

ATTACHMENT E

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Refund of Accumulated
Member Contributions and Interest Issued to Designated
Attorney-in-Fact of: DWAIN D. MOORE, Respondent**

Agency Case No. 2021-0255

OAH No. 2021060147

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter via telephone and video conference on October 18, 2021, from Sacramento, California.

Preet Kaur, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Dwain D. Moore (respondent) represented himself.

Oral and documentary evidence was received on October 18, 2021. The record was held open to allow respondent to submit two additional documents, marked for identification as exhibits RR and SS. On October 19, 2021, the record closed and the matter was submitted for decision.

ISSUE

Whether CalPERS properly processed respondent's member contributions and refunded the contributions plus interest to respondent's brother, Dathan Moore.

FACTUAL FINDINGS

Background

1. On January 9, 1986, respondent began working for the California Department of Social Services. Due to this employment, he became a member of CalPERS and made regular contributions to his pension account. On August 1, 1997, respondent separated from CalPERS employment. His contribution balance remained intact.

2. On September 9, 1997, CalPERS mailed respondent a letter acknowledging his employer reported he had separated from state service. The letter informed respondent of his rights regarding the retirement contributions he had made to date and his options going forward. The options included leaving the funds as-is and continue to earn 6-percent interest, which would make them available should respondent re-enter employment with a CalPERS employer, or requesting a refund, which would be taxed at stated amounts and would terminate his CalPERS membership. There is no record respondent submitted his election.

3. On October 23, 1997, respondent's brother, Dathan Moore, presented a letter to CalPERS explaining he was respondent's "power of attorney," and he had "broad scope of his business and financial affairs." Dathan Moore also stated respondent's "whereabouts are unknow [sic] to any of his family and have been since

late June of the current year." Dathan Moore also stated that due to respondent's "legal difficulties with the law," it was "very unlikely that he will return." Dathan Moore indicated he and a sister were overseeing respondent's financial affairs and incurred expenses, which the retirement contributions would cover. Dathan Moore would also pay respondent's legal expenses and establish an Individual Retirement Account with the money.

4. Dathan Moore attached a Uniform Statutory Form Power of Attorney (Power of Attorney form) to his October 23, 1997 letter. The Power of Attorney form states, in pertinent part:

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA CIVIL CODE SECTIONS 2475-2499.5, INCLUSIVE). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, DWAIN DARIUS MOORE, appoint DATHAN O. MOORE, as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following subjects:

- Real property transactions.
- Tangible personal property transactions.

- Stock and bond transactions.
- Banking and other financial institution transactions.
- Business operating transactions.
- Personal and family maintenance.
- Retirement plan transactions.
- Tax matters.

[¶] . . . [¶]

The form states the designated power of attorney also applies to bank or credit union accounts and lists three of respondent's accounts. The Power of Attorney form is dated April 23, 1996, over respondent's printed name, signature, and social security number. On the same date, Jack D. Earles, Notary Public, certified respondent was identified as "the person whose name is subscribed to this instrument," and the notary "acknowledged [respondent] executed it."

5. On October 24, 1997, Dathan Moore signed "for [respondent]," an election to terminate respondent's CalPERS membership and a request to refund respondent's "total accumulated contributions." Dathan Moore checked the box requesting the refund be mailed to him, and hand-wrote in the margin that he would personally pick up the check.

6. On November 6, 1997, CalPERS sent Dathan Moore a letter allowing him to withdraw respondent's contributions. The letter stated, in part:

After careful review of [respondent's] file, your request to elect a refund of his contributions and interest as his attorney-in-fact has been approved. Please find enclosed a refund election form and tax election. Once the completed forms are returned, Mr. Moore's refund will be processed and a warrant will be issued made payable to [respondent] and mailed to you within 3 to 4 weeks.

Once a member withdraws his contributions and interest, he has forfeited any future right to reserve a monthly retirement allowance. Thus, as his attorney-in-fact, by making this election, [respondent's] membership will be terminated. Furthermore, if it is discovered that he has passed away, no death benefits will be payable.

