

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Request for Return of
Contributions Upon the Death of
CATHLEEN KIDD by:

CHELSEA DePHILLIPS,

Respondent

Case No. 2014-0369

OAH No. 2014061146

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 30, 2014, in San Diego, California.

Christopher C. Phillips, Staff Attorney, represented California Public Employees' Retirement System, State of California.

There was no appearance by or on behalf of Chelsea DePhillips.

On December 30, 2014, the matter was submitted.

DEFAULT

Ms. DePhillips failed to appear although she received adequate notice pursuant to Government Code section 11509. As a result, this matter proceeded as a default pursuant to Government Code section 11520.

ISSUES

Did decedent Cathleen Kidd make a correctable mistake pursuant that allows for the return and distribution of her member contributions pursuant to Government Code 21493 when she selected "the Unmodified Allowance" Option, instead of Option 1, in her September 24, 2012, service retirement application?

FACTUAL FINDINGS

Preliminary Matters

1. Respondent Chelsea DePhillips is the daughter of decedent Cathleen Kidd. Ms. Kidd was employed as a psychiatric technician by the California Department of State Hospitals, Metropolitan. By reason of her employment, Ms. Kidd was a state safety member of the California Public Employees' Retirement System (CalPERS).

2. On September 24, 2012, Ms. Kidd submitted her retirement application with CalPERS. In her application, Ms. Kidd selected the "Unmodified Allowance" Option. This option provided Ms. Kidd with the highest monthly retirement allowance during her lifetime but did not allow for the return of member contributions or for monthly benefits payable to a beneficiary upon a member's death except for a \$2,000 lump sum death benefit. Effective September 24, 2012, Ms. Kidd retired from service. Her first warrant was issued on October 8, 2012. Ms. Kidd died on November 28, 2012.

3. Respondent Chelsea DePhillips asserts that Ms. Kidd mistakenly failed to select Option 1 in her retirement application. Option 1 allows for a member's unused contributions to be returned or distributed to her beneficiaries. Ms. DePhillips claims that her mother mistakenly selected the "Unmodified Allowance" Option due to mental incompetence. As a result of this asserted mistake, her mother's retirement contributions were not distributed to Ms. DePhillips and her siblings. In connection with her claim, Ms. DePhillips submitted letters from various individuals who knew Ms. Kidd and medical records for the period from October 1, 2012 to November 28, 2012.

Ms. Kidd's Retirement Application

4. On September 24, 2012, Ms. Kidd visited a CalPERS office and met with Retirement Program Specialist Brandon Burns to complete a retirement application. Mr. Burns documented his conversation with Ms. Kidd in case notes that are part of the record. In her retirement application, Ms. Kidd checked the "Unmodified Allowance" Option. This option meant that Ms. Kidd would receive, as Mr. Burns advised her, the "highest" retirement allowance together with a \$2,000 lump sum death benefit. The application also contained a separate section to facilitate the distribution of a member's contributions if the member selected Option 1. Ms. Kidd did not complete this section. Ms. Kidd completed a section that designated Ms. DePhillips as the recipient of the death benefit. During her meeting with Mr. Burns, Ms. Kidd said that she intended to file a disability retirement application "asap." Ms. Kidd signed the application in Mr. Burns's presence. After she completed this application, Ms. Kidd received three months of retirement benefits before her death on November 28, 2012.

Medical Records

5. Ms. DePhillips submitted medical records regarding her mother's condition for the October 1, 2012 to November 26, 2012 period. These records document that, on October

1, 2012, Ms. Kidd was admitted to Scripps Hospital in Encinitas with complaints of abdominal pain, distention, and vomiting. Ms. Kidd was noted to have a history of Hepatitis C and alcohol abuse. At Scripps, Ms. Kidd was diagnosed with medical complications related to alcohol abuse. On October 4, 2012, Ms. Kidd was discharged. She was instructed to follow-up with her primary care doctor and to refrain from using alcohol. No doctor or clinician expressed concerns that Ms. Kidd was unable to follow instructions or take care of herself.

On November 26, 2012, Ms. Kidd was taken by ambulance to Scripps Hospital in Encinitas after her husband called 911. She was admitted in critical condition to the intensive care unit with complications related to alcohol abuse. Ms. Kidd reported that she had been feeling fatigued and lightheaded, and she stated that she had not used alcohol since her last hospital admission in October.

Letters

6. Ms. DePhillips submitted a letter that she wrote, dated July 16, 2013, to support her application. Also, Ms. DePhillips submitted: an undated letter from Ms. Kidd's son, John Charles Kidd; a letter, dated July 16, 2013, from Ms. Kidd's friend, Dennis Warn; a letter dated July 17, 2013 from Ms. Kidd's parents Mary Ann and Conrad Lindberg; a letter dated July 17, 2013 from Ms. Kidd's sister Sherri Lindberg; an undated letter from Ms. Kidd's friend, Robynne Kuehner; and an undated letter from Ms. Kidd's friend Phil Huber.

In summary, all but one person described Ms. Kidd as a person who suffered from alcohol abuse and who made questionable personal decisions but who was capable of taking care of her needs. The person who disagreed with the foregoing was Ms. Lindberg, Ms. Kidd's sister. Ms. Lindberg believed that Ms. Kidd was unable to take care of herself and/or "make decisions."¹ Even if fully credited, her opinion is given little weight because it conflicts with other evidence in the record, including Ms. Kidd's October hospital records, the facts relating to her September 24, 2012 retirement application, and the letters in the record from other individuals.

CalPERS Argument Regarding Excusable Neglect

7. CalPERS argued that Ms. Kidd did not make a mistake that is correctable. The evidence established that Ms. Kidd consciously selected "the Unmodified Allowance" Option, and the evidence did not establish that Ms. Kidd suffered from mental incompetence.

¹ A person who is unable to provide for his or her basic personal needs for food, clothing, or shelter due to chronic alcoholism may be deemed "gravely disabled" under Welfare and Institutions Code section 5008, subdivision (h)(1)(2). A person deemed gravely disabled due to chronic alcoholism may be conserved under Welfare and Institutions Code section 5350 or detained for intensive treatment pursuant to Welfare and Institutions Code section 5250. Contrary to Ms. Lindberg's suggestion, Ms. Kidd was not "gravely disabled" because she was able to provide for her basic needs.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Government Code section 20160 provides that the one seeking the correction bears the burden of proof. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Statutes

2. CalPERS is a “prefunded, defined benefit” retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member’s retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) “final compensation” (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) Members are afforded an opportunity to elect retirement payment options and to make beneficiary designations. This includes designation of beneficiaries to receive a lump sum death benefit.

3. Government Code section 21453, in effect in 2012 when Ms. Kidd applied for retirement, states as follows²:

An election, revocation, or change of election shall be made prior to the making of the first payment on account of any retirement allowance or, in event of a change of retirement status after retirement, prior to the making of the first payment on account of any retirement allowance following the change in retirement status. . . .

This section shall not be construed to authorize a member to change his or her retirement status after the mailing of the first retirement warrant following the election, revocation, or change of election provided in this section.

4. Government Code section 21493, subdivision (a), provides, in part, that if a person had no beneficiary designation in effect on the date of death, any benefit payable shall be paid to the survivors of the person in the following order:

- (1) The decedent’s spouse.
- (2) The decedent’s natural or adopted children.
- (3) The decedent’s parents.

² Effective August 21, 2014, pursuant to AB 2472, Government Code section 21453 was amended. The amendments are not relevant to the issues in this matter.

(4) The decedent's brothers and sisters.

5. California Code of Regulations, title 2, section 582 states, in relevant part:

A member may designate as beneficiary to receive any benefit payable to a member's designated beneficiary upon death before or after retirement, any person or persons, including a corporation; ...The designation must be in writing, except as otherwise provided in this section, must give the name of the person and his address, and must be filed in the office of the board in Sacramento, California. The right of a beneficiary to receive payment of a benefit is contingent on his survival at the time of the member's death, and the member may designate a beneficiary or beneficiaries on the contingency that the first beneficiary does not so qualify.

6. Government Code section 20160 governs requests by CalPERS members or beneficiaries to correct an error. It provides:

(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).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

Evaluation Regarding Excusable Neglect or Mistake

7. Ms. DePhillips did not meet her burden to modify her late mother's retirement application under Government Code section 20160. The evidence did not establish that Ms. Kidd made a mistake when she selected the "Unmodified Allowance" Option.

To the contrary, the evidence established that her late mother consciously selected the "Unmodified Allowance" Option in order to receive the highest monthly retirement

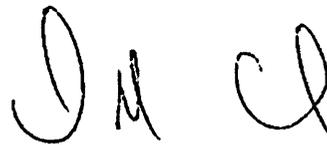
allowance. On September 24, 2012, Ms. Kidd met personally with a CalPERS representative; this representative counseled her regarding her retirement application; and she made selections consistent with her desire to receive the highest monthly benefit. The CalPERS representative documented that Ms. Kidd presented as an informed individual who understood her rights. For example, Ms. Kidd told the CalPERS representative that she intended to file a disability retirement application "asap."

Further, the medical evidence around the time of her application does not support the inference that Ms. Kidd was not competent. At the hospital on October 1, 2012, doctors who examined her were not concerned that Ms. Kidd was unable to take care of her affairs; she described her medical history and her condition accurately; and upon her discharge on October 4, 2012, doctors gave her specific instructions for her to follow.

ORDER

The application by Chelsea DePhillips to change Cathleen Kidd's retirement application from the "Unmodified Allowance" Option to "Option 1" is denied.

DATED: January 30, 2015



ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings