is questionable whether testimony regarding the difference between a

check mark and a written signature could constitute reliable evidence that the marks were made by different people using different pens. See Fassi v. State, 591 So. 2d 977 (Fla. 5th DCA 1991) (comparison of spray-painted graffiti on a wall to handwriting in a letter is too speculative to be probative regarding the identities of the scribes).

^{10/} It is further noted that Petitioner received—and admits he received—a letter from Cathy David dated July 1, 2012, that expressly informed him that he was enrolled in the Life Annuity plan. See paragraph 40, above. This letter was admitted into evidence without objection, as Respondent's Exhibit 6, during Respondent's cross-examination of Petitioner. Petitioner's continued insistence, in the face of this evidence, that he did not know until November 2015, that he was enrolled in the Life Annuity rather than the Last Survivor Annuity, further calls his credibility into question. The undersigned notes that a copy of this letter was not included in the exhibits that were transmitted to DOAH after the final hearing; however, the letter was admitted into evidence at the final hearing and the salient parts were read into the record during cross-examination.

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.