

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

In the Matter of the Appeal for Option 2
Pre-Retirement Death Benefits Payable
On Behalf of Steven E. Gilbert,
Deceased, By

LORY GILBERT,

Respondent,

and

PATRICIA GILBERT,
Both in Her Own Right and on Behalf of
Matthew Gilbert and Jonathan Gilbert

Respondent.

Case No. [3007](#)
OAH No. N-[1999110419](#)

**PRECEDENTIAL DECISION
00-02**

EFFECTIVE: May 31, 2000

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated [February 25, 2000](#), concerning the [application of Steven Edward Gilbert](#); hereby designates its decision as precedential; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * * *

I hereby certify that on [April 19, 2000](#), the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

Dated: May 1, 2000

BY _____
BARBARA HEGDAL
ASSISTANT EXECUTIVE OFFICER

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

In the Matter of the Appeal for Option 2
Pre-Retirement Death Benefits Payable
on Behalf of Steven E. Gilbert,
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LORY GILBERT,

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And

PATRICIA GILBERT,
Both in Her Own Right and on Behalf of
Matthew Gilbert and Jonathan Gilbert,

Respondent.

PROPOSED DECISION

Ann E. Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Fresno, California on January 4, 2000.

Respondent, Lory Gilbert, appeared and was represented by Leith B. Hansen, Attorney at Law.

Respondent, Patricia Gilbert, appeared and represented herself and respondents Matthew Gilbert and Jonathan Gilbert.

Petitioner, Board of Administration for the California Public Employees' Retirement System (CalPERS) appeared and was represented by Maureen Reilly, Senior Staff Counsel.

Evidence was received and the record remained open pending receipt of trial briefs. Petitioner's trial brief was filed on February 1, 2000. Applicant Lory Gilbert's trial brief was filed on February 2, 2000. The record was closed and the matter was submitted on February 3, 2000.

FACTUAL FINDINGS

1. On November 16, 1999, James E. Burton, Chief Executive Officer of the California Public Employees' Retirement System (CalPERS) made and filed a Statement

of Issues in his official capacity as Chief Executive Officer. The Statement of Issues was amended at the hearing of this matter. ¹

2. Steven Gilbert became a miscellaneous member of CalPERS in September of 1970 through his employment as a professor for the California State University, Fresno. Steven Gilbert died unexpectedly on February 26, 1999, after a brief and sudden illness (pneumococcal meningitis). He was 55 years old, with 29 years of service credit. He was eligible for a service retirement from CalPERS, although he had not retired and was still employed.

3. At the time of his death, Steven Gilbert had been married to Lory Gilbert for almost eight months. ² At the time of his death, Steven Gilbert had two sons from a previous marriage to Patricia Gilbert. His children are Matthew Gilbert, born 7-5-89, and Jonathan Gilbert, born 1-20-81. Matthew Gilbert was a minor at the time of his father's death.

4. Shortly after his marriage to Lory Gilbert, in August of 1998, Steven Gilbert properly filed a beneficiary designation form (STD-241) with CalPERS naming Lory Gilbert as sole primary beneficiary, and his sons as secondary co-beneficiaries. STD-241 is the form by which the member directs payment of death benefits in the event the member dies prior to retirement. There is bold language on the face of the form, which appears prior to the section for designation of primary beneficiary. That language states in pertinent part;

"I understand that if I die *after becoming eligible for service retirement*, this beneficiary designation may be superseded in certain cases and benefits paid according to law to my eligible surviving spouse or minor children;..." (italics added)

5. Due to his death, Steven Gilbert's beneficiary or beneficiaries are entitled to payment of a lump sum of \$5,000, representing the proceeds of a group term life insurance policy, plus death benefits minus the community property interests of both Patricia Gilbert and Lory Gilbert. Government Code sections 21604 ³and 21605.

The community property interest of each spouse consists of the sum of the spouse's community property contribution plus interest. At hearing, it was stipulated by the parties that Patricia Gilbert is entitled to 26.83% of Steven Gilbert's member contributions plus interest on the accumulated contributions (\$111,679 in total accumulated contributions) bringing her share to \$29,963.68. Lory Gilbert also has a pro-rata share of Steven Gilbert's accumulated contribution, for the eight-month period of

¹ The Statement of Issues was Amended to reflect the total amount of community property interest held by Patricia Gilbert in the Death Benefits. Page #3 FN 4.

² Lory and Steven Gilbert were married on 7/4/98.

³ All references to statutory code sections are to the Government Code unless otherwise noted. Section 21604 provides in pertinent part; "The insurance benefit shall be paid upon death of an insured member of this system to the beneficiary entitled to receive the basic or special death benefit..."

their marriage. Neither Lory Gilbert nor CalPERS have submitted a figure representing Lory Gilbert's community property interest.

6. This is a dispute over entitlement to the balance of the death benefits payable on behalf of Steven Gilbert and the life insurance policy payable on his behalf (hereafter collectively referred to as "benefits"). Lory Gilbert claims she is entitled to the benefits because she is the surviving spouse of Steven Gilbert and because she is designated as Steven's sole primary beneficiary on the beneficiary designation form. CalPERS contends that Lory is not entitled to benefits because section 21546 directs CalPERS to pay death benefits to a surviving spouse only if the marriage had been in effect for at least one year prior to the employee's death. CalPERS maintains that because Lory Gilbert does not qualify as a surviving spouse under section 21546, benefits are payable in an allowance to Steven's minor child, or in a lump sum to his two children, at the election of the guardian of the minor child, Patricia Gilbert. Patricia Gilbert has duly elected the lump sum payment.

7. APPLICABLE STATUTES

Lory Gilbert's position is that her claim for death benefits stems from rights set forth in section 21548. When a state member is eligible for "service retirement" at the time of death and has not retired, section 21548 provides that the "Pre-retirement Option 2W" allowance be paid to a surviving spouse. That section provides in pertinent part;

"The surviving spouse of a member who has attained the minimum age for voluntary service retirement applicable to him...in his...last employment preceding death, *and who is eligible to receive an allowance pursuant to Section 21546*, shall instead receive an allowance that is equal to the amount that the member would have received if the member had been retired from service on the date of death and had elected optional settlement 2 and Section 21459....⁴ ... (emphasis added)

Section 21546 provides in pertinent part:

"Upon the death of a member who has attained the minimum age for voluntary service retirement applicable to him ... in his ... last employment preceding death, and who is eligible to retire and in circumstances in which the basic death benefit

⁴ Section 21548 goes on to provide: "The allowance shall be payable as long as the surviving spouse lives. Upon the death of the surviving spouse, the benefit shall be continued to minor children, as defined in Section 6500 of the Family Code, or a lump sum shall be paid as provided under circumstances specified in Section 21546 or in Sections 21541 and 21543, as the case may be. The allowance provided by this section shall be paid in lieu of the basic death benefit, but the surviving spouse qualifying for the allowance may elect before the first payment on account of it to receive the basic death benefit in lieu of the allowance. This section shall apply with respect to state members whose death occurs on and after July 1, 1976. All references in this code to Section 21546 shall be deemed to include this section in the alternative."

is payable ... a monthly allowance equal to one-half of and derived from the same source as the unmodified retirement allowance which the member would have been entitled to receive if he or she had retired for service on the date of his or her death shall be payable:

(a) To the member's *surviving spouse* as long as he or she lives. (Emphasis added)

(b) To the children under age 18 collectively if there is no surviving spouse or if the surviving spouse dies before all children of the deceased member attain age 18, until every child dies or attains age 18. No child shall receive any allowance after marrying or attaining the age of 18.

The allowance provided by this section shall be paid in lieu of the basic death benefit but a surviving spouse qualifying for the allowance may elect before the first payment on account of it to receive the basic death benefit in lieu of the allowance. The allowance provided by this section shall be paid in lieu of the basic death benefit but the guardian of the minor child or children qualifying for the allowance may elect, before the first payment on account of it, to receive the basic death benefit in lieu of the allowance. If an election of the basic death benefit is made, the basic death benefit shall be paid to all the member's surviving children, regardless of age or marital status, in equal shares.

If the total of the payments made are less than the basic death benefit that was otherwise payable on account of the member's death, the amount of the basic death benefit less any payments made pursuant to this section shall be paid in a lump sum as follows:

(a) If the person last entitled to the allowance is the remarried spouse of the member, to the remarried spouse.

(b) Otherwise, to the surviving children of the member, share and share alike, or if there are no children, to the estate of the person last entitled to the allowance.

The board shall compute ... *As used in this section, "a surviving spouse" means a spouse who was married to the member for at least one year prior to his or her death*, and "child" includes a posthumously born child of the member. ... (Emphasis added)

CalPERS contends that a spouse must meet the qualification criteria found in section 21546 in order to qualify for benefits under section 21548. Section 21546 directs that a spouse must have been married to the decedent for a minimum of a year in order to be eligible for benefits.

Lory Gilbert does not contest the fact that section 21564 directs that a spouse must have been married to the decedent for a minimum of a year in order to be eligible for benefits. Rather, she maintains that section 21546 does not apply to her claim under section 21548. Specifically, she refers to the language of 21548, which refers to

eligibility under 21546. She maintains that 21548 provides not that the **spouse** must be eligible under 21546, but that the **member** must be eligible under 21546. The operative language of 21548 is highlighted below:

"The **surviving spouse of a member who** has attained the minimum age for voluntary service retirement applicable to him...in his...last employment preceding death, **and who is eligible to receive an allowance pursuant to Section 21546, shall instead receive an allowance that is equal to...**

Lory Gilbert argues that common sense and the rules of grammar require that the statutory phrase "member who" and "who" refer to the same person. She argues that section 21548 requires that the member has met the minimum age for voluntary service retirement and that the member also be eligible to receive an allowance pursuant to section 21546. Section 21548, she argues, does not require that the spouse be eligible under 21546.

Ms. Gilbert is mistaken for several reasons. Although it is indeed unclear on the statute's face whether the phrase "and who is eligible...pursuant to Section 21546" refers to the surviving spouse or to the member, the statute can only be reasonably construed in one manner and is therefore clear. In matters of statutory construction, the courts primarily strive to effect legislative intent. Where the meaning of a statute is plain on its face, the courts will not superimpose a different outcome. *Oden v. Board of Administration* (1994) 23 Cal. App. 4th 194; *Neely v. Board of Administration* (1974) 36 Cal. App. 3d 815, 822. The plain language of section 21546 provides that upon the death of a member, only a surviving spouse or other beneficiary is eligible for an allowance under section 21546. Therefore, a member can never be eligible to receive an allowance (his own death benefits) under section 21546. The phrase at issue in section 21548 "**and who is eligible to receive an allowance pursuant to Section 21546**" can not by any stretch of the imagination refer to the deceased member, and thus must refer to the spouse.

More telling though, is the statute's provision that one who is eligible to receive an allowance pursuant to section 21546 "shall **instead** receive an allowance equal to the amount the member would have received if the member had been retired from service on the day of death and had elected optional settlement 2 and Section 21459." Clearly the surviving spouse is the one who **instead** of receiving the allowance set forth in section 21546 actually receives the allowance set forth in section 21548. Thus, section 21548 can only be properly read as providing that the **surviving spouse who is eligible to receive an allowance pursuant to section 21546, shall instead receive an allowance that is equal to** the amount the member would have received had he retired on the day he died and made a particular distribution election.

Lory Gilbert does not qualify as a surviving spouse under any of the Death Benefit provisions set forth in Chapter 14, Article 2 of the Public Employees Retirement Act. The statutory relationship of sections 21546, 21547, and 21548 as it applies to a surviving spouse is as follows;

Under section 21546, when a member dies who has reached the minimum age for voluntary service retirement applicable to his last employment preceding death, and who

is eligible for retirement and there is a basic death benefit payable, his "surviving spouse" is eligible to receive a monthly allowance of 1/2 of the allowance the member would have received if he had retired on the date of death, as long as she lives. In lieu of the allowance, the surviving spouse may elect the basic death benefit. If the surviving spouse dies before the basic death benefit has been expended, the remainder goes to her estate. In order to collect an allowance or death benefit under this section, a surviving spouse must have been married to the member for at least one year prior to his death. Lory Gilbert clearly does not qualify for the benefit options available under section 21546 because she does not meet the definition of a surviving spouse.

Section 21547⁵ confers benefits on a surviving spouse in situations where, regardless of whether the member has reached the minimum age for retirement, if upon his death he has 20 years or more of state service his surviving spouse may receive a monthly allowance in lieu of the basic death benefit. The amount paid to a surviving spouse would be an amount equal to the amount a member would have received if he had retired for service at minimum retirement age on the date of death and elected Option Settlement 2 and Section 21459. If the surviving spouse dies before the basic death benefit has been expended, the remainder goes to her estate. The statute directs that "The Board shall notify the eligible survivor, as defined in Section 21546, of this alternate death benefit." This language, although inartful, incorporates the section 21546 definition of "surviving spouse" into section 21547, and thus Lory Gilbert would not be eligible for benefits under this section.

Section 21548 grants surviving spouses who are eligible to receive an allowance under section 21546 the right to elect an allowance which would be an amount equal to the amount a member would have received if he had retired for service at minimum retirement age on the date of death and elected Option Settlement 2 and Section 21459. Under section 21546, beneficiaries, (surviving spouses or children), receive an allowance or a lump sum benefit which is based upon one-half of the modified retirement allowance the decedent would have been entitled to receive if he had lived and retired. Thus, section 21548 appears to expand the rights a surviving spouse (but not the children) to a larger allowance than that available under section 21546. The legislature intended that section 21548 be available as an alternative to section 21546. "All references in this code to Section 21546 shall be deemed to include this section in the alternative." Section 21548. Lory Gilbert is not an eligible surviving spouse under section 21546 and thus is not an eligible spouse under section 21548.

8. CONSTITUTIONAL ARGUMENTS

Lory Gilbert argues that by denying her benefits under section 21548, CalPERS is depriving her of due process and equal protection under the Constitution. She argues that similarly situated persons are entitled to the benefits, which have been denied to her. She contends that other benefits provisions of the Public Employees Retirement Act define a surviving spouse as one who has been married to the member for at least a year prior to the death or who was married to the member prior to the occurrence of the injury or onset of the illness which resulted in death. Sections 21541, 21571, 21572,

⁵ This is the section Cal PERS argues applies to Lory Gilbert's claim. The payment provisions are virtually identical to section 21548, upon which Lory Gilbert bases her claim.

21573 and 21574. She argues that under this expanded definition, she would qualify as a surviving spouse.

CalPERS responds that it has no authority to declare a statute unconstitutional or to refuse to enforce a statute. Ca. Const., Art III, sec. 3.5. Lory Gilbert maintains that even though an administrative agency has no authority to determine the validity of a duly enacted statute, an administrative agency may construe a statute to avoid constitutional infirmity. *Leek v. Washington Unified School District* (1981) 124 Cal. 3d 43. Essentially, Lory Gilbert claims that CalPERS must establish a compelling interest and an absence of a less discriminatory alternative, in requiring her to have been married for a year; when it does not enforce this requirement on other spouses seeking benefits under other CalPERS statutes. Such a requirement would have the effect of forcing CalPERS to establish the constitutionality of the statute. CalPERS has no such authority.

Lory Gilbert suggests an alternative to a finding that sections 21546 through 21548 are unconstitutional. She urges that the definition of surviving spouse appearing in sections 21541, 21571, 21572, 21573 and 21574 be read into sections 21546 through 21548. This would avoid inequitable results and constitutional infirmity. However, even if CalPERS had authority to disregard the clear language of the statutes at issue, there is no valid reason why the clear intent of the legislature should be disregarded in order to harmonize the eligibility requirements between these two very different statutory schemes.

Sections 21541, 21571, 21572, 21573 and 21574 do contain a different and more expansive definition of surviving spouse than that available to spouses seeking pre-retirement monthly death benefits. However, these sections pertain to different benefits than those claimed by Lory Gilbert.

Section 21541 confers a *special death benefit*. The special death benefit is paid only to members of certain, enumerated job classifications (such as wardens, forestry service worker) or under certain circumstances (i.e. if the death of the member was a direct consequence of a violent act perpetrated on his person that arose out of and was in the course of his official duties).

