

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2678

RINA RICHARD DEMICHAEL,

Appellant,

v.

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Appellee.

On appeal from the Department of Management Services,
Division of Retirement.
Jonathan Satter, Secretary.

February 16, 2022

NORDBY, J.

Rina Demichael appeals a final order denying her petition to change her late husband's retirement benefits selection. She raises three grounds for reversal, two of which we discuss below. First, she claims that her husband lacked sufficient mental capacity to select a benefits option. And second, she claims that the spousal acknowledgment form was invalid. We affirm on all grounds because competent substantial evidence supports the findings below.

Florida's Retirement System

Chapter 121, Florida Statutes, governs Florida's Retirement System (FRS). A member's rights under the system are contractual and enforceable as such. § 121.011(3)(d), Fla. Stat. (2020). Before retirement, an FRS member can choose from four benefits options:

1. The maximum benefit "payable to the member during his or her lifetime."
2. A decreased benefit "payable to the member during his or her lifetime," and if the member dies within ten years after retirement, the member's beneficiary gets the same monthly payment for the rest of that ten-year period.
3. A decreased benefit "payable during the joint lifetime of both the member and his or her joint annuitant," and if either dies, the survivor still receives the same benefit during his or her lifetime, subject to section 121.091(12), Florida Statutes.
4. A decreased benefit "payable during the joint lifetime of the member and his or her joint annuitant," and if either dies, the survivor receives a further-reduced benefit (66 $\frac{2}{3}$ % of the previous payment) during his or her lifetime, subject to section 121.091(12), Florida Statutes.

§ 121.091(6)(a)1.–4., Fla. Stat. (2020).

If a member selects option one or two, then that member's spouse "shall be notified of and shall acknowledge" that selection. § 121.091(6)(a), Fla. Stat. To enforce this provision, a member's payments will not begin until:

- (1) the Department receives the completed spousal acknowledgment form;
- (2) the Department agrees that the spouse cannot be found; or

- (3) if the spouse refuses to sign the acknowledgment form, “the Division shall notify the spouse in writing of the option selection. Such notification shall constitute acknowledgment by the spouse of such selection.”

Fla. Admin. Code R. 60S-4.010(9)(b). Once benefits begin and the first payment is cashed, the member’s option selection becomes “final and irrevocable.” §121.091(6)(h). Fla. Stat.

Background

The relevant facts begin shortly before FRS Member David Demichael filled out his option selection form. In early 2013, the Member checked himself into a Sunrise Detox Facility to help his struggles with alcoholism. Records from the facility show that the Member recently relapsed and was on temporary leave from work. Although the Member reported experiencing anxiety and depression, he had not sought help from a mental health professional. According to the intake notes, the Member met the criteria for admission.

Five days after check-in, the Member left the facility. Doctor’s notes from that morning say that the Member was “medically stable for discharge.” The Member went straight to his job at the Broward County Sheriff’s Office (BCSO) accompanied by Ms. Demichael.

Once they arrived, they ate breakfast in the cafeteria and went up to a rooftop terrace. Ms. Demichael then met with an officer to discuss the Member’s recent troubles. Meanwhile, the Member filled out retirement paperwork and selected option one—to receive the maximum benefit payable during his lifetime. Ms. Demichael was then alone on the rooftop when Tiffany Pieters, another BCSO employee, approached her with a document. Ms. Demichael signed the form then left with the Member.

The Member soon started receiving retirement benefits in line with option one. Sadly, just two years later, he passed away. The Department informed Ms. Demichael that the Member’s benefits selection provided no continuing benefits after his death.

A few years passed before Ms. Demichael petitioned the Department to direct the benefits payments to her. The Department denied her request and submitted the matter to the Division of Administrative Hearings for a formal hearing. There, Ms. Demichael argued that she had a right to change the Member's benefits option for two reasons. First, the Member lacked the mental competency to select an option when he retired. Second, the spousal acknowledgment form was invalid because Ms. Demichael had no chance to read the form and Ms. Pieters improperly notarized the form.

At the hearing, Ms. Demichael testified that the Member became visibly upset and was "traumatized" on the way home from BCSO the day he retired. She said he eventually reached a breaking point at home and even started drinking in front of deputies who came to collect BCSO equipment. As for the spousal acknowledgment form, Ms. Demichael asserted that Ms. Pieters obstructed the document with both hands to prevent Ms. Demichael from reading the form. Ms. Demichael admitted that she signed the form. Yet she claimed that Ms. Pieters marked "personally known" when notarizing the form even though she did not know Ms. Pieters.

The Administrative Law Judge (ALJ) soundly rejected Ms. Demichael's testimony. Citing a distinct opportunity to observe Ms. Demichael's demeanor, the ALJ found that her testimony was not credible. The ALJ then denied her petition on both claims.

On the first claim, the ALJ found that Ms. Demichael presented no medical evidence to show that the Member was mentally incapacitated when he retired. According to records from Sunrise, the Member was "medically stable for discharge" the morning he retired. Plus, the Member ate breakfast, smiled, and exchanged pleasantries with Ms. Demichael once at BCSO. Even after that day, Ms. Demichael never sought a guardianship or power of attorney to protect the Member.

On the second claim, the ALJ found that Ms. Demichael failed to prove that she had no chance to read the spousal acknowledgment form before signing. The writing near the signature line explained that the Member selected either option

one or two. And the writing just below where Ms. Demichael signed explained the four benefits options. Ms. Demichael never asked Ms. Pieters to explain the form, nor did she ask for more time to read it.

The Department adopted the ALJ's recommended order and denied Ms. Demichael's exceptions. This timely appeal followed.

Discussion

An administrative agency may not reject an ALJ's factual findings when competent, substantial evidence supports those findings. § 120.57(1)(l), Fla. Stat. (2020); *Strickland v. Fla. A & M Univ.*, 799 So. 2d 276, 278 (Fla. 1st DCA 2001). As the reviewing court, we are similarly bound. § 120.68(7)(b), Fla. Stat. (2020). Competent, substantial evidence is evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "[T]he weighing of evidence and judging of the credibility of witnesses . . . are solely the prerogative of the Administrative Law Judge as finder of fact." *Strickland*, 799 So. 2d at 278.

The Member's competence may have been a close call, but competent, substantial evidence supports the ALJ's findings. Sunrise's records signify that the Member was "medically stable for discharge" the morning he retired. The Member ate breakfast and was in a positive mood at BCSO. From then on, Ms. Demichael never sought legal protection over the Member, and a court never adjudicated the Member to be incompetent. This evidence is all relevant to determine the Member had the proper mental capacity.

Ms. Demichael highlights compelling evidence to the contrary. For example, Sunrise's records reported that the Member lacked proper judgment and was anxious about losing his job. And after leaving BCSO, the Member was traumatized and cried the whole way home. He even started drinking in front of the officers who came to retrieve his equipment. This evidence supports Ms. Demichael's assertions that the Member lacked the proper mindset to make a sound retirement benefits choice.

Essentially, Ms. Demichael asks us to reweigh the evidence, or credit her testimony where the ALJ declined to do so. But that is not our role. Instead, we simply hold that the ALJ's findings on this claim are supported by competent, substantial evidence. That is, the ALJ relied on relevant and material evidence that a reasonable person would accept as enough to support the decision. *See De Groot*, 95 So. 2d at 916.

Even so, Ms. Demichael cites no authority that would allow an ALJ, or this Court, to let a spouse change a member's benefits selection once payments begin. We have found none either. What is more, the plain language of the statute appears to allow only a *member* to change their selection and only *before* the first payment is received. *See* § 121.091(6)(a), (h), Fla. Stat. Without backing up her argument through legal support, her first claim ultimately fails.

Ms. Demichael next raises two arguments to support her claim that the spousal acknowledgment form is invalid. She first contends that she had no chance to read the form before signing. Then, she argues that Ms. Pieters improperly notarized the form. We find that both arguments lack merit.

To start, the ALJ relied on competent, substantial evidence. The ALJ found that Ms. Demichael saw the parts of the form near where she signed which included information that the Member had selected either option one or two. She failed to read the fine print below her signature which explained the four retirement benefits options. And she never asked Ms. Pieters to explain the form or for more time to read the form. Taken together, this evidence supports the decision that Ms. Demichael had a chance to read the form before signing it. *See De Groot*, 95 So. 2d at 916.

Ms. Demichael again merely highlights evidence to the contrary. She says that Ms. Pieters prevented her from reading the form. This obstruction, coupled with the circumstances—an intimidating environment and Ms. Demichael's limited ability to read English—obligated Ms. Pieters to explain the form. But because the ALJ discredited Ms. Demichael's testimony, and because we cannot reweigh the evidence at this stage, her first argument fails.

Finally, we reject Ms. Demichael's argument about notarization. The Department persuades us to find that even a faulty notarization does not afford Ms. Demichael her requested relief. To be sure, the statute requires spousal acknowledgment. But the rules give multiple ways to secure such acknowledgment. *See* Fla. Admin. Code R. 60S-4.010(9)(b) (allowing acknowledgment even if a spouse refuses to sign the form by providing written notice of the member's selection). This means, as the Department puts it, the spousal acknowledgment form does not give Ms. Demichael "veto power" over the Member's selection. Ultimately, as with her first claim, Ms. Demichael cites nothing to show she can change the Member's selection even if the form's notarization were invalid.

In short, we affirm the ALJ's findings as supported by competent, substantial evidence. Beyond that, Ms. Demichael has shown no legal support for her desired relief.

AFFIRMED.

BILBREY and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

James C. Casey of Law Offices of Slesnick & Casey, LLP The Biltmore, Coral Gables, for Appellant.

Ladasiah Jackson Ford, Assistant General Counsel, Kristen Larson, General Counsel, and Rebekah A. Davis, Deputy General Counsel, Department of Management Services, Tallahassee, for Appellee.

Supreme Court of Florida

THURSDAY, AUGUST 11, 2022

CASE NO.: SC22-361

Lower Tribunal No(s).:
1D20-2678; 20-0050

RINA RICHARD DEMICHAEL vs. FLORIDA DEPARTMENT OF
MANAGEMENT SERVICES,
DIVISION OF RETIREMENT

Petitioner(s)

Respondent(s)

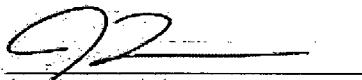
This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

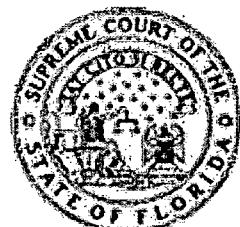
No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

CANADY, POLSTON, LABARGA, COURIEL, and GROSSHANS, JJ., concur.

A True Copy

Test:


John A. Tomasino
Clerk, Supreme Court



lc

Served:

MEGAN SILVER
REBEKAH A. DAVIS
KRISTEN G. LARSON
RINA RICHARD DEMICHAEL
J. TODD INMAN, SECRETARY
HON. KRISTINA SAMUELS, CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RINA RICHARD DEMICHAEL,
Petitioner,

vs.

