

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

**In the Matter of the Appeal to Change the Retirement Option  
Election of Melinda J. Evans, Deceased, by:**

**DWIGHT A. EVANS, Respondent.**

**Agency Case No. 2020-1476**

**OAH No. 2021041021**

**PROPOSED DECISION**

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on September 23, 2021 via videoconference.

Staff attorney Helen L. Louie represented complainant Keith Riddle, Chief of the Benefit Services Division of CalPERS.

Respondent Dwight A. Evans represented himself.

The matter was submitted on September 23, 2021.

## **ISSUE**

Whether decedent's retirement option election can be modified, after her death, from the Unmodified Allowance retirement benefit to the Option 1 retirement benefit pursuant to Government Code section 20160 or any other provision of the California Public Employees' Retirement Law (PERL)?<sup>1</sup>

## **FACTUAL FINDINGS**

1. On April 21, 2021, Keith Riddle filed the statement of issues in his official capacity as Chief of the Benefit Services Division of the California Public Employees' System (CalPERS).

2. Melinda J. Evans (decedent) became a local miscellaneous member of CalPERS on February 17, 1994, through her employment with the County of Riverside.

3. On June 29, 2001, decedent signed a Pre-retirement Death Benefits Beneficiary Designation form naming her son, respondent Dwight A. Evans (respondent), and her mother, Fletter Q. Blackburn, as equal share primary beneficiaries.

4. On August 14, 2018, decedent visited the CalPERS San Bernardino Regional Office (SBRO) and submitted her Service Retirement Election Application (Application). Decedent selected the Unmodified Allowance retirement payment option, which expressly states: "There is no beneficiary designation with this option."

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<sup>1</sup> All statutory references are to the Government Code unless otherwise stated.

Option 1 is listed directly below decedent's selection and described as "Return of Remaining Contributions Option 1" (Option 1). If a member selects Option 1, he or she receives a lesser monthly allowance, but if he or she dies before receiving in such payments the amount equal to his or her accumulated contributions at retirement, the unpaid balance is paid to the member's designated beneficiaries. (§ 21474.) Decedent did not select this option. No beneficiary was designated in the section for an Option 1 beneficiary. Decedent named respondent as beneficiary for the \$500 Retired Death Benefit (RDB). She requested a retirement date of December 2, 2018. The Application bears decedent's signature and the signature, name and other information of the CalPERS representative who witnessed decedent sign the Application.

5. CalPERS maintains a log of notes from contacts with its members. This log contains the following note dated August 14, 2018, related to decedent's visit to the regional office and Application:

Member came to SBRO, service retired date 12/02/2018, member elected unmodified allowance, RDB named for son Dwight [respondent]; witnessed member signature. FWD [service retirement application] to SBRO for processing and provided member with a copy submitted documents.

The author of this note is the CalPERS representative who witnessed decedent's signature on the Application.

6. CalPERS representatives sometimes assist members in filling out applications. However, the member must sign an application to verify that it accurately states the member's intentions.

7. By letter to decedent dated August 22, 2018, CalPERS acknowledged receipt of her Application, and confirmed her retirement payment option election. The letter includes the following statements:

Please review the following information for accuracy and notify us immediately if any information is incorrect. You may be responsible for repaying any overpaid retirement benefits resulting from inaccurate information.

[¶ . . . . ¶]

Retirement Option Selected: Unmodified Allowance

Provides the highest monthly allowance paid for life. There is no continuing monthly benefit to a beneficiary and no return of unused member contributions upon your death.

. . . . If you want to change your retirement payment option, your named lifetime beneficiary, your retirement, or cancel your retirement application, you must make the request within 30 days of the issuance of your first retirement check or your choice becomes irrevocable.

8. Decedent retired for service effective December 2, 2018.

9. On December 3, 2018, CalPERS sent decedent a letter which included the following statements:

We have processed your Service Retirement application based on your election to receive the following retirement payment option:

**Unmodified Allowance**

Provides the highest monthly allowance paid for life. There is no continuing monthly benefit to a beneficiary and no return of unused member contributions upon your death.

[¶] . . . [¶]

If you want to change your retirement date or cancel your retirement application, you must make the request within 30 days of the issuance of your first retirement check or your choice becomes irrevocable.

**BENEFICIARY AND SURVIVOR INFORMATION**

Upon your death, benefits will be paid to your beneficiary in accordance with the designation indicated on your retirement application. Your retirement payment option and lifetime beneficiary choice becomes irrevocable 30 days from the issuance date of your first retirement check, unless you have a future qualifying event, such as a change in marital status or death of your beneficiary. Beneficiaries you name to receive any lump-sum benefits may be changed at any time.



**Ongoing Monthly Benefit:**

**Beneficiary's Birthdate:**

**Monthly Benefit Amount:**

**Retired Death Benefit:** Dwight A. Evans

**Death Benefit Amount:** \$500.00

[11] . . . [11]

Please notify us immediately if any of your information in this letter and the attached Account Detail Sheet appears inaccurate. You may be responsible for repaying any overpaid retirement benefits resulting from inaccurate information.

(Emphasis in original.)

10. On December 19, 2018, CalPERS sent a letter to decedent informing her that her retirement benefit amount would be adjusted due to updated payroll information received.

11. On January 1, 2019, CalPERS issued decedent her first monthly retirement check.

12. On January 14, 2019, decedent contacted CalPERS with questions about the December 19, 2018 adjustment letter she received. CalPERS staff explained the letter to her.

13. On October 3, 2019, decedent contacted CalPERS to update her address.

14. On November 29, 2019, decedent passed away. On her certificate of death, the causes of death are listed as hypertensive cardiovascular disease and obstructive sleep apnea.

15. On December 4, 2019, respondent contacted CalPERS to report decedent's death.

16. On December 13, 2019, respondent contacted CalPERS and requested to dispute decedent's option election. No request to revoke or change decedent's retirement payment option election was made by or on behalf of decedent prior to this date.

17. On December 14, 2019, CalPERS staff informed respondent that he needed to submit his request to dispute decedent's option election in writing and provided him the fax number to do so.

18. On April 25, 2020, respondent disputed decedent's Unmodified Allowance option election and requested CalPERS modify decedent's option election from the Unmodified Allowance to Option 1, on the basis that decedent intended to elect Option 1 and designated him as beneficiary for the return of contributions, but failed to do so as a result of her medical conditions.

19. CalPERS requested and received additional information from respondent regarding his request to modify decedent's retirement payment option election from the Unmodified Allowance to Option 1.

20. On November 16, 2020, CalPERS notified respondent that his request to modify decedent's retirement payment option election from the Unmodified Allowance to Option 1 was denied, based upon his failure to demonstrate that all



requirements of section 20160 were satisfied. Respondent was also advised of his appeal rights.

21. On December 11, 2020, respondent Evans filed a timely appeal and requested an administrative hearing. This proceeding followed.

## **Respondent's Evidence**

22. Respondent reports that decedent, his mother, intended to leave all her money to him, including her retirement funds. He submitted decedent's last will and testament, dated January 19, 2018, and signed by decedent and two witnesses. The will did not go through probate. It is addressed to respondent and reflects decedent's expectation that respondent would attend to her estate. After a discussion of the disposition of three cemetery plots, decedent wrote "I leave all my access to Dwight who will oversee everything." At hearing respondent claimed that he knows that this statement meant that decedent wanted him to have access to "everything," including her retirement funds. However, there is no reference to retirement funds or CalPERS in the document.

23. Respondent submitted excerpts of respondent's medical records from the period April 10, 2018, through July 22, 2019. He contends these excerpts show a link between her altered mental status and urinary tract infections (UTI's) during the time decedent was "receiving consultation for her retirement from CalPERS." The records include the following information:

- On June 9, 2018, a physician reported decedent had a history of diabetes mellitus and presented with altered mental status and slurred speech, "likely due to hypoglycemia." It was later reported that decedent had a UTI at this time, which "might have contributed to her confusion."

- On August 10, 2018, a physician reported that decedent had another UTI.
- On September 4, 2018, a physical therapist reported that decedent suffered from “[d]epression limiting patient participation in daily activities and physical function.”
- On December 3, 2018, a physician reported that decedent had a history of a single episode of major depressive disorder, altered mental status, and UTI’s.
- On March 8, 2019, a physician reported that decedent was provided a neurology follow up visit for headaches. The physician further reported that decedent reported memory problems and confusion since June 9, 2018, which she associated with frequent UTI’s. She also reported taking daily medications for anxiety and depression. The physician reported decedent was “[p]ositive for memory loss” and that she had an “MRI of brain on 6/11/18 that showed no acute events. She does have chronic white matter changes that could be due to risk factors for stroke . . . .” The physician informed decedent “that UTIs can cause memory problems and confusion especially with advancing age. She will have to continue to address her UTI problems with her primary care physician.”
- On March 29, 2019 a physician reported that decedent was evaluated for recurrent UTI’s “for the last 6 months” and she reported “feeling delusional when she has an infection.” She denied a history if UTI’s “prior to six months ago.”
- On July 22, 2019, decedent was examined by a physician who reported diagnoses including chronic migraine and memory loss associated with recurrent UTI’s since June 2018.

24. Respondent was unaware of the Application prior to decedent's death. He reports that several features of the Application, including the handwriting and spelling mistakes, show that decedent did not fill out the Application herself. However, he does not dispute that decedent signed the Application.

25. On September 5, 2018, a Riverside County human resources representative (HR Representative) informed decedent via email "I'm not sure if you receive[d] stubs from CalPERS. Please contact them directly at 888-225-7377." Decedent replied, asking the HR Representative who she should contact at CalPERS if she needed to "make changes or add?" Decedent further stated "I'm sure you told me, however I had an incident June 9, 2018 and I had some memory loss." The HR Representative replied "Can you be more specific as to what changes you are referring to as it depends on the change as to who you will contact." There is no evidence that decedent responded.

26. Respondent submitted documents tending to show that decedent was fiscally responsible and had no debt. He argues that this shows that decedent would not have selected the Unmodified Allowance retirement payment option due to need.

27. Respondent argues that there is no evidence decedent received the letters CalPERS sent her regarding her application and election of the Unmodified Allowance retirement payment option. Respondent reports that in decedent's neighborhood "people steal mail." He reports that he saw that her mailbox was knocked off its support by "kids" playing baseball and that he also observed that her mailbox looked "tampered with" and had no locking mechanism, but he does not remember what year he observed these things. He reports that decedent told him her mail was frequently delivered to a different address and she received it a month later. He does not remember when she told him this. In light of decedent's response to



CalPERS' December 19, 2018 letter, it is found that she was receiving most if not all of CalPERS' communications.

28. Decedent lived by herself from 2018 through her death. She had a driver's license and sometimes drove herself places.

## **Ultimate Findings**

29. It is found that between June 9, 2018, and July 22, 2019, near the time of her Application, and likely until her death, decedent suffered from depression, anxiety, and episodes of confusion and memory loss.

30. However, the evidence failed to establish that decedent's election of the Unmodified Allowance retirement payment option in the Application was the result of mistake, inadvertence, surprise, or excusable neglect, as each of these terms is used in section 473 of the Code of Civil Procedure. Decedent signed the Application. In letters dated August 22 and December 3, 2018, decedent was advised that: (1) she elected the Unmodified Allowance retirement payment option; (2) this election meant no continuing monthly benefit to her survivors; and (3) of the deadline to change this election. She asked her HR Representative about contacting CalPERS to possibly "make changes or add," but what potential change she contemplated is unknown and she did not make a change or ask CalPERS about making a change despite speaking with a CalPERS representative approximately four months later. Her un-probated will does not mention CalPERS or retirement funds. During the relevant period, she was able to live on her own, drive a car, communicate effectively with medical professionals, and respond to CalPERS' December 19, 2018 letter. There was no determination that she was incompetent. Nor did her physicians express any concern about her ability to live independently or manage her affairs.

31. The Unmodified Allowance retirement payment option provided decedent with the highest monthly benefit available. Because of her death approximately one year after she began receiving benefits, this choice resulted in CalPERS' retention of some of decedent's contributions. However, there is no evidence that decedent suspected that she would pass away before receiving payment of all of her contributions, or that this issue was more important to her than receiving the maximum possible monthly payment during her lifetime. The evidence is insufficient to establish that decedent's election of the Unmodified Allowance retirement payment option was the result of mistake, inadvertence, surprise, or excusable neglect.

## **LEGAL CONCLUSIONS**

1. CalPERS was established by state law in 1932 to provide retirement benefits for state employees. The California Employees' Retirement Fund, managed by CalPERS, is a trust fund devoted to providing benefits to members, retired members and their survivors and beneficiaries. (§§ 20151, 20170, 20171.) CalPERS and its benefits are governed by the PERL (§ 20000 et seq.).

2. Section 21471 provides:

(a) The unmodified allowance consists of the right to have the maximum retirement allowance paid to a member until his or her death. There is no continuing allowance to a beneficiary and there is no return of unused accumulated contributions after the death of the member.

(b) This section shall apply to any member who retires on or after January 1, 2018.

3. Section 21472 provides, in relevant part:

(a) An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance . . .

(b) For purposes of this section, payment shall be deemed to have been made on the date a warrant is mailed, or the date funds are electronically transferred to a bank, savings and loan association, or credit union account for deposit in the member's account.

(c) This section shall not be construed to authorize a member to change his or her retirement status after the election, revocation, or change of election provided in this section.

(d) This section shall apply to any member who retires on or after January 1, 2018.

4. In her application, decedent elected the Unmodified Allowance retirement payment option. (Factual Findings 4 & 5.) On January 1, 2019, CalPERS issued decedent her first monthly retirement check. (Factual Finding 11.) No request to revoke or change this election was made by or on behalf of decedent within 30 days of this date. (Factual Finding 16.) Respondent's requests to change this election were not timely. (Factual Finding 16; § 21472.)

5. Pursuant to section 20160, subdivision (a), the board may correct the errors or omissions of a retired member "provided that all the following facts exist:"



(1) The request, claim, or demand to correct the error or omission is made by the party seeking the correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of the right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of these terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking the correction with a status, right, or obligation not otherwise available under this part.

Failure by a member . . . to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

(§ 20160, subd. (a).)

6. The laws relating to pension benefits should be liberally construed in favor of the applicant. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, 565.) Such a liberal interpretation can be used to effectuate, rather than defeat, the purpose to provide benefits for the employee. (*Button v. Board of Administration* (1981) 122 Cal.App.3d 730, 737.) Despite a liberal interpretation, no relief can be granted to respondent under section 20160.

7. The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.) The party seeking such a correction has the burden of presenting documentation or other evidence to the board establishing his or her right to such a correction. (§ 20160, subd. (d).)

8. The alleged error respondent seeks to correct is decedent's election of the Unmodified Allowance retirement payment option in the Application. However, such relief cannot be granted because it was not shown that this election was the result of mistake, inadvertence, surprise, or excusable neglect, as each of these terms is used in section 473 of the Code of Civil Procedure. (Factual Findings 30 & 31.)

9. Respondent also argued without citation to authority that decedent's retirement contributions remain part of her estate. However, the interest of her estate in those contributions was limited by the PERL and her election of the Unmodified Allowance retirement payment option in the Application. No relief can be granted on this basis.

## **Conclusion**

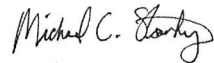
10. Respondent failed to prove that decedent's retirement option election can be modified, after her death, from the Unmodified Allowance retirement benefit to the Option 1 retirement benefit pursuant to Government Code section 20160 or any other provision of the PERL.

## **ORDER**

Respondent Dwight A. Evans's application to change the retirement option election of decedent Melinda J. Evans, after her death, from the Unmodified Allowance

retirement benefit to the Option 1 retirement benefit, is denied. Decedent's retirement option election shall remain the Unmodified Allowance retirement benefit.

DATE: 10/19/2021



MICHAEL C. STARKEY

Administrative Law Judge

Office of Administrative Hearings