7. On November 24, 1997, CalPERS issued a check payable to Dwain Moore. The gross amount was \$30,622.87, with a net amount after taxes of \$23,903.25.

8. On January 7, 2015, respondent sent CalPERS a letter stating he recently learned his brother, Dathan Moore, requested and was granted a refund of respondent's CalPERS contributions. He stated he signed the Power of Attorney form "under extreme duress," and would not otherwise have signed it. Even so, respondent asserted he would "by no means approve of" his brother's access to his retirement account.

9. On February 10, 2015, a supervisor in CalPERS's "Refund Unit" responded by letter informing respondent that the refund was made pursuant to a valid Power of Attorney form. The Power of Attorney form included granting the attorney-in-fact the

power to make "retirement plan transactions." CalPERS asserted retirement plan transactions included contribution refund elections. CalPERS further stated it had accepted the contribution refund request, issued a check to respondent at Dathan Moore's address, and terminated respondent's CalPERS membership.

10. On March 16, 2015, a Senior Benefit Program Specialist sent respondent a letter with similar information. The letter contained the specifics of the refund check, including where it was sent. The letter of explanation and Power of Attorney form Dathan Moore provided CalPERS were attached.

11. On April 8, 2015, respondent sent CalPERS another letter detailing Dathan Moore's "embezzlement" of his CalPERS funds, among other assets. He also submitted a notarized revocation of the 1996 Power of Attorney form.

12. CalPERS responded on April 10, 2015, stating a warrant issued in the amount of \$23,903.25 on November 24, 1997. CalPERS assumed the warrant was cashed.

13. In a letter dated March 20, 2020, CalPERS reiterated the contents of the April 10, 2015 letter. Respondent was informed he could file a claim with the Department of General Services, Government Claims Program to request "reimbursement for this warrant." CalPERS also stated it would recommend the claim be denied.

14. On July 8, 2020, CalPERS sent respondent a letter stating it had conducted a thorough review of his account and its opinion remained unchanged. Respondent was informed of his appeal rights.

15. By letter dated December 29, 2020, respondent appealed CalPERS's determination. The matter was set for an evidentiary hearing before an Administrative Law Judge of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

CalPERS's Evidence

16. Erica Canaan is an Associate Governmental Program Analyst with the CalPERS refund unit. Her unit is tasked with refunding contributions to members who separate from state employment. Ms. Canaan reviews case files, makes recommendations, and oversees the refund procedures. She testified at hearing.

17. Ms. Canaan explained that if a member separates from state service, he may request a refund of all contributions he has made to his pension plus interest. She is familiar with respondent's refund request. When CalPERS received the request, an inquiry was conducted into the history of his file. Because CalPERS's computer program had changed since 1997, some of the information was archived and notated in the current "touchpoint" system. Ms. Canaan explained touchpoint notes record all communications or contact between CalPERS and members and are made contemporaneously to the contact.

18. In 2011, CalPERS employee Julie Watson's notes were converted to the touchpoint system. Ms. Watson entered a note on October 23, 1997, explaining Dathan Moore had come into CalPERS with a copy of the signed and notarized Power of Attorney form. She stated respondent had over \$29,000 in his account and 10.971 years' service credit. Ms. Watson explained to Dathan Moore that CalPERS only accepts its own Special Power of Attorney Form to allow an attorney-in-fact to request a contribution refund. Ms. Watson "explained there were limited circumstances which

allow us to make an exception to accept a non-Special Power of Attorney form for a refund election." She did not include what those circumstances or exceptions were and asked him to come back with the original Power of Attorney form so she could view the notary seal.

19. On October 24, 1997, Ms. Watson reviewed respondent's file and assigned another employee to prepare a memorandum with a recommendation regarding Dathan Moore's request for a refund of respondent's contributions. The employee prepared the memorandum recommending CalPERS approve the refund request based on the language in the Power of Attorney form. The employee returned her recommendation to Ms. Watson, who forwarded it to "Mary, Lynn, and Chris" for approval on October 31, 1997. On November 6, 1997, Ms. Watson entered a note stating the request was approved.

20. In 2015, the touchpoint notes indicate respondent informed CalPERS he learned of the refund processed to his brother "without [his] permission," and requested CalPERS investigate the matter. On January 28, 2015, the touchpoint notes state respondent called and stated "although [he] designated his brother as his attorney in fact, he did not authorize his brother to request a refund on his behalf." CalPERS informed respondent an inquiry would commence. The touchpoint notes between January 2015 and the time of respondent's appeal in 2021 confirm the above background information.

21. Ms. Canaan explained she reviewed CalPERS's 1997 actions and agreed with the course of conduct. In 1997, Ms. Watson received a letter explaining Dathan Moore was respondent's attorney-in-fact; she requested and reviewed the original notarized copy of the Power of Attorney form. Ms. Watson made a copy of the form

for respondent's file. With that information, Ms. Canaan agreed Ms. Watson and CalPERS's senior administrators were correct to approve the refund request.

22. Ms. Canaan also explained CalPERS's Special Power of Attorney form was not necessary because Probate Code section 4406, subdivision (d),¹ applied as an "exception." That section requires CalPERS to accept a "statutory form power of attorney" if the only reason to refuse is that the party did not use a special form. Ms. Canaan also noted respondent signed the Power of Attorney form prior to his employment separation.

23. Regarding respondent's claims that he did not recall signing the Power of Attorney form, did not recognize his signature, and signed it under duress, Ms. Canaan stated respondent has options, including filing a claim with the state Victim's Compensation and Government Claims division, filing criminal charges, or filing a civil suit against Dathan Moore. But respondent's arguments did not invalidate CalPERS's 1997 decision to approve Dathan Moore's request for a contribution refund. Dathan Moore presented a valid, notarized form that CalPERS was legally able to act on. Additionally, CalPERS received respondent's Revocation of Power of Attorney, suggesting the original Power of Attorney form was valid.

24. Ms. Canaan also explained that because there was a valid, notarized power of attorney form designating Dathan Moore as respondent's attorney-in-fact,

¹ The Power of Attorney form respondent signed in 1996 refers to the Uniform Statutory Power of Attorney Act in Civil Code sections 2475 through 2499.5. These Civil Code sections were reclassified to Probate Code section 4401, et seq, without substantive change.

Ms. Watson was not obligated to investigate whether the letter Dathan Moore submitted was accurate. Though respondent disputes he gave Dathan Moore authority to access his CalPERS retirement account, the Power of Attorney form lists "Retirement plan transactions" as one of the subjects on which the attorney-in-fact may "act for [respondent] in any lawful way."

Respondent's Evidence

25. Respondent submitted voluminous documentation to support his argument that his brother Dathan Moore defrauded him of his retirement account money as well as several properties and other assets. On the whole, his evidence was admitted as administrative hearsay.² Respondent relies on statements his other siblings have made regarding their understanding and belief that Dathan Moore acted dishonestly, against respondent's interests, and with fraudulent intent.

26. It was clear that respondent is distraught over his current financial situation, as his brother turned all respondent's assets over to himself. Additionally, the knowledge that his brother betrayed respondent and treated him so callously when he was vulnerable is distressing.

27. Respondent believes CalPERS had an affirmative duty to contact him before refunding his contributions. CalPERS made no effort to verify the contents of Dathan Moore's letter, which contained many falsehoods. Respondent was in contact with many members of his family in 1997, contrary to Dathan Moore's assertions.

² Respondent submitted two recordings, Exhibits II and KK, on which ruling was withheld. The recordings are admitted as administrative hearsay.

28. Additionally, respondent contends he was in jail when Dathan Moore coerced him into signing a document, and respondent did so under duress. He clarified that he was not "forced" to sign a document but given the stress he was under being in jail, he felt he had no choice. Respondent does not believe Dathan Moore showed him the first page of the document. Additionally, the Power of Attorney form does not specifically refer to CalPERS, which should have caused CalPERS to reject Dathan Moore's request. He also questions whether the signature on the Power of Attorney form is his own.

29. Respondent believes his brother defrauded him. Respondent never would have given Dathan Moore access to his bank accounts, some of which were "secret," the homes he purchased, or his retirement account. When respondent was imprisoned for 13 years, he believed his assets would be intact on his release. Instead, he learned his brother betrayed him and stole from him to support his drug habit.

PRINCIPLES OF LAW

30. CalPERS is governed by the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.; PERL). The PERL dictates how and when members may request contributions, how CalPERS is to act, and whether alleged errors or omissions may be corrected.

31. Respondent has the burden of proving CalPERS made an error or omission that is subject to correction pursuant to Government Code section 20160, subdivision (b). (Gov. Code, § 20160, subd. (d).) The applicable standard of proof by which he must satisfy his burden is a preponderance of the evidence. (Evid. Code, § 115.) The preponderance of the evidence standard requires respondent to produce

evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, he must prove it is more likely than not that CalPERS made a correctable error or omission. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

32. Government Code section 20730 allows a member to request a refund of his contributions plus interest when he separates from state employment, and prior to collecting a retirement benefit. CalPERS must determine whether the member is “permanently separated” from state service. (Gov. Code, § 20735.) Upon request, the contributions “shall be paid to that person immediately.” (*Id.* at § 20730.)

33. The Board of Administration “shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.” (Gov. Code, § 20160, subd. (b).) Unlike the correction of errors or omissions made by an active or retired member or one of their beneficiaries, correction of errors or omissions made by a state agency or CalPERS is mandatory.

34. Probate Code section 4401 establishes language for a statutory power of attorney. If the document complies substantially with the language in Probate Code section 4401, is properly completed, and the signature is “acknowledged” (notarized), the document is valid. (Prob. Code, § 4402.)

35. Probate Code section 4406 governs the party that receives the executed statutory power of attorney form. In part, that section requires:

- (a) If a third person to whom a properly executed statutory form power of attorney under this part is presented refuses to honor the agent’s authority under the

power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney in an action brought against the third person for this purpose, except that the third person may not be compelled to honor the agent's authority if the principal could not compel the third person to act in the same circumstances.

[¶] . . . [¶]

(d) Notwithstanding subdivision (c), a third person's refusal to accept an agent's authority under a statutory form power of attorney under this part shall be deemed unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented.

ANALYSIS

36. Respondent is in a difficult situation. While he was incarcerated, a trusted family member sought his signature on a form to ostensibly help him by tending to his financial affairs. Instead, on his release, respondent discovered his brother used his signature to gain access to respondent's assets and convert them to his own.

37. Here, however, respondent must provide evidence that CalPERS made a mistake when it issued a refund of respondent's contributions to Dathan Moore. The evidence respondent presented shows Dathan Moore to be untrustworthy and possibly engaging in illegal acts. But respondent has not proven by a preponderance

of the evidence that the Power of Attorney form he signed and Dathan Moore presented to CalPERS was fraudulent or that CalPERS should not have acted based on that form.

38. While the letter presented to CalPERS may have multiple errors and falsehoods, Ms. Canaan's testimony that CalPERS acted on the Power of Attorney form, rather than the letter, was persuasive. Ms. Canaan's assertion that CalPERS accepted the Power of Attorney form because an "exception" applied is a misnomer. Respondent signed the Power of Attorney form and a notary acknowledged he certified respondent's identity. Under Probate Code section 4402, the power of attorney form was valid. CalPERS was obligated to accept it even if it has its own "Special Power of Attorney form" because Probate Code section 4406, subdivision (d), states it would be "unreasonable" not to.

39. Respondent's evidence showed that he may be a victim to his brother's fraud. Because Dathan Moore presented a valid, signed Power of Attorney form to CalPERS, giving him broad power to act as respondent's agent, CalPERS acted reasonably when it issued a refund of respondent's contributions. Respondent's appeal of CalPERS's decision not to reverse that refund must be denied.

LEGAL CONCLUSION

Respondent did not establish by a preponderance of the evidence that CalPERS made a correctable mistake under Government Code section 20160. Consequently, respondent's appeal is denied.

ORDER

Respondent Dwain D. Moore's appeal is DENIED.

DATE: November 4, 2021

Heather M. Rowan

Heather M. Rowan [Nov 4, 2021 13:53 PDT]

HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings