

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Appeal Regarding
Retirement Option Selection of John Cosulich
by:

LORI CREASEY,

Respondent.

Case No. 2013-0239

OAH No. 2014050474

PROPOSED DECISION

Administrative Law Judge Amy Yerkey, State of California, Office of Administrative Hearings, heard this matter on October 2, 2014, in Orange, California.

Rory Coffey, Senior Staff Counsel, represented Petitioner Anthony Suine, Chief of the Benefit Services Division of the California Public Employees' Retirement System (CalPERS).

Lori Creasey (Respondent), Attorney at Law, represented herself.

The matter was submitted on October 2, 2014.

FACTUAL FINDINGS

1. John Cosulich (Cosulich) was employed as a Supervising Engineer with the Los Angeles County Sanitation District No. 2 for approximately thirty years. By virtue of his employment, Cosulich was a local miscellaneous member of CalPERS. Respondent was Cosulich's fiancée.

2. On February 18, 2010, Cosulich submitted his service retirement application at the Orange Regional Office. He was counseled by a CalPERS agent regarding his retirement options, and he selected the "Unmodified Allowance Option." Cosulich was retired for service effective December 15, 2009, and CalPERS issued his first warrant on March 3, 2010. Cosulich died on May 5, 2012. Prior to his death, he did not modify his retirement option.

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C. Bodily

3. In September 2012, Respondent sent a claim to CalPERS requesting that CalPERS review Cosulich's account for mistake. She claimed that Cosulich meant to elect "Option 3" and designate her as lifetime beneficiary.

4. By letter dated February 7, 2013, CalPERS denied Respondent's request, finding that Cosulich made an informed decision when selecting his election option, and informed her of her right to appeal this determination. Respondent filed an appeal by letter dated March 5, 2013.

5. CalPERS filed a Statement of Issues on April 28, 2014. The appeal is limited to the issue of "whether a mistake, correctable under Government Code section 20160, was made by decedent John Cosulich that would entitled respondent Creasey to a lifetime allowance as [an] Option 3 beneficiary." (Ex. 1.)

6. Gracey Garcia (Garcia) testified at the hearing. She is a CalPERS Retirement Program Specialist II, and has worked in the capacity of a retirement specialist for 23 years. She assisted Cosulich on February 18, 2010. Garcia entered contemporaneous notes during her interaction with Cosulich, known as a "Customer Touch Point" (CTP) report. According to the CTP notes, Cosulich came to the CalPERS office to submit a service retirement election application. His form was completed and notarized. Cosulich had selected the unmodified allowance, which is the highest amount a member can receive, and provides no benefits to anyone else. Garcia explained generic estimates to him, as well as the option election – meaning that the option he chose could be changed up until CalPERS made the first disbursement. Garcia made it clear that once the first disbursement is made, Cosulich's option election became irrevocable. Under this protocol, Cosulich had until April 2010 to change his beneficiary. He did not do so. Garcia explained that a member can change their beneficiary designation, but they must come back in person or sign a document. This has always been the procedure: the member must submit a written request in order to change the beneficiary. Garcia indicated that the subject of life insurance may come up in a discussion during retirement planning, but CalPERS does not provide life insurance, and she does not give advice about it.

7. Shayne Day-Bolar (Day-Bolar) testified at the hearing. She is a CalPERS Staff Services Manager, and has worked at CalPERS for approximately 19 years. She explained that Cosulich was service retired, not disability retired. CalPERS had no information about his health or any medical conditions. That information was not necessary because he was service retired. The evidence established that Cosulich received proper notification on how he could change his beneficiary if he chose to do so. (Exhibits 3 and 13.)

8. Respondent testified at the hearing.¹ She and Cosulich met eight years ago. She initially stated that they were waiting to get married until both of their kids graduated

¹ CalPERS objected to the majority of Respondent's testimony as non-admissible hearsay evidence, citing the parol evidence rule. Respondent argued that multiple hearsay

from high school. Later, she explained that she delayed marrying him for other reasons. Respondent claimed that Cosulich wanted her to have his pension. She acknowledged that he also wanted to leave his daughter with money. Respondent contended that on February 18, 2010, Cosulich went to CalPERS with an incomplete service retirement application, and that he had planned to designate her as beneficiary. According to Respondent, who did not attend the meeting at CalPERS that day, Cosulich told her that he did not designate her as his beneficiary because the CalPERS representative told him to buy life insurance instead. Then Cosulich told Respondent that he called an insurance company and the agent said he was not eligible for life insurance for medical reasons. According to Respondent, Cosulich became very upset and wanted to change his retirement election so that Respondent could be his beneficiary. Cosulich called CalPERS and allegedly discussed changing his beneficiary. Respondent claimed that she also spoke to the CalPERS representative that evening, and that the representative assured her that the change had taken place; that is, Respondent had become his beneficiary. This explanation is not credible. First, the evidence clearly demonstrated that in order to change a beneficiary designation, CalPERS required the member to submit the request in writing. It has never been procedure to allow such a change over the phone. Second, according to the CTP notes, the CalPERS representative discussed the procedure for disbursing money to his daughter in the event of his death. There was no mention of any discussion of option election changes or beneficiary designation changes in the CTP notes. The CTP notes are a more credible account of the substance of the conversation, as the CalPERS representative made the notes contemporaneously and in the course of his business duties. Respondent is a licensed attorney and knew or should have known that a change of beneficiary or option election must occur in writing. There is no credible evidence to support Respondent's version of the events.

9. Respondent explained that Cosulich fell ill later that night. Cosulich was an alcoholic, and he self-medicated with alcohol. Respondent cared for him and kept him alive for the two years that ensued. She explained that for five months before Cosulich made his retirement election, he was completely sober. On the night of his CalPERS election option, he started drinking and immediately went into liver failure. Respondent contended that Cosulich could not have changed the election after that point because he did not have the mental capacity to do so. He was in bed every day for the rest of his life. She described a very difficult decline in Cosulich's mental and physical capabilities, during which she

exceptions applied. The ALJ deferred ruling at the hearing, but allowed Respondent to place her testimony on the record. The parol evidence rule "provides that when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing." (*Riverisland Cold Storage Inc. v. Fresno-Madera Prod. Credit Ass'n* (2013) 55 Cal.4th 1169, 1174, citations omitted (*Riverisland*)). *Riverisland* held that the parol evidence rule does not bar evidence of fraudulent promises at odds with the contract terms. (*Id.* At p.1182.) Respondent alleged that CalPERS fraudulently induced Cosulich into choosing an option that reverted his pension to CalPERS upon his death. Having considered the applicable law, CalPERS' objection is overruled, and Respondent's stated exceptions to the hearsay rule apply.

supported and assisted him. She acknowledged that on February 18, 2010, Cosulich went to CalPERS and selected the unmodified allowance option, which meant that he did not have a beneficiary upon his death. Respondent claimed that a misrepresentation occurred; in that the CalPERS representative who first assisted him told him he could get life insurance, and then later the CalPERS representative told him that he could change his option election over the phone. Respondent explained that in the two years between his election and his death, she was too busy keeping him alive to think about whether the change occurred properly.

10. Respondent submitted a letter dated June 2, 2005, from CalPERS to Cosulich. (Exhibit B.) The letter confirmed that CalPERS received a check from Cosulich's Los Angeles County Sanitation 457 plan account, in the amount of \$106,920.28, to be credited as a payment towards additional retirement service credit purchase. Respondent argued that this letter demonstrates that Cosulich intended to designate her as a beneficiary. She claimed that Cosulich knew he was going to die, and that he never intended to leave such a large sum of money in his retirement account to revert back to CalPERS. Respondent's argument is not supported by the evidence. Cosulich's decision to purchase retirement service credit does not show that he intended to make Respondent his beneficiary.

11. Respondent also submitted a declaration of James Strebis, M.D. (Strebis). (Exhibit E.) Strebis was Cosulich's doctor from 2008 until his death in 2012. Strebis stated that Cosulich was an in-patient for treatment for alcoholism from August 2009 to October 2009. By March 2010, Cosulich's liver enzymes were "significantly elevated, indicating that he had restarted heavy alcohol consumption. His alcoholic liver disease progressed until he died." (*Id.*) Respondent argued that Strebis's statement demonstrated that Cosulich did not have the mental capacity to correct the mistake that she should be his beneficiary. This argument is also not supported by the evidence. Respondent acknowledged that Cosulich was sober and thinking clearly immediately before he chose his retirement election option. Moreover, the evidence did not establish that Cosulich lacked the mental capacity to correct any alleged errors or mistakes that may have occurred.

12. On February 23, 2010, CalPERS send a letter to Cosulich which confirmed that he had selected the unmodified allowance election. CalPERS also included a publication entitled "Changing Your Beneficiary or Monthly Benefit After Retirement." Subsequently, there was no evidence or effort by Cosulich to CalPERS indicating that he had selected the wrong option or that there was some kind of mistake.

LEGAL CONCLUSIONS

1. The parties agree that Respondent has the burden of proving that Cosulich made a correctable mistake under Government Code section 20160, that would entitle Respondent to a lifetime allowance as a beneficiary.

2. The standard of proof in this matter is the preponderance of the evidence. Generally, the standard of proof in administrative matters such as this case is the preponderance of the evidence, unless a law or statute requires otherwise. (Evid. Code, § 115.) In this case, no such other law or statute was cited or appears to apply.

3. Government Code section 20160 governs requests by CalPERS members or beneficiaries to correct an error. It provides in pertinent part:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking 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 this right.

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

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

Failure by a member or beneficiary 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.

(b) Subject to subdivisions (c) and (d), the board 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.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

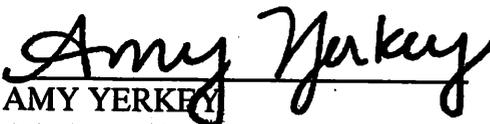
(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

4. Respondent did not meet her burden of presenting evidence establishing a right to correction under Government Code section 20160. It was not established that Cosulich made any error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect as those terms are used in section 473 of the Code of Civil Procedure. The only evidence in support of Respondent's position are her own statements, which are viewed skeptically in light of the fact that they are self-serving. The credible evidence showed that Cosulich made no mistake in selecting his retirement election option. Accordingly, Respondent's request to correct an alleged mistake and name her as beneficiary should be denied.

ORDER

Respondent Lori Creasey's appeal is denied.

DATED: November 3, 2014


AMY YERKEY
Administrative Law Judge
Office of Administrative Hearings