BEFORE THE HONORABLE
JUDGE DARREN SCHWARTZ

DOAH CASE NO. 19-4145

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

Respondent.

**PROPOSED RECOMMENDED ORDER ON
BEHALF OF THE PETITIONER**

The Petitioner, Rina Richard DeMichael, by and through the undersigned files this her
Proposed Recommended Order

STATEMENT OF THE CASE

This is an administrative action brought before the STATE OF FLORIDA DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT (hereafter DMS or DIVISION) to enable RINA RICHARD DEMICHAEL (hereafter RINA or PETITIONER to receive retroactive spousal Florida Retirement System (hereafter FRS) retirement benefits earned by her late husband, DAVID JOHN DEMICHAEL (hereafter DAVID).

DAVID was a 20-year plus veteran of the BROWARD SHERIFF'S OFFICE (hereafter BSO) and was also a severe alcoholic. BSO gave DAVID many opportunities to rehabilitate by sending him to several Detox clinics and several extended-stay, in-patient Rehab facilities. Despite those opportunities to rehabilitate himself and improve his work conduct the disease of alcoholism had taken total control of DAVID's daily personal and career life to the extent that after his last BSO ordered stay at Sunrise Detox Clinic (hereafter SUNRISE) he was forced to resign.

On February 11, 2013, on leaving SUNRISE sometime after 8:30 a.m., DAVID was ordered to immediately report to BSO and did so accompanied by RINA and his sister Susan Herzog (hereafter HERZOG).

On arrival at BSO, RINA and DAVID were separated until they left BSO Headquarters (except for a brief time when DAVID took a cigarette break on the BSO rooftop terrace where RINA was being made to wait.) During their time at BSO the DeMichael's did not discuss DAVID's forced resignation, his FRS retirement, or the consequences of FRS retirement options.

At some point while RINA waited on the BSO rooftop terrace she was approached by a woman. The woman told RINA to sign a document which was obstructed by the woman. The woman did not explain the document to RINA. RINA signed the document without being fully aware of what she was signing and was not given a copy of the document to read or keep.

The basis of RINA's case is estoppel wherein Petitioner asserts that DAVID did not possess the mental and emotional capacity to make a reasoned, knowing and informed retirement option selection while at the same time being forced to resign from BSO pending charges just minutes after being discharged from Rehab where he was given drugs and diagnosed with anxiety and depression. Further, RINA was coerced to sign a blank Spousal Acknowledgement form by a member of BSO (who RINA did not know). Further, and probably most important the meaning and consequences of her signature on that Spousal Acknowledgement Form were not explained to RINA by anyone. Also, the Spousal Acknowledgement Form (R. Ex. # 4), which was first seen by RINA after DAVID's death stated that the Notary, TIFFANY PIETERS (hereafter PIETERS), personally knew the Petitioner. RINA did not know PIETERS prior to February 11, 2013 nor has she seen her since that day.

Based upon the documentary evidence in P. Ex. # 7 setting forth the red flag issues regarding DAVID's mental and emotional capacity to appreciate and understand his retirement options as well as the factual testimony of RINA regarding DAVID's mental and emotional state on February 11, 2013 and thereafter, Petitioner asserts DAVID lacked the mental and emotional capacity to appreciate the FRS Retirement options and the consequences for his spouse.

Subsequent to DAVID's death on August 25, 2015 RINA personally inquired of FRS and inquired of her probate attorney regarding FRS benefits without satisfactory explanation. Thereafter, the instant Petition was filed resulting in the matter being referred to DOAH and a hearing was held in this matter on January 20, 2020.

FINDINGS OF FACT

1. DAVID was employed by BSO as a Deputy Sheriff on 5/28/1991. (P. Ex. # 2¹)
2. As a BSO Deputy DAVID was a member of FRS.
3. RINA and DAVID were married on November 19, 2011 although they had known each other prior to 2003, that is when they became serious and they remained married until her husband's death on August 25, 2016. (P. Ex. # 1) (Tr. p. 19-20) (R. Ex. # 7)
4. DAVID worked as a BSO Deputy Correctional Officer during the time RINA knew her husband. (Tr. p. 20) (P. Ex. # 2)
5. RINA is currently 58 years old, was born in Haiti where her first languages were French and Creole. Petitioner learned English in the United States. (Tr. p. 18-19)
6. RINA's highest educational level was the earning of a GED (General Equivalency Diploma) (Tr. p. 19)

¹ References to admitted Exhibits shall be designated as either P. Ex. # ____ or R. Ex. # _____. References to the Transcript shall be designated as Tr. p. _____.

7. RINA also attended ESOL (English for speakers of other languages) classes. (Tr. p. 19)

8. RINA was aware that DAVID had a drinking problem and was an alcoholic. (Tr. p. 20) (P. Ex. # 7) (R. Ex. # 7)

9. DAVID ran into problems at work because of his drinking. (Tr. p. 21)

10. DAVID's supervisor was Judy Cowell with whom RINA had contact every time DAVID was in trouble at work and for getting DAVID into Detox and Rehab. (Tr. p. 22)

11. DAVID was in Rehab at least 4 times. (Tr. p.22)

12. RINA was aware that DAVID was admitted to Detox and Rehab prior to their marriage since she drove him there. (Tr. p. 23-24)

13. DAVID was admitted to SUNRISE in February 2013 where he had been at least 3 times before. (Tr. p. 25) (P. Ex 7)

14. RINA had driven DAVID to Detox before but had never picked him up from there as she did on February 11. 2013 at approximately 8:30 a.m. (Tr. 26-27)

15. RINA picked up DAVID at Detox and immediately drove to BSO headquarters also accompanied by HERZOG. (Tr. p. 26)

16. Upon arrival at BSO Judy Cowell escorted RINA, DAVID and HERZOG to the BSO Cafeteria and then to the BSO rooftop terrace. (Tr. p. 28)

17. Thereafter, RINA was escorted to BSO Internal Affairs where RINA refused to answer Deputy Palmer's questions about her husband's drinking and activities. (Tr. p. 29-31)

18. RINA, after leaving Internal Affairs was escorted to the Lobby and thereafter escorted back up to the rooftop terrace where she remained, for the most part, by herself. (Tr. p. 31-32)

19. At one-point DAVID came out on the rooftop terrace to smoke a cigarette and he and RINA exchanged pleasantries after which he left. (Tr. p. 32)

20. There was no talk of retirement between RINA and DAVID. RINA thought they were at BSO to straighten out DAVID's job situation. (Tr. p.32)

21. Typically, DAVID's time in Detox were normally followed by 40 days of Rehab either at Coconut Creek or Beachcomber facilities where they would counsel DAVID and administer drugs to decrease his craving for alcohol. (Tr. 32-33)

22. At some point HERZOG came back to the rooftop terrace but left to take a phone call. Thereafter, RINA did not see either DAVID or HERZOG until they all left BSO. (Tr. p. 34)

23. At some point, while RINA was still on the rooftop terrace, she was approached by a woman she did not know. The woman introduced herself as Tiffany Pieters a woman she had never seen before or since. (Tr. p. 34)

24. PIETERS showed RINA a document that later RINA learned was a Spousal Acknowledgement Form. The top of the form was obstructed by PIETERS and RINA was told by PIETERS to sign the document which RINA did. RINA was not given the option of reading the Spousal Acknowledgement Form. (Tr. p. 34) (R. Ex. 6)

25. RINA is now aware that PIETERS worked for BSO.

26. PIETERS indicated that after RINA signed that if her husband would pass away that RINA would be his beneficiary. (Tr. p. 35-36)

27. PIETERS did not hand over the form to RINA rather, RINA was told to print and sign and that was that. (Tr. p. 35-36)

28. RINA did not see any handwriting on the printed form; PIETERS did not explain the form to RINA; RINA was unable to read the document due to PIETERS' obstruction and RINA did not know and was not told what the document was for. (Tr. p. 36)

29. RINA could not recall whether PIETERS actually notarized the document in front of her. (Tr. p. 36)

30. RINA has had documents notarized before and the notarization situation involving PIETERS was not a proper notarization situation. (Tr. p. 36-37)

31. RINA did not know PIETERS even though PIETERS wrote on the Spousal Acknowledgement Form Notary section that PIETERS personally knew RINA. (Tr. p. 37)

32. PIETERS did not ask for RINA's identification nor did PIETERS identify herself as a Notary. (Tr. p. 37-38)

33. Immediately after RINA signed the form PIETERS left the rooftop terrace. (Tr. p. 38)

34. RINA next saw DAVID when they were escorted from the BSO building sometime in the afternoon. (Tr. p. 38)

35. RINA had not talked to DAVID about his retirement. All RINA knew was that DAVID was traumatized and crying as they left BSO. RINA did not know what was going on. (Tr. p. 38)

36. HERZOG wanted her brother, DAVID, to go to Rehab but DAVID refused. (Tr. p. 38)

37. BSO Deputy Palmer and another deputy followed RINA, DAVID and HERZOG to collect any BSO property that Petitioner's husband had at home. RINA did not think this was totally unusual since DAVID was often in and out of trouble at BSO. (Tr. p. 38-39) (Tr. p. 56)

38. DAVID continued to cry during the entire time, and he found a bottle somewhere and began drinking in front of Palmer and the other deputy whereupon HERZOG grabbed the bottle from DAVID. (Tr. p. 39)

39. The deputies also found two additional bottles of wine in the trunk of DAVID's personal vehicle also DAVID had previously been caught drinking on the job when he had left his post shaking and sweating due to his addiction to alcohol. (Tr. p. 39)

40. HERZOG, who was about to return to Buffalo, was crying because DAVID refused to go to Rehab and from HERZOG's personal experience with HERZOG's own husband, who is a dentist/doctor, who almost lost his license due to his being an alcoholic. (Tr. p. 40-42)

41. DAVID would drink at work because of his lack of control over alcohol and would go to work after he drank, so when he would sweat, he feared that the alcohol would smell coming from his pores. David then would start shaking, go through withdrawal and had to have a drink which he kept in his car. (Tr. p. 42)

42. DAVID had previously been shaking in front of her and he would vomit and have a drink anyway. Vomiting would also occur when DAVID drank after taking pills given to him to curb his addiction to alcohol. (Tr. p. 43)

43. DAVID would try not to drink he would also shake and sweat and then blackout and fall. (Tr. p. 43)

44. RINA, while at BSO on February 11, 2013 was not aware that DAVID was retiring, nor had they ever discussed his retirement. RINA had thought that the purpose of their visit to BSO was to get DAVID back to work. (Tr. 43)

45. RINA thought the taking of DAVID's uniforms and equipment by Deputy Palmer and another deputy was unusual. DAVID's response was that he had to take some time off (from work) and did not want to discuss it further and DAVID started crying, he walked away and started drinking again. (Tr. 43-44)

46. DAVID's drink of choice was usually sauvignon blanc wine as well as Absolute Vodka with coke. (Tr. p. 44)

47. DAVID would drink until he could not drink anymore. Then he would either fall asleep or yell and scream that he really wanted to quit. (Tr. p. 44)

48. 4 or 5 months after leaving BSO DAVID went to pick up his gun at BSO is when RINA became aware that he no longer worked for BSO. RINA would not allow the gun to be kept at home, so she made him sell it at a pawn shop. (Tr. 45-46)

49. RINA wanted to know that since he was not going back to work what next? RINA understood that as his beneficiary money would be coming to her. And that's when RINA also came to understand that DAVID was forced to retire and understood RINA was DAVID's beneficiary. (Tr. p. 46-47)

50. RINA was not aware that DAVID applied for retirement on February 11, 2013. (Tr. p. 47)

51. David never showed Rina the FRS Spousal Acknowledgement Form or a copy of it. (Tr. p. 47) (R. Ex. # 6)

52. On the FRS Application Form where it is handwritten Rina Richard Demichael, Wife and birth date were not written by RINA. (Tr. p. 47-48) (R. Ex. # 4)

53. The first time RINA saw DAVID's Retirement Option Selection Form was at the deposition in this matter. (Tr. p. 48) (R. Ex. # 5) (Also see. R. Ex. # 10 Deposition of Rina Demichael dated October 7, 2019)

54. RINA was not aware, that on February 11, 2013 and beyond, that DAVID had chosen FRS Retirement Option # 1. (Tr. p. 48) (R. Ex. # 5)

55. RINA never received the October 6, 2015 letter from FRS regarding the estate of David which RINA first saw at her Deposition in this matter. (Tr. p. 48) (R. Ex. # 9) (R. Ex. # 10)

56. RINA had never seen R. Ex. 12 Estimate of Retirement Benefits prior to seeing it in the undersigned's office. (Tr. p. 48)

57. DAVID never allowed RINA direct access to his bank accounts although from time to time she did see statements, but DAVID said that she (RINA) was his beneficiary and there would be money coming in, just as PIETERS said on February 11, 2013. (Tr. p. 49) (Tr. p. 35-36)

58. DAVID never did return to Rehab and in fact began to drink even more after retirement and eventually passed away on August 25, 2015. (Tr. p. 49)

59. After David passed away RINA called FRS and spoke to a lady, whose name she cannot recall, who also was traumatized and RINA as she was told faxed DAVID's death certificate to FRS but never heard back from FRS. (Tr. p. 50)

60. RINA told her probate lawyer Odelia Goldberg about the situation and Ms. Goldberg allegedly checked and alleged there were no benefits. (Tr. p. 50)

61. RINA understood that she would gain access to DAVID's account and other benefits once probate was complete. (Tr. p. 50)

62. RINA called FRS again and was advised that FRS had the paperwork and were working on the determination of benefits but never heard back. (Tr. p. 50-51)

63. RINA, at the undersigned's request, went to SUNRISE and requested DAVID'S Detox medical records which she obtained directly from Sunrise and forwarded to the undersigned without reviewing them because RINA did not want to be traumatized again. (Tr. p. 51-52)

64. There was never any issue with the bills being paid when both RINA and DAVID were working and even after DAVID's retirement, bills were still not an issue since there was money coming in from Retirement. The major point was to get DAVID healthy. (Tr. p. 58-59)

65. RINA did not contact FRS when she found out that DAVID retired because she understood that she was DAVID's beneficiary and she had no reason not to believe him. (Tr. p. 59)

66. Respondent's witness is DAVID HEIDEL (hereafter HEIDEL) DMS, Division of Retirement Benefits Administrator. (Tr. p. 73)

67. According to HEIDEL that the Spousal Acknowledgement Form is a courtesy given to a spouse advising the spouse a member is retiring and what Option was selected. (Tr p. 78)

68. According to HEIDEL, R. Ex. # 12 is a letter to DAVID accompanied by an article called "What retirement options should you choose?" (Tr. p. 96)

69. The above Article is provided to retiree's once their application is initially processed. (Tr. p. 97-98)

70. HEIDEL stated that the description of the four Retirement Options on R. Ex. # 4 and # 6 are clear to HEIDEL who is a 14 plus year veteran of the DMS Division of Retirement. (Tr. p. 99; 73)

DISCUSSION AND ANALYSIS

REVIEW OF PETITIONER'S EXHIBITS

P. Ex. # 1 is DAVID and RINA's marriage certificate with date of marriage as 11/19/1991 which proves that DAVID and RINA were in legal marriage until DAVID's death.

P. Ex. # 2 is DAVID's BSO Resignation Form dated and signed by DAVID on 2/11/13. The document also states below DAVID's signature and the Captain's signature is a box that is checked "Charges Pending yes" which was verified also on 2/11/13. Due to the fact that DAVID had been ordered to report to BSO immediately after release from Detox and signed a BSO Resignation Form on that same date with charges pending, clearly pressure was brought to bear on DAVID to resign from BSO. It should be noted that all the command staff acknowledgements were dated on 2/12/13. Below the command staff acknowledgements is another box that is checked "Charges Pending yes" which appears to be verified on 2/18/13. Below that box is the undated BSO Sheriff's signature.

P. Ex.# 3 is DAVID's FRS Option Selection form with the name David Demichael typed just above a check next to Option 1. The Notary section of the form is signed by Tiffany Pieters on 2/11/13 who alleged that DAVID was personally known to her, which based on the testimony of RINA does not appear likely.

P. Ex.# 4 is the FRS Spousal Acknowledgement Form in which the top box is signed by DAVID on 2/11/13 and again Notarized by Tiffany A. Pieters who again alleged that DAVID is personally known to her. There is a line on this exhibit which calls for a mark whether the FRS member is Married: Yes or No. The line Married is checked and adjacent to the Yes or No lines is an area in block letters: IF YES AND YOU SELECTED OPTION 1 OR 2, **YOUR SPOUSE** **MUST ALSO COMPLETE BOX 2.** (Emphasis added)

The blocked letter area which reads "Your Spouse Must Also Complete Box 2" is at odds with the testimony of HEIDEL who stated that the Spousal Acknowledgement form is merely a courtesy. (Tr. p. 78)

P. Ex. # 4 in Box 2 is signed by RINA, however her printed name was not printed by RINA and the Notary Portion states that the Notary Tiffany A. Pieters notarized RINA's signature as RINA being personally known to the Notary which RINA vehemently denied in her testimony. (Tr. p. 37)

P. Ex. # 5 is an obituary for DAVID dated August 25, 2015.

P. Ex. # 6 is the April 23, 2019 Final Agency Action letter addressed to the undersigned.

P. Ex. # 7 is the Sunrise Detox admission (2/6/13) and discharge (2/11/13) documents.

On pages 2 - 5 of P. Ex. # 7 includes various medications Librium, Ativan as well as others taken as needed or on a daily basis during DAVID's stay at Sunrise.

On page 6 of P. Ex. # 7 in the area titled: PRESENTING PROBLEM PRECIPITATING ADMISSION, the following is written, in part: "Pt is on temporary leave from his job and knows that In order to get it back he needs to be sober. Other contributing factors leading David to seek treatment Depression or other bad Employment problems, Family problems, Inability to function, interpersonal problems, Negative feelings about self, poor impulse control, Poor Judgment, and Tired of fighting addiction on my own."

Also on page 6 of P. Ex. # 7 in the area titled CHEMICAL DEPENDANCY (Most Recent Pattern of Use) "Drug Type/Substance: ETOH First Used: January 2013 Last Use: 2/6/13 Frequency of Use: more than once per day Amount/Pattern: 2 750mL wine daily Route: oral Used last 24-48 hours: 4 bottles wine."

On page 7 of P. Ex. # 7 in the area titled: DEPRESSANTS "Drug Type/Substance":
ALCOHOL First 15 Last Use: 2/6/13 Frequency of Use: 5 - more than once per day
Amount/Pattern: 2-3 750mL wine daily for the past month Route: oral."

On page 7 of P. Ex. # 7 in the area titled: PSYCHOLOGICAL PROBLEMS the document states that DAVID suffers from Anxiety and Depression.

On page 8 of P. Ex. # 7 in the area titled: Interpersonal relationship problems: Arguments with partner, Loss of friends, and Social isolation.

On page 8 of P. Ex. # 7: School/ Job / Financial Problems? yes if Yes, describe: In jeopardy of losing job and less productive at work. Pt was put on a temporary leave.

On page 9 of P. Ex. # 7: OPIATE TREATMENT I SUBSTANCE ABUSE COUNSELING / TREATMENT HISTORY Has David received Opiate Treatment /Substance Abuse Counseling / Treatment in the past? yes Date (As reported by DAVID):

Sept. 2012 20-day inpatient treatment.

Sept. 2012 5-day Detox

Aug. 2011 5-day Detox

Time abstinent from each prior treatment Pt was fast in Detox and tx 4 mos. ago.

On page 10 of P. Ex.# 7 at the top: the document reads: David's addiction has affected the following type of activities in his life: Pt reports that all of his activities are affected.

On page 10 of P. Ex.# 7 under RELAPSE HISTORY, the document states: Abstinence about 1 month about a year and a half ago. Also, Patient states he does not know how to stay sober.

REVIEW OF RESPONDENT'S EXHIBITS

R. Ex. # 1 Final Agency Action dated April 23, 2019 (see P. Ex. # 6 above).

R. Ex. # 2 Petitioner's Petition dated May 6, 2019 which contains the same Petitioner's Exhibits 1-6 as set forth herein and also includes several pages of Respondent's exhibits.

R. Ex. # 3 DAVID's FRS Estimate of Retirement Benefits created November 7, 2012

R. Ex. # 4 DAVID's FRS Application for Retirement Benefits dated February 11, 2013, notarized by Tiffany A. Pieters indicating she personally knew DAVID, to which there is no proof.

R. Ex. # 5 DAVID's FRS Option Selection Form dated February 11, 2013 and notarized by Tiffany A. Pieters indicating she personally knew DAVID to which there is no proof. (See also P. Ex. # 3)

R. Ex. # 6 FRS Spousal Acknowledgement Form see comments under P. Ex. # 4.

R. Ex. # 7 February 20, 2013 FRS Acknowledgement of Service Retirement Application for DAVID.

R. Ex. # 8 DAVID's Death Certificate, date of death August 25, 2015 which Indicates the following causes of death: Respiratory Failure, Liver Failure, Renal Failure and Alcoholic Liver Disease.

R. Ex. # 9 Letter to RINA dated October 6, 2015 (not received by RINA). (Tr. p. 48)

R. Ex. # 10 Deposition of RINA dated October 7, 2019.

R. Ex. # 11 PIETERS Notary Application Documents. The initial application was dated June 30, 2011 well before February 11, 2013. The remainder of the documents are irrelevant to this matter occurring after February 11, 2013.

R. Ex. # 12 DAVID's FRS Estimate of Retirement Benefits dated February 20, 2013 which contains the information letter regarding Option Selection: "What Retirement Option Should You Choose." (See HEIDEL Testimony Tr. p. 96-98)

R. Ex. # 13 DAVID's FRS Salary Certification by BSO dated March 13, 2013. This FRS document was filed by BSO and then was sent to FRS via Fax per the instructions. There is no indication that this document was ever sent to or seen by either DAVID or RINA and therefore irrelevant.

R. Ex. # 14 Letter from FRS to DAVID requesting proof of age dated April 1, 2013.

R. Ex. # 15 DAVID's State of Pennsylvania Notification of Birth Registration faxed to FRS on April 30, 2013.

R. Ex. # 16 DAVID's FRS Warrant History dated January 16, 2020 showing the first payment was made on May 10, 2013.

Florida Statute 117, 2013 provides:

(5) A notary public may not notarize a signature on a document unless he or she personally knows, or has satisfactory evidence, that the person whose signature is to be notarized is the individual who is described in and who is executing the instrument. A notary public shall certify in the certificate of acknowledgment or jurat the type of identification, either based on personal knowledge or other form of identification, upon which the notary public is relying.

(a) For purposes of this subsection, "personally knows" means having an acquaintance, derived from association with the individual, which establishes the individual's identity with at least a reasonable certainty.

(b) For the purposes of this subsection, "satisfactory evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person whose signature is to be notarized is not the person he or she claims to be and any one of the following:

1. The sworn written statement of one credible witness personally known to the notary public or the sworn written statement of two credible witnesses whose identities are proven to the notary public upon the presentation of satisfactory evidence that each of the following is true:

a. That the person whose signature is to be notarized is the person named in the document.

- b. That the person whose signature is to be notarized is personally known to the witnesses;
- c. That it is the reasonable belief of the witnesses that the circumstances of the person whose signature is to be notarized are such that it would be very difficult or impossible for that person to obtain another acceptable form of identification.
- d. That it is the reasonable belief of the witnesses that the person whose signature is to be notarized does not possess any of the identification documents specified in subparagraph 2.; and
- e. That the witnesses do not have a financial interest in nor are parties to the underlying transaction.

Clearly, PIETERS did not comply with the 2013 version of Florida Statute 117 in that PIETERS was not authorized to notarize a signature unless she personally knew DAVID and RINA. As the statute provides “personally knows” means having an acquaintance, derived from association with the individual, which establishes the individual’s identity with at least a reasonable certainty. None of that proof was presented at the hearing. The uncontested evidence is that RINA testified that she did not know PIETERS, had never seen her before 2/11/13 and has not seen her since. In fact, RINA did not know for whom PIETERS worked until sometime after DAVID’s death. (Tr. p. 34-38)

Petitioner argues that PIETERS’ notarization of RINA’s signature(s), was in violation of Florida Statute 117 and as to the Spousal Acknowledgement should be considered null and void. And based on this testimony and evidence it also calls into question the validity of PIETERS’ notarization of DAVID’s signatures.

Additionally, it should not accrue to the detriment of the Petitioner that DAVID was a severe alcoholic, who was not in open communication with RINA regarding his work situation prior to 2/11/13, let alone his forced resignation from BSO and subsequent retirement from FRS in the few moments that they had together on the rooftop terrace on 2/11/13. In fact, DAVID hid these facts from RINA for a significant amount of time after 2/11/13.

Further, it should not accrue to the detriment of the Petitioner that no one specifically advised her of the ramifications of her signature, what the Spousal Acknowledgement meant and what it was for. Especially, in light of the fact that RINA was born in Haiti, that English was her 3rd language which she learned through ESOL classes and highest level of education was attaining a GED. While HEIDEL considers the descriptions of the Retirement Options as clearly stated he is a 14 year veteran of FRS his determination and understanding of the options cannot be compared to that of RINA and her understanding of the options on the Spousal Acknowledgement form that she believed she had a short time to sign and was not given an opportunity to read and question the significance of the document.

A review of Florida Statute 121.091(6)(a) regarding Spousal Acknowledgement reads “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.**” Based on the uncontested testimony of RINA there is no doubt that this was not appropriate notification or notice to RINA of DAVID’s option selection since she saw no writing on the form. BSO was aware of DAVID’s alcoholism, knew or should have known of DAVID’s secretive nature, knew or should have known that by keeping DAVID and RINA apart during his forced resignation and retirement and having PIETERS approach RINA to sign the Spousal Acknowledgement Form without explanation would lead to inappropriate notice under the statute.

HEIDEL’s testimony made it sound like the Spousal Acknowledgement Form was a courtesy and not necessary, however the “shall” portion of the statutory provision obviously makes it mandatory and the Notice provision clearly requires that, in this case, RINA be notified about the contents, ramifications and consequences of the Spousal Acknowledgement Form.

Adams v. Aetna, 74 So. 2d 1142 (1st DCA 1991) is an insurance case dealing with whether an insured was properly notified and informed of coverage limits and whether a knowing decision was made to accept or decline those limits. The relevance to this case is clear FRS has the statutory duty to promulgate the Spousal Acknowledgement Form. Florida Statute 121.091(6)(a) clearly places the duty on FRS to Notify spouses such a RINA that DAVID chose Option One. FRS owed a duty to RINA to Notify and inform RINA so that a knowing decision could be made. No such proper notification was made by FRS or their surrogates and therefore FRS should be estopped from using their own dereliction of statutory duty to deny RINA spousal retirement benefits.

The sequence of events that followed DAVID's February 11, 2013 resignation from BSO and application for FRS retirement included the following: Letter from FRS to DAVID dated April 1, 2013 requesting his birth certificate (R. Ex. #14); DAVID's birth certificate which was faxed to FRS on April 30, 2013 (R. Ex. # 15); and the first FRS payment which wasn't paid to DAVID per R. Ex. # 16 until May 10, 2013 which according to the exhibit was not made by EFT (electronic funds transfer). Clearly, there was no requirement that BSO, FRS and PIETERS had to insist that RINA sign the Spousal Acknowledgement Form on February 11, 2013 without having the benefit of discussing retirement with DAVID, without having the benefit of reading the document and without having someone from BSO, FRS, or a person of her own choosing explain the document to her, especially since the first payment was not made until May 2013.

As far as DAVID is concerned it should not accrue to the detriment of RINA that based on the fact DAVID was taken immediately from the trauma of Detox where it was clear from P. Ex. # 7 that he was medicated, suffered from withdrawal, anxiety and depression and then obviously placed under pressure while at BSO to submit his forced resignation and retire. This was evidenced by P. Ex. # 2 that charges were pending against him.

Clearly, DAVID was in denial that he needed additional time in Rehab to help him with his alcoholism, DAVID's alcoholism and affect is specifically evidenced by his crying and emotional state upon leaving BSO and by the fact that upon reaching home on 2/11/13, after leaving BSO and being followed by 2 deputies DAVID began to drink in front of them and the deputies found bottles of wine in the trunk of his personal vehicle. And per RINA's testimony it is clear DAVID was traumatized and crying and was not emotionally prepared to handle his forced resignation and retirement based on his advanced and severe alcoholism and therefore Petitioner asserts that DAVID lacked the mental and emotional capacity to make a valid option selection.

In *Maddox v. Department of Management Services Division of Retirement*, DOAH Case No. 17-1434 (2017) in a case with similar aspects to the DeMichael case the Administrative Law Judge (hereafter ALJ) made several Conclusions of Law which bear on this matter. For example, in Conclusion # 24 the ALJ found that: "No medical evidence was presented that Mr. Maddox lacked the capacity to make a valid option selection..." Petitioner presented P. Ex. # 7 which set forth many red flags as to DAVID's mental and emotional capacity as well as RINA's uncontested factual testimony regarding DAVID's mental and emotional state on February 11, 2013 and beyond.

Given the fact that RINA was not aware that DAVID had resigned and retired until 4 or 5 months after February 11, 2013. (Tr. p. 45-46) Therefore, it would have been impossible for RINA based on the totality of the circumstances to have in some way attempted to have DAVID change his FRS Option Selection. Those circumstances include but are not limited to:

- (1) DAVID's severe alcoholism.
- (2) DAVID's refusal to go to Rehab after February 11, 2013.
- (3) DAVID's traumatized and emotional state on February 11, 2013 and beyond after his forced resignation from BSO and FRS retirement.

- (4) DAVID's total lack of communication with RINA regarding his status with BSO and FRS.
- (5) RINA first discovered 4-5 months after February 11, 2013, that DAVID had resigned from BSO and retired from FRS.
- (6) RINA's educational level (GED).
- (7) RINA's English skills (born in Haiti original languages Creole & French).
- (8) PIETERS, BSO and FRS' improper Notice per Florida Statute 121091(6)(a) to RINA and lack of any explanation of the ramifications and consequences of FRS Option 1; and
- (9) the improper notarization of the Spousal Acknowledgement Form by PIETERS per Florida Statute 117.

CONCLUSIONS OF LAW

1. DOAH has jurisdiction over the parties to, and the subject matter of, this proceeding, pursuant to sections 120.659 and 120.57(1).
2. Petitioner contends that FRS and BSO failed in their statutory duty to DAVID in that DAVID who just shortly after being released from Detox and in a traumatized and emotional state after having been receiving drugs in Rehab was forced to resign under the cloud of pending charges and subsequently retired a made option selections without being permitted to discuss retirement options and having his signatures notarized improperly.
3. Petitioner contends that FRS and BSO failed in their statutory duty RINA in that she was not permitted to speak to DAVID regarding FRS retirement was not appropriately notified about the Spousal Acknowledgement Form and was coerce into signing the form without being allowed to read it and lacked the educational and language skills necessary to understand the document as well as having her signature improperly notarized.

4. Petitioner is asserting the affirmative of the issue in this proceeding, therefore she bears the ultimate burden to establish, by a preponderance of the evidence. Balino v. Dep't of HRS, 348 So. 2d. 349, 350 (Fla. 1st DCA 1977)(unless otherwise established by statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal); see Wilson v. Dep't of Admin., Div. of Retirement, 538 So. 2d 139, 142 (Fla. 4th DCA 1989)(burden is on beneficiary seeking to establish his or her right to retirement benefits under chapter 121).

5. Petitioner, therefore under the totality of the circumstances of this case should be made whole for the spousal benefit of DAVID's retirement based on FRS Retirement Option 4 or alternatively within the sound discretion of the ALJ in addition to any other relief the ALJ deems appropriate.

Respectfully submitted this 20th day of March 2020.

James C. Casey

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was e-filed via DOAH and e-mailed to Ladasiah Ford, Esquire and Nikita S. Parker, Esquire Attorneys for Respondent, 4050 Esplanade Way, Suite 160, Tallahassee, Florida 32399 at Ladasiah.Ford@dms.myflorida.com and nikita.parker@dms.myflorida.com on this 20th day of March 2020.

James C. Casey