

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Of:

JOLIE CAUGHEY,

Respondent,

Case No. 2011-0953

OAH No. 2015050083

PROPOSED DECISION

This matter regularly came for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on November 5, 2015.

Christopher C. Phillips, Senior Staff Counsel, represented Complainant Diane Alsop, Acting Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

John Michael Jensen, Attorney at Law, represented Jolie Caughey (Respondent).

Respondent seeks a retirement allowance following the death of her husband, Donald Caughey (Caughey), a retired member of CalPERS. CalPERS denied her request after concluding that Respondent was never designated as the continuing beneficiary of Caughey's retirement allowance and that Caughey's failure to designate Respondent as his beneficiary was not an error or omission that could be corrected pursuant to Government Code section 20160.¹ Respondent counters that Caughey intended to name her as his Option 2 retirement settlement beneficiary and that he erred in not filing the necessary form. Respondent also contends that CalPERS failed to discharge its fiduciary duties toward Caughey and that CalPERS committed errors and omissions in its dealings with Caughey regarding the Option 2 beneficiary matter. In her view, the errors are correctable pursuant to section 20160 and she is entitled to a retirement allowance for the remainder of her life.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. Initial arguments were received on November 19, 2015 (Respondent's) and November 20, 2015 (Complainant's), and a reply brief was received from Respondent on December 7, 2015. The matter was submitted for decision on December 7, 2015.

¹ Except as otherwise noted, all further references are to the Government Code.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues solely in her official capacity.
2. Caughey was employed by the California Highway Patrol as an officer. By virtue of his employment, Caughey was a member of CalPERS.
3. Caughey retired effective December 23, 1993. In his application for retirement, dated February 19, 1993, Caughey stated his desire to modify his retirement allowance in order to provide a monthly income for his wife at the time, Susan Caughey.
4. On March 17, 1993, Caughey completed an "Election of Optional Settlement and Beneficiary Designation," electing to receive "Option Number 2" and designating Susan Caughey as the option beneficiary. Under Option Number 2, Caughey would receive a lower retirement allowance, and Susan Caughey would receive a monthly allowance upon his death. In the election form, Caughey also designated Susan Caughey as his death benefit beneficiary, a benefit in which she would receive a lump sum benefit upon Caughey's death.
5. Caughey and Susan Caughey divorced effective October 19, 1996. The judgment of dissolution was issued on April 22, 1996, by the Superior Court of California, County of Modoc, and as set forth in the Marital Settlement Agreement between Caughey and Susan Caughey, Caughey retained the total interest in his CalPERS pension.
6. On October 26, 1996, Respondent and Caughey were married.
7. Respondent testified that during their marriage Caughey told her that he would be taking a smaller pension so that she would have a pension after he died.
8. Caughey sent three handwritten notes to CalPERS, expressing his desire to designate Respondent as his new beneficiary. The three notes are undated, and their exact sequence is uncertain. However, in light of their content and contemporaneous letters sent by CalPERS, all notes were sent in the latter part of 1996 or early part of 1997. In one of the letters, Caughey wrote: "Attention PERS, [¶] Please delete my ex-wife Susan Caughey from my health benefits. Our divorce was final October 19, 1996. [¶] Please add my current wife, Jolie Caughey to my health benefits. [E]nclosed is a copy of the marriage license and the divorce papers. [¶] Thank you, [signed]." (Exh. 6, at p. 1.) Respondent was added as a beneficiary on Caughey's health insurance in February 1997.
9. In a second note, Caughey wrote: "PERS, [¶] Please leave my retirement option the same as it is, just change my beneficiary. Enclosed is a copy of the divorce agreement and my marriage license. [¶] Thank you." (Exh. 6, at p. 2.)

10. In late 1996, Caughey submitted a "Beneficiary Designation" form, signed by him and Respondent on November 25, 1996, designating Respondent as the beneficiary for the "Option 1 Balance." (Exh. 7, at p. 2.)

11. On February 24, 1997, CalPERS employee Christina Flores-Thompson wrote a letter to Caughey, which stated, in part, "At the time of retirement you chose Option 2. Option 2 provides the same reduced monthly allowance you receive will be paid to your designated beneficiary, Susan J. Caughey for life. Your divorce to Susan J. Caughey nullified survivor continuance which is now not payable to your former spouse. [¶] I have enclosed a[n] information sheet which will explain changing options and beneficiaries after retirement. Also, a recalculation of your retirement allowance [sic] to provide an optional settlement or a new beneficiary. [¶] Before the calculation can be done we will need you to provide us with information about the person you which to name as your new beneficiary. . . . [¶] . . . [¶]." (Exh. 8; emphasis in original.)

12. On May 1, 1997, Christina Flores-Thompson wrote to Caughey: "This letter is a follow up to your request for a possible recalculation of your retirement allowance to provide an optional settlement to a new beneficiary. [¶] Before the calculation can be done we will need you to provide us with information about the person you may wish to name as your new beneficiary. . . . [¶] . . . [¶]." (Exh. 109.)

13. In his third note, sent to Christina Flores-Thompson, Caughey stated: "[I]n response to changing my beneficiary - [¶] Name - Jolie Dee Caughey [¶] D.O.B. [redacted] [¶] Marriage Date - 10-26-96 [¶] If I need the proper form, please send it to me. My local office only has forms for active members. [¶] Sincerely [¶] [Caughey]." (Exh. 6, at p. 3.)

14. On May 21, 1997, Christina Flores-Thompson wrote a letter to Caughey, returning the Beneficiary Designation form signed on November 25, 1996. The letter stated, in pertinent part, "At the time of retirement you chose Option 2. Option 2 provides the same reduced monthly allowance you receive will be paid to your designated beneficiary, Susan J. Caughey for life. Your divorce to Susan J. Caughey nullified survivor continuance which is now not payable to your former spouse. [¶] If you would like a recalculation of your retirement allowance to provide an optional settlement to your current wife, Jolie D. Caughey, please send a copy of the judgment or community property settlement agreement awarding your entire interest of your PERS benefits. [¶] As your Beneficiary Designation from (PERS-PRS-509/PERS-PRS-800) was being reviewed, it was found that some items were incomplete or marked incorrectly. Your form is being returned to you because you marked an option for which you do not qualify. [¶] Please read and complete the enclosed form PERS-PRS-800 and Beneficiary Designation form PERS-PRS-509 in duplicate and return both copies to the address listed above. After we receive the completed forms and they are determined to be acceptable, the duplicate copy will be returned to you for your records. [¶] Sincerely, [¶] [name]." (Exh. 9; emphasis in original.)

15. In or about June 1997, Caughey submitted another Beneficiary Designation form, signed by him and Respondent on June 2, 1997, again designating Respondent as the beneficiary for the "Option 1 Balance." (Exh. 7, at p. 1.) This election was approved on August 25, 1997. Although Caughey had not chosen Option 1 and did not have an Option 1 lump sum balance to distribute at his death, CalPERS deemed the election to apply to any lump sum distribution of Caughey's benefits.

16. a. On August 18, 1997, Christina Flores-Thompson wrote to Caughey: "[I]n response to your request for information regarding a possible change of beneficiary under an optional settlement, we have prepared the enclosed election document *Modification of Original Election at Retirement* (PRS-204). Please review it very carefully. [¶] The items listed below must be submitted to our office before approval of the election will be made. . . . [¶] A photo of your new beneficiary's birth certificate or other acceptable documentation of birthdate [¶] If you choose to make a change of beneficiary or optional settlement by completing this election, you must do so in the presence of a notary. The completed election document should be returned to PERS by September 30, 1997 for processing. **Please keep a copy of the completed election document for your records.** A delay in returning the completed document may result in a later effective date and may require a further adjustment of the allowance. [¶] . . . [¶]." (Exh. 10, at p. 1; emphasis in original.)

b. An attached Modification of Original Election at Retirement form contained figures regarding Caughey's unmodified allowance (\$2,825.99), and his reduced allowances under Option 1 (\$2,729.94), Option 2 (\$2,266.44), Option 2W (\$2,272.10), Option 3 (\$2,515.13), and Option 3W (\$2,517.96). The document set forth the beneficiary's monthly allowance under the various options, including Option 2 (\$2,266.44).

c. The election form contained instructions, Respondent's name as the beneficiary, and space for Caughey to choose an option.

17. Caughey sent CalPERS a copy of page 1 of the August 18, 1997 letter with a copy of Respondent's birth certificate. The documents were received by CalPERS on September 4, 1997.

18. Respondent recalled receiving a letter in the mail from CalPERS with a paragraph circled, the one referring to the need for the birth certificate of the new beneficiary, quoted in part above. She does not recall receiving the Modification of Original Election at Retirement form containing the retirement allowance calculations or the election form. Respondent testified that they were having problems with neighbors and some of their mail was not received. Respondent further testified that they mailed to CalPERS a copy of the page they received and the copy of the birth certificate.

