

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RINA RICHARD DEMICHAEL,

Petitioner,

vs.

Case No. 19-4145

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.

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RECOMMENDED ORDER

This matter came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings (“DOAH”) for final hearing on January 21, 2020, by video teleconference with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: James C. Casey, Esquire
Law Offices of Slesnick and Casey, LLP
2701 Ponce de Leon Boulevard, Suite 200
Coral Gables, Florida 33134

For Respondent: Ladasiah Jackson Ford, Esquire
Nikita S. Parker, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether Petitioner, Rina Richard DeMichael (“Petitioner”), the surviving spouse of David DeMichael, is entitled to change the Florida Retirement

System (“FRS”) retirement benefits payment Option 1 selected by Mr. DeMichael.

PRELIMINARY STATEMENT

On April 23, 2019, Respondent, Department of Management Services, Division of Retirement (“Respondent”) issued a final agency action letter to Petitioner, informing Petitioner that her request that Respondent pay her FRS benefits from Mr. DeMichael’s retirement account was denied. Dissatisfied with Respondent’s decision, Petitioner timely filed a Petition for Administrative Hearing. On June 19, 2019, Respondent set an informal administrative hearing. On August 5, 2019, Respondent determined that disputed issues of material fact exist, and referred the matter to DOAH to assign an administrative law judge to conduct a formal hearing.

On August 13, 2019, the undersigned set the final hearing for October 28, 2019. On October 14, 2019, Respondent filed an unopposed motion to continue the final hearing. On October 16, 2019, the undersigned entered an Order granting the motion and reset the final hearing for January 21, 2020. On January 13, 2020, the parties filed their Joint Pre-hearing Stipulation, in which they stipulated to certain facts.

The final hearing was held on January 21, 2020. Petitioner testified on her own behalf. Petitioner’s Exhibits 1 through 7 were received into evidence. Respondent presented the testimony of David Heidel, benefits administrator for Respondent. Respondent’s Exhibits 1 through 16 were received into evidence.

The one-volume final hearing Transcript was filed at DOAH on February 14, 2020. On February 19, 2020, Respondent filed an unopposed motion for extension of time for the parties to file their proposed recommended orders. On February 20, 2020, the undersigned entered an

Order granting the motion, extending the deadline to March 13, 2020. On March 11, 2020, Petitioner filed an unopposed motion for another extension of time for the parties to file their proposed recommended orders. On March 11, 2020, the undersigned entered an Order granting the motion, extending the deadline to March 20, 2020. The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

The stipulated facts in the parties' Pre-hearing Stipulation have been incorporated herein as indicated below. All references to the Florida Statutes are to the 2015 version, unless otherwise indicated.

FINDINGS OF FACT

1. Respondent is the state agency charged under chapter 121, Florida Statutes, with administering the FRS.

2. In 1991, Mr. DeMichael began employment with the Broward County Sheriff's Office ("BCSO"). Mr. DeMichael was a member of the FRS pension plan based on his employment with the BCSO as a deputy sheriff.

3. Mr. DeMichael married Petitioner on November 19, 2011.

4. On February 11, 2013, Mr. DeMichael retired from the BCSO. At that time, he signed the Florida Retirement System Pension Plan Application for Service Retirement form ("Application for Service Retirement Form") designating Petitioner as his primary beneficiary.

5. On February 11, 2013, Mr. DeMichael also signed the Florida Retirement System Pension Plan Option Selection for FRS Members form (Form FRS-110)("Option Selection Form"). On the Option Selection Form, Mr. DeMichael was required to select one of four retirement benefit payment options. The Option Selection Form provided an explanation for each of the four options. Mr. DeMichael selected to receive an Option 1 retirement benefit by checking the line next to the Option 1 benefit payment option.

Option 1 provides the maximum benefit for the life of the FRS member with no continuing benefit after the member's death.

6. On February 11, 2013, Petitioner signed the Spousal Acknowledgement Form (Form SA-1) ("Spousal Acknowledgement Form") acknowledging that Mr. DeMichael "selected either Option 1 or 2." The purpose of the Spousal Acknowledgement Form is to inform the spouse that he/she will not receive a lifetime benefit following the FRS member's death. The Spousal Acknowledgement Form does not give a spouse control over which option the FRS member selects. That option selection decision is the sole choice of the member. The Spousal Acknowledgement Form provided an explanation of the four different retirement payment options available to FRS members. At the hearing, Petitioner acknowledged she signed the Spousal Acknowledgement Form.

7. Ms. Tiffany Pieters was a duly licensed notary with the State of Florida and an employee of BCSO on February 11, 2013. Ms. Pieters notarized the Application for Service Retirement Form and Option Selection Form signed by Mr. DeMichael, and the Spousal Acknowledgement Form signed by Petitioner.

8. The Division received Mr. DeMichael's Application for Service Retirement Form, Option Selection Form, and Petitioner's Spousal Acknowledgement Form on or about February 11, 2013.

9. On February 20, 2013, Respondent mailed Mr. DeMichael an Acknowledgement of Service Retirement Application letter acknowledging Respondent's receipt of Mr. DeMichael's Application for Service Retirement Form; his selection of Option 1 as the benefit payment option; his employment termination date of February 11, 2013; and retirement date of March 1, 2013. The Acknowledgement of Service Retirement Application letter expressly provides that Mr. DeMichael cannot change the option he selected once his retirement becomes final, and that retirement benefits become final when any payment is cashed or deposited.

10. Mr. DeMichael's Application for Service Retirement Form and Option Selection Form also expressly provide that he cannot change the option he selected once his retirement becomes final, and that retirement benefits become final when any benefit payment is cashed or deposited. On February 20, 2013, Respondent also mailed Mr. DeMichael an Estimate of Retirement Benefit letter, which provides an estimate of the payment benefit for each of the four options. The letter also acknowledges that Mr. DeMichael selected Option 1, and that his option selection cannot be changed after any payment is cashed or deposited.

11. On April 1, 2013, Respondent mailed a request for birth date verification to Mr. DeMichael. In response, on April 30, 2013, Respondent received Mr. DeMichael's birth certificate.

12. Based on his selection of Option 1, Mr. DeMichael received an initial retroactive payment of \$7,809.76 on May 10, 2013; an initial regular retirement payment of \$3,904.88 on May 31, 2013; and a subsequent retirement payment every month in 2013 in the monthly amount of \$3,904.88.

13. Mr. DeMichael received a retirement payment every month beginning May 2013 until he died on August 25, 2015. Mr. DeMichael received a total of 29 retirement payments for a total gross benefit amount of \$119,832.92. Each retirement payment was cashed or deposited into Mr. DeMichael's bank account.

14. Respondent was notified of Mr. DeMichael's death in August 2015.

15. On or about October 6, 2015, Respondent notified Petitioner that Mr. DeMichael's benefit had ended and that there would be no continuing benefit to her based on Mr. DeMichael's Option 1 selection.

16. In this proceeding, Petitioner claims she is entitled to change Mr. DeMichael's Option 1 retirement benefit selection and receive a continuing monthly spousal benefit. In support of her position, Petitioner contends Mr. DeMichael's selection of Option 1 is invalid because he lacked

the mental capacity to make a retirement option at the time his Application for Service Retirement Form and Option Selection Form was submitted to Respondent. Based on the persuasive and credible evidence adduced at hearing, Petitioner failed to establish that Mr. DeMichael lacked the mental capacity to make a retirement option at the time his Application for Service Retirement Form and Option Selection Form were submitted to Respondent.

17. 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.

18. In fact, Mr. DeMichael was released from Sunrise Detoxification Center on February 11, 2013, following in-patient rehabilitative treatment for his alcoholism. Petitioner's Exhibit 7 expressly states that Mr. DeMichael "was medically stable for discharge" at 8:00 a.m. that morning.

19. Moreover, Petitioner and Mr. DeMichael ate breakfast together later that morning at the BCSO cafeteria. Subsequently, Petitioner was escorted to the BCSO Internal Affairs area where she was questioned about Mr. DeMichael's alcoholism. After Petitioner refused to answer any questions, she was escorted to the BCSO rooftop terrace.

20. After a while, Mr. DeMichael came to the rooftop terrace. According to Petitioner, Mr. DeMichael was smiling and they exchanged pleasantries.

21. After February 11, 2013, Mr. DeMichael continued to manage his own financial affairs, including his bank account.

22. On April 1, 2013, Respondent sent a request to Mr. DeMichael to provide verification regarding his date of birth. In response, Mr. DeMichael sent his birth certificate to Respondent.

23. Finally, at no time did Petitioner ever seek a guardianship or power of attorney over Mr. DeMichael, and at no time was Mr. DeMichael adjudicated incompetent by a court.

24. Petitioner also claims that Mr. DeMichael's selection of Option 1 is invalid and that she is entitled to a continuing benefit because she lacked the

opportunity to read the Spousal Acknowledgement Form before signing it. Based on the persuasive and credible evidence adduced at hearing, Petitioner failed to establish that she lacked the opportunity to read the Spousal Acknowledgement Form before signing it.

25. In support of her position, Petitioner testified at one point in the hearing that she only saw the area of the form near where she signed it. However, in the area of the form near where Petitioner signed (Respondent's Exhibit No. 6) is the express "acknowledgement that the member has selected either Option 1 or 2."

26. At another point in the hearing, Petitioner testified she saw the small writing below her signature at the bottom of the Spousal Acknowledgement Form, but she did not read any of the writing. The small writing below Petitioner's signature at the bottom of the form provides an explanation of the four retirement benefit payment options.

27. Notably, Petitioner did not testify that she asked Ms. Pieters for any explanation of the Spousal Acknowledgement Form. Further, Petitioner did not testify that she needed or asked for more time to read the Spousal Acknowledgement Form before signing it, or that Ms. Pieters refused to allow her to read the form. Petitioner could have asked Ms. Pieters for more time to read the Spousal Acknowledgement Form if she felt it was necessary, but she did not.

28. At no time did Petitioner ever file a complaint against Ms. Pieters or complain about her handling of the Spousal Acknowledgement Form.

29. Had Petitioner been concerned about the Spousal Acknowledgement form or Mr. DeMichael's mental capacity on February 11, 2013, she also could have spoken to Judy Cowell, Mr. DeMichael's supervisor at BCSO. Ms. Cowell greeted Petitioner and Mr. DeMichael at the front office when they arrived at BCSO on the morning of February 11, 2013, and Ms. Cowell escorted them to the cafeteria and rooftop terrace. At hearing, Petitioner

testified that Ms. Cowell “was like a mom,” and that she had spoken to her on numerous occasions when Mr. DeMichael had problems with his employment.

30. At hearing, the undersigned had the distinct opportunity to observe Petitioner’s testimony and her demeanor. Petitioner’s testimony regarding Mr. DeMichael’s alleged mental incapacity on February 11, 2013, and her not having the opportunity to read the Spousal Acknowledgement Form and the alleged invalidity of the Spousal Acknowledgement Form, Option Selection Form, and Application for Service Retirement Form, is not credited and is rejected as unpersuasive.

31. In sum, Petitioner is not entitled to change Mr. DeMichael’s selection of Option 1 as his FRS retirement benefits payment option and she is not entitled to a continuing benefit.

CONCLUSIONS OF LAW

32. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes.

33. As the party seeking the affirmative of the issue, Petitioner has the burden of proving by a preponderance of the evidence that she is entitled to change Mr. DeMichael’s Option 1 benefit payment selection and receive a continuing benefit. *Wilson v. Dep’t of Admin. Div. of Ret.*, 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989).

34. The rights of FRS members are contractual in nature between the member and the State of Florida. Such contractual rights are legally enforceable as valid contract rights and cannot be abridged in any way. § 121.011(3)(d), Fla. Stat. A party to a contract is conclusively presumed to know and understand the contents, terms, and conditions of a contract before signing it, and any inquiries concerning the ramifications of the contract should be made before signing it. *Semerena v. Dist. Bd. of Trus. of Miami Dade College*, 282 So. 3d 974, 977 (Fla. 3d DCA 2019).

35. With these legal principles in mind, the four retirement benefit payment options available to FRS employees are explained in section 121.091(6)(a):

(6) OPTIONAL FORMS OF RETIREMENT BENEFITS AND DISABILITY RETIREMENT BENEFITS.—

(a) Prior to the receipt of the first monthly retirement payment, a member shall elect to receive the retirement benefits to which he or she is entitled under subsection (1), subsection (2), subsection (3), or subsection (4) in accordance with one of the following options:

1. The maximum retirement benefit payable to the member during his or her lifetime.
2. A decreased retirement benefit payable to the member during his or her lifetime and, in the event of his or her death within a period of 10 years after retirement, the same monthly amount payable for the balance of such 10-year period to his or her beneficiary or, in case the beneficiary is deceased, in accordance with subsection (8) as though no beneficiary had been named.
3. A decreased retirement benefit payable during the joint lifetime of both the member and his or her joint annuitant and which, after the death of either, shall continue during the lifetime of the survivor in the same amount, subject to the provisions of subsection (12).
4. A decreased retirement benefit payable during the joint lifetime of the member and his or her joint annuitant and which, after the death of either, shall continue during the lifetime of the survivor in an amount equal to $66 \frac{2}{3}$ percent of the amount that was payable during the joint lifetime of the member and his or her joint annuitant, subject to the provisions of subsection (12).

The spouse of any member who elects to receive the benefit provided under subparagraph 1. or subparagraph 2. shall be notified of and shall acknowledge any such election. The division shall establish by rule a method for selecting the appropriate actuarial factor for optional forms of benefits selected under subparagraphs 3. and 4., based on the age of the member and the joint annuitant.

36. Section 121.091(6)(h) further provides, in pertinent part: “The option selected or determined for payment of benefits as provided in this section shall be final and irrevocable at the time a benefit payment is cashed or deposited.”

37. As detailed above, it is undisputed that Mr. DeMichael selected Option 1 and signed the Option Selection Form and Application for Service Retirement Form, and that Petitioner signed the Spousal Acknowledgement Form acknowledging that Mr. DeMichael had selected either Option 1 or Option 2. In addition, the Spousal Acknowledgement Form explained the four options. Petitioner received 29 Option 1 retirement benefit payments prior to his death, totaling \$119,832.92. Each retirement payment was cashed or deposited into Mr. DeMichael’s bank account. Pursuant to the plain language of section 121.091(6)(h), Mr. DeMichael’s selection of Option 1 on the Option Selection Form cannot be changed.

38. Moreover, as detailed above, Petitioner failed to prove by a preponderance of the evidence that Mr. DeMichael lacked the mental capacity to make a retirement option at the time his Application for Service Retirement Form and Option Selection Form was submitted to Respondent. Petitioner also failed to prove by a preponderance of the evidence that she lacked the opportunity to read the Spousal Acknowledgement Form before signing it.

39. In numerous similar cases, administrative law judges have rejected the claim that an FRS member’s retirement selection option can be

posthumously changed based on allegations of mental incapacity or duress. See *Williams v. Dep't of Mgt. Servs., Div. of Ret.*, Case No. 19-5499 (Fla. DOAH Mar. 4, 2020); *Maddox v. Dep't of Mgt. Servs., Div. of Ret.*, Case No. 17-1424 (Fla. DOAH Aug. 25, 2017; Fla. DMS Jan. 5, 2018); *Jones v. Dep't of Mgt. Servs., Div. of Ret.*, Case No. 16-0429 (Fla. DOAH Oct. 25, 2016; Fla. DOAH Jan. 3, 2018); *Renaud v. Dep't of Mgt. Servs., Div. of Ret.*, Case No. 15-1528 (Fla. DOAH June 24, 2015); *Radicella v. Dep't of Mgt. Servs., Div. of Ret.*, Case No. 11-5491 (Fla. DOAH Feb. 27, 2012; Fla. DMS Mar. 15, 2012); *Carpenter v. Dep't Mgt. Servs., Div. of Ret.*, Case No. 01-1618 (Fla. DOAH July 12, 2001; Fla. DOAH Aug. 22, 2001); *Holland v. Div. of Ret.*, Case No. 98-3886 (Fla. DOAH June 29, 1999; Fla. Div. of Ret. September 9, 1999); *Reeber v. Dep't of Admin., Div. of Ret.*, Case No. 92-0215 (Fla. DOAH May 29, 1992; Fla. DOA July 21, 1992). Nothing about this case distinguishes it from those cited above. The undersigned heard no evidence or testimony to persuade him to deviate from the plain language of the applicable statutes.

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 denying Petitioner's request to change the Florida Retirement System retirement benefits payment Option 1 selected by Mr. DeMichael and receive a continuing monthly spousal benefit.

DONE AND ENTERED this 14th day of April, 2020, in Tallahassee, Leon
County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2020.

COPIES FURNISHED:

James C. Casey, Esquire
Law Offices of Slesnick and Casey, LLP
2701 Ponce de Leon Boulevard, Suite 200
Coral Gables, Florida 33134
(eServed)

Ladasiah Jackson Ford, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950
(eServed)

Nikita S. Parker, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950
(eServed)

David DiSalvo, Director
Division of Retirement
Department of Management Services
Post Office Box 9000
Tallahassee, Florida 32315-9000
(eServed)

Sean Gellis, General Counsel
Office of the General Counsel
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950
(eServed)

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.