Sections 21571 through 21574, inclusive, are options for *allowances under the "1959 Survivor Benefit"* provisions of Article 3. These are survivor's benefits paid to certain family members. The benefit amount is tied to the number of dependents and is paid in addition to the death benefits received by the survivor(s) under Article 2 (sections 21456, 21457 and 21458). The survivor benefit is paid to the survivors out of the State's contributions and consists of a small monthly allotment (i.e. \$180 per month for a spouse through \$430 per month for a spouse and more than one child) Section 21571 (b).

Lory Gilbert is not, as she claims, "situated precisely" as those beneficiaries under sections 21541 and 21570 through 21574. Section 21541 claimants are eligible for benefits which augment basic death benefits. Section 21570 through 21574 claimants are eligible for benefits which provide basic support to dependents.

The death benefits Lory Gilbert is seeking under 21546 through 21548 differ markedly from those provided under sections 21541 and 21570 through 21574. Lory

Gilbert is claiming the basic death benefit payable on behalf of the member. That benefit is based upon the contributions the member has made over his lifetime⁶ The legislature has determined that the narrower definition of “surviving spouse” eligibility applies to spouses who claim these basic death benefits. There has been no showing that the clear distinction drawn by the legislature between the definitions of “surviving spouse” in these quite different statutory schemes, with very different purposes, should be disregarded.

9. Lory Gilbert argues that she and Steven Gilbert had a close spousal relationship for about three years prior to their marriage ceremony. She was regularly present at his home, spent the nights there and helped care for his children. Under these circumstances she argues she should be considered to have been a spouse for well over the eight months in which they were legally married. There is no authority supporting the position that a person who has a close relationship with the member should be considered to have been a spouse during that close non-martial relationship. There is no language in the relevant statutes which indicates that the legislature had intended putative spouses or romantic companions to qualify as eligible spouses, or to extend the time as an actual spouse to include such periods of putative marriage.

LEGAL CONCLUSIONS

1. Lory Gilbert, as the applicant, bears the burden of proof in establishing her entitlement to public pension benefits. *Harmon v Board of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689, 691. Cf. *Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal. App. 3d 937,947.

2. Lory Gilbert has failed to show that she is entitled to public pension benefits under Government Code sections 21546 through 21548, by virtue of Factual Findings 2 through 9, inclusive.

3. Death Benefits under Government Code sections 21546 through 21548, are payable as follows; Patricia Gilbert, as the custodial parent of the minor Matthew Gilbert, may elect either the 1957 Survivor Benefit, payable to Matthew Gilbert until his 18th birthday, or she may elect the Basic Death Benefit, payable to Matthew and his brother Jonathan Gilbert in lump-sum, in equal shares, by virtue of Factual Findings 2 through 9, inclusive.

4. Matthew Gilbert is entitled to receive a Group Term Life Insurance payment of \$5,000, by virtue of Factual Findings 2 through 9, inclusive.

5. Patricia Gilbert is entitled to 26.83% of the member's contributions plus interest on account (accumulated contributions of \$111,679.76) in the sum of \$29,963.68, by virtue of Factual Finding 5.

⁶ Under sections 21546 through 21548, Lory Gilbert would be entitled to \$2, 336.00 per month if she qualified as a surviving spouse. In the event there is no eligible surviving spouse and there are minor children, the benefit goes to the minor children.

6. Lory Gilbert is entitled to a community property share of the member's contributions plus interest on account, by virtue of Factual Finding 5, to be computed by CalPERS member services.

ORDER

The determination of the Chief Executive Officer of the Board of Administration, California Public Employees' Retirement System, that Lory Gilbert is not eligible to receive a monthly allowance as the surviving spouse of Steven Gilbert, and that the death benefits are payable to Patricia Gilbert on behalf of Matthew Gilbert or to Patricia Gilbert on behalf of Matthew Gilbert, and Jonathan Gilbert, at the election of Patricia Gilbert, is affirmed.

Dated: _____

ANN E. SARLI
Administrative Law Judge
Office of Administrative Hearings