19. The evidence establishes that CalPERS mailed the August 18, 1997 letter with all of the documents described in factual finding number 15, and that the letter was received by Caughey and Respondent. The August 18, 1997 letter was sent to the same address as the other letters whose receipt is not questioned, and Respondent admits having received the letter. It is not credible that only the first page of the packet would have been sent or received. The first paragraph of the letter refers to the "election document Modification of Original Election at Retirement," and in the unlikely event that CalPERS staff failed to include the other documents, reference to the documents would have triggered inquiry by Caughey. Moreover, even if the neighbors were inclined to steal Caughey's and Respondent's mail, it is unlikely that they would have only taken the part of the contents of the letter from CalPERS.

20. Except for submission of the birth certificate, no other response was provided to the August 18, 1997 letter.

21. Caughey never submitted an election form designating Respondent as his Option 2 beneficiary.

22. The unmodified allowance set forth in factual finding number 15, \$2,825.99, was calculated following Caughey's divorce from Susan Caughey and the resulting nullification of the prior Option 2 allowance. CalPERS informed Caughey of the change in a letter dated August 22, 1997. The change became effective July 1, 1997, based on the date Caughey provided proof of the divorce, June 4, 1997, and resulted in a monthly increase in Caughey's monthly allowance of \$146.96.²

23. a. It is CalPERS's custom and practice to document its contacts with members. A document entitled "Customer Touch Point Report" was received in evidence and it documents CalPERS contacts with Caughey or about Caughey after his death.

b. A note dated September 4, 1997, entered by Lynette Leufgen, states: "member sends in first page of recal election and copy of beneficiary's birth certificate. No i.election page, file and documents given to Tina to respond[.]" (Exh. 15, at p. 9.) There is no note reflecting Tina's response, if any, and the last letter from Christina Flores-Thompson, who is likely the "Tina" in Lynette Leufgen's note, is the August 18, 1997 letter.

² Section 21456 provides, in pertinent part, "[I]f the marriage of a member is dissolved or annulled or there is a legal separation between the member and the beneficiary spouse and the judgment dividing the community property awards the total interest in this system to the member, and the member elects this section to be effective on or after January 1, 1994, the member's allowance shall be adjusted effective the first of the month following the filing of the judgment with the board to reflect the benefit that would have been paid had the member not selected an optional settlement. [¶] . . . [¶]."

c. There was no subsequent note in the Customer Touch Point Report reflecting contact with Caughey.

24. Respondent testified that Caughey told her that he had called CalPERS twice to confirm that she was his beneficiary, and that he received an affirmative response. As Caughey's health was failing, Respondent testified, he told her that everything with the pension "was alright." This hearsay testimony contains some ambiguity, as Respondent was Caughey's lump sum benefit beneficiary, and is insufficient to establish that anyone at CalPERS told Caughey that Respondent was his Option 2 beneficiary. Moreover, it is unlikely to be true in light of undisputed facts. As Respondent learned, CalPERS records did not actually contain an executed Modification of Original Election at Retirement form designating her as the Option 2 continuing allowance beneficiary, something anyone calling CalPERS between October 1997 and October 2010 would have found out.

25. Caughey died on October 10, 2010.

26. On October 13, 2010, Respondent notified CalPERS of Caughey's death. On December 20, 2010, after she did not receive a monthly retirement allowance, Respondent contacted CalPERS. Respondent was informed that she was not entitled to a lifetime benefit, as Caughey had never elected to provide for a lifetime allowance for her.

27. On August 5, 2011, following Respondent's inquiries about her pension, CalPERS informed her in writing that she was not entitled to a monthly pension because she was never designated as the Option 2 beneficiary. CalPERS informed Respondent that there was no evidence that Caughey had made an error or omission that could be corrected pursuant to section 20160. In this regard, the letter stated, in part, "[I]f [Caughey] had returned the election document by September 30, 1997 and elected the Option 2 allowance, [Respondent] would be entitled to a monthly death benefit of \$3,029.04, payable for her lifetime. If the request to correct [Caughey]'s mistake of not electing the Option 2 were approved there would be an overpayment of \$102,341.13 for the period of October 1, 1997 through his death on October 12, 2010." (Exh. 3, at p. 2.)

28. Respondent filed an appeal on October 3, 2011. She argued that Caughey intended to make her the beneficiary of his continuing (Option 2) allowance. He relied on CalPERS's communications that the necessary action had been taken to implement his wishes and CalPERS is now equitably estopped from denying the continuing allowance. Respondent also argued that CalPERS failed to discharge its fiduciary duty to inform Respondent about her community property rights.

29. Except as set forth in this Decision, all other allegations in the Statement of Issues and all other arguments by the parties lack merit or constitute surplusage.

LEGAL CONCLUSIONS

1. A member may elect to receive a lower retirement allowance in order to provide a lifetime monthly allowance for a survivor. (§ 21451.) This election is irrevocable, absent a qualifying event, such as a marriage, if a new election is made within 12 months of the qualifying event. (§ 21464.) The opportunity for a new election arose in Caughey's case because of his divorce from Susan Caughey. As set forth in factual finding numbers 8 through 19, Caughey expressed the desire to provide a lifetime allowance for Respondent, and communicated with CalPERS to designate Respondent as his Option 2 beneficiary. The exchanges culminated with the August 18, 1997 letter, setting forth the changes in Caughey's allowance to provide for an allowance for Respondent and containing an election form with which to execute Caughey's wishes. However, Caughey did not actually submit an election form designating Respondent as his Option 2 beneficiary, and Respondent is therefore not entitled receive an Option 2 continuing allowance.

2. Respondent nevertheless argues that she may obtain relief pursuant to section 20160 because of errors or omissions made by Caughey and by CalPERS in connection with Caughey's request to name Respondent as his Option 2 beneficiary. Section 20160 states:

"(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.”

Respondent may not avail herself of the benefits of section 20160. She failed to establish that Caughey made an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Code of Civil Procedure section 473. Having made an Option 2 election for the benefit of Susan Caughey, Caughey was aware of the requirement of executing an election form, including the formality of signing the document before a notary public. The requirements for designation of an Option 2 beneficiary were again explained in the letter of August 18, 1997. Failure to execute the election form may have been an error or omission, as Respondent argues. Or it may have been a conscious decision by Caughey to keep the unmodified allowance, which was \$559.55 higher per month than the Option 2 allowance. After all, Caughey was not only aware of the steps he had to take to designate a beneficiary, but he also knew that his allowance would be reduced to provide for the beneficiary, yet made no attempt to correct the purported error or mistake. Submission of the birth certificate is at best the first step in satisfying the prerequisites to complete the form, but it does not necessarily mean that Caughey was going to execute the form.

Even if Respondent were to establish the existence of a correctable error or omission, she failed to establish that Caughey made reasonable inquiry about the status of his beneficiary designation as required by section 20160, subdivision (a)(3). Since Caughey continued to receive the unmodified election for over 13 years, until his death, his failure to make any inquiry about the reason(s) the allowance had not been reduced to provide for a beneficiary is not reasonable.

3. Respondent nevertheless blames CalPERS for writing confusing and ambiguous letters and for failing to contact Caughey about the reason he submitted Respondent's birth certificate, which she refers to an "incomplete application," but did not complete the election from. While there were multiple letters between Caughey and CalPERS after his divorce from Susan Caughey and despite the fact that some of them touched on more than one subject, the letters, set forth in the factual findings, are not inherently ambiguous or confusing. But even if they were, the August 18, 1997 letter was not ambiguous or confusing. The letter provided information and instruction for Caughey to select Respondent as his beneficiary for a continuing allowance. Submission of the birth certificate was not submission of an application and, as set forth above, was at best the first step in satisfying the prerequisites for completing the form and did not require action by CalPERS.

4. Absent clear evidence that Caughey had made an error or omission with respect to his Option 2 beneficiary designation, CalPERS was not required to act to correct any claimed error or omission.

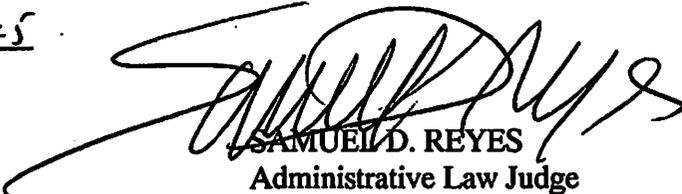
5. CalPERS does owe a fiduciary duty to its members. (*Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374.) Contrary to Respondent's arguments, CalPERS properly discharged its duty to Caughey by responding to his requests to change beneficiaries, including presenting him with the necessary calculations for him to make an informed choice about making Respondent a beneficiary of Caughey's retirement allowance, as set forth in factual finding numbers 8 through 19.

6. By reason of factual finding numbers 1 through 29 and legal conclusion numbers 1 through 5, Respondent did not establish that Caughey designated her as his continuing retirement allowance beneficiary or that his failure to designate her as his beneficiary constituted an error or omission that can be corrected pursuant to section 20160.

ORDER

The appeal filed by Respondent Jolie Caughey is denied.

DATED: 12/23/05


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings