**STATE OF FLORIDA**
**DEPARTMENT OF MANAGEMENT SERVICES**

**RINA RICHARD DEMICHAEL,**

**Petitioner,**

**vs.**

**Final Order No.: DMS-20-0050**
**DOAH Case No.: 19-4145**

**DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,**

**Respondent.**
_____/

# FINAL ORDER

This matter comes before the Department of Management Services ("Department") for entry of a Final Order in accordance with section 120.569(1), Florida Statutes.

On March 4, 2020, Darren A. Schwartz, Administrative Law Judge ("ALJ"), issued a Recommended Order recommending the Department enter a Final Order denying Petitioner Rina DeMichael ("Ms. DeMichael")'s request to change the FRS retirement benefits payment option selection made by her late husband ("Husband"). Ms. DeMichael filed exceptions to the recommended order on April 28, 2020. After a thorough review of the record, including the exceptions filed by Ms. DeMichael, and being fully advised in the premises, the Department hereby makes the following findings of fact and conclusion of law:

## FINDINGS OF FACTS

Following a thorough review of the record, the Findings of Facts set forth in the Recommended Order are hereby adopted in their entirety and are incorporated herein by reference, except to the extent they may be modified by the ruling on exceptions below.

## CONCLUSIONS OF LAW

Following a thorough review of the record and applicable laws, the Conclusions of Law set forth in the Recommended Order are adopted in their entirety and are incorporated herein by reference, except to the extent they may be modified by the ruling on exceptions below.

## RULING ON EXCEPTIONS

Ms. DeMichael filed four (4) exceptions to the recommended order, which will be addressed below.

### Standard of Review

As provided in Section 120.57(3)(*l*), Florida Statutes:

> (l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

### Exception 1

Ms. DeMichael takes exception to Finding of Fact #17 which states "No medical evidence was presented establishing that Mr. DeMichael was mentally incapacitated at the time he executed the Application for Service Retirement Form and Option Selection Form on February 11, 2013." Ms. DeMichael cites to her Exhibit #7, which contains notes from attending

nurses and physicians at a detoxification facility. This exhibit has notes showing that the Husband was a chronic alcohol abuser, consuming 2-3 750ml bottles of wine per day, and that he suffered from anxiety and depression. It also noted that he had interpersonal relationship problems, loss of friends, and social isolation, in addition to financial problems.

The ALJ found that Ms. DeMichael failed to prove that the Husband lacked the mental capacity to make a retirement option selection at the time he chose Option 1. In support of this finding, the ALJ considered Ms. DeMichael's Exhibit #7. In doing so, he found there was no medical evidence to support a finding that the Husband was mentally incapacitated. This conclusion was based on the Husband making his Option 1 selection on the same day he was discharged from the detoxification facility with a note indicating he "was medically stable for discharge at 8:00 a.m." that morning. The ALJ also noted that the Husband continued to manage his financial affairs, including his bank account.

To conclude, there is competent substantial evidence in the record to support the ALJ's findings. The ALJ, as finder of fact, is entitled to weigh the evidence and credibility of the witnesses. The undersigned cannot overturn a finding of fact unless it is not supported by competent substantial evidence. § 120.57(1)(*l*), Fla. Stat. ("The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of the law."). Here, the medical evidence showed that the Husband was medically stable at 8:00 a.m. the day he selected Option 1. The ALJ considered the medical evidence in conjunction with Ms. DeMichael's testimony and made a factual finding that the Husband was not mentally incapacitated at the time he selected Option 1. He also found

in Finding of Fact 23, which was not challenged in the exceptions, that the Husband was never adjudicated incompetent by a court. Finally, in paragraph 30 of the Findings of Fact, which was likewise not challenged, the ALJ expressly rejected Ms. DeMichael's testimony as "not credited" and "unpersuasive." Therefore, Exception 1 is denied.

Exception 2

Ms. DeMichael takes exception to Finding of Fact #18 to the extent it finds that the Husband was "medically stable for discharge." She claims that this finding conflicts with Finding of Fact #17 because the ALJ acknowledged Ms. DeMichael's Exhibit #7 for the proposition that the Husband was released in stable condition, but disregarded it for the proposition that he was mentally incapacitated. The conclusion that the Husband was medically stable upon discharge is based on competent substantial evidence in the form of the note in his discharge paperwork indicating he was medically stable to be discharged that morning, as well as other corroborating evidence. See Ms. DeMichael's Exhibit 7. The issue about the Husband's mental capacity has been addressed in Exception 1 above. Therefore, Exception 2 is denied.

Exception 3

In Exception 3, Ms. DeMichael takes issue with Findings of Fact 24, 25, and 26 to the extent they find that she failed to prove she lacked the opportunity to read the Spousal Acknowledgment Form before signing it. She argues primarily that the ALJ did not take into consideration her place of birth, language of origin, education level, or her understanding of the document. She also argues that she did not see any handwriting on the form so she could not have been on notice that Option 1 or 2 was selected. In Florida law, a party who signs a document without reading it is bound by its terms in the absence of coercion, duress, fraud in the inducement, or some other independent ground justifying rescission. Hale v. State, 838 So. 2d

1185, 1187 (Fla 5th DCA 2003). The ALJ considered the evidence and the testimony at trial, including Ms. DeMichael's testimony that he found "unpersuasive," and determined that she failed to establish that she lacked the opportunity to read the Spousal Acknowledgment Form before signing it. He also found that although Ms. DeMichael testified that she only saw the area of the form where she signed it, the area where she signed also indicated an "acknowledgment that the member has selected either Option 1 or 2". The other grounds for rescission argued by Ms. DeMichael should likewise be rejected. As stated by the Florida Supreme Court in All Florida Surety Company v. Coker, 88 So. 2d 508, 511 (Fla. 1956):

> The rule that one who signs a contract is presumed to know its contents has been applied even to contracts of illiterate persons on the ground that if such persons are unable to read, they are negligent if they fail to have the contract read to them. If a person cannot read the instrument, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents.

Here, there is competent substantial evidence in the record to support the ALJ's findings, specifically the form Ms. DeMichael signed and submitted into evidence as Exhibit #6, and her own testimony regarding the circumstances surrounding her signing of form. There is an insufficient basis for the Department to overturn these findings and therefore Exception 3 is denied.

Exception 4

Ms. DeMichael's final exception is directed to Conclusion of Law 39, which provided that the instant case is not distinguishable from a long line of cases holding that an FRS member's retirement selection option cannot be posthumously changed based on allegations of mental incapacity or duress. This exception argues that the totality of the circumstances separates this case from the other cases cited by the ALJ, and points to evidence in the record in the form of Ms. DeMichael's testimony and actions taken by the Husband. Simply put, this exception will

be denied because the undersigned does not find that rejection of Conclusion of Law 39 is as or more reasonable than that which is proposed to be rejected. Exception 4 does not contain any persuasive legal analysis as to why this case should be distinguished from the eight (8) cases cited by the ALJ. Likewise, the ALJ expressly found in paragraph 30 of the Findings of Fact, which was not challenged by Ms. DeMichael, that her demeanor led the ALJ to find her testimony "not credited" and "rejected as unpersuasive." For those reasons, Exception 4 is denied.

It is hereby **ORDERED AND ADJUDGED:**

1. The Recommended Order issued in this case is adopted and incorporated herein by reference;
2. The exceptions filed by Ms. DeMichael are **DENIED** in their entirety;
3. The Department's decision to deny Ms. DeMichael's request to change the FRS retirement benefits payment option selected by her late husband, an FRS member, is hereby **AFFIRMED**; and
4. The final Order shall become effective on the date of filing with the Department's Agency Clerk.

**DONE** and **ORDERED** on this 8/18/2020 | 4:26 PM EDT

DocuSigned by:
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**JONATHAN R. SATTER**
Agency 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 the 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 8/18/2020 | 4:32 PM EDT

DocuSigned by:
Diane Wint
0478473E176B441...
Diane Wint
Agency Clerk