

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 Death
Benefits Payable Upon the Death of Grantland
Lee Johnson by:

LEE TURNER JOHNSON,

Respondent.

Case No. 2015-0373

OAH No. 2015081045

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 6, 2015, in Sacramento, California.

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

Attorney Ian J. Barlow of the law firm Kershaw, Cook & Talley, PC, represented respondent Lee Turner Johnson, who was present throughout the hearing.

Evidence was received, and the record was left open for the parties to submit simultaneous closing briefs. The parties' closing briefs are marked as Exhibits 15 (CalPERS's), 16 (CalPERS's amended brief), and P (Ms. Turner Johnson's).¹ The record was closed, and the matter was submitted for decision on December 18, 2015.

¹ Attachment A to Exhibit 15 was an Enrolled Bill Report for AB 553 (Moore). The record was not left open to receive further evidence. Therefore, Attachment A was not considered. Ms. Turner Johnson included with her closing brief the Declaration of Ian J. Barlow in Support of Respondent Lee Turner Johnson's Closing Brief. Attached to the Declaration were a portion of the hearing transcript and duplicate copies of the hearing exhibits with the exhibit designations changed (e.g., Exhibit D to the Declaration purported to be a true and correct copy of the exhibit that was marked and admitted at hearing as Exhibit 9o). CalPERS included the entire hearing transcript, which is included in the administrative record as Exhibit 17, with Exhibit 15, and the exhibits marked and admitted at hearing are the only official exhibits in this matter. Therefore, neither the Declaration nor any of the attachments were considered.

SUMMARY

Grantland L. Johnson retired for service from the State of California on November 16, 2003. On his retirement application, he made an irrevocable election of "Option 2" benefits, and irrevocably named his then-wife, Charlot Bolton, his life option beneficiary. A statutory exception allowing Mr. Johnson to change his life option beneficiary arose when the family law court entered judgment awarding him his CalPERS pension in its entirety on December 31, 2014. Fourth months prior to entry of judgment, he initiated the process for changing his life option beneficiary to his new wife, Lee Turner Johnson. But that process was not completed before Mr. Johnson passed away on August 19, 2014. Therefore, Ms. Turner Johnson is not entitled to lifetime Option 2 benefits or continued enrollment in employer-sponsored health insurance and dental insurance through CalPERS, and her appeal of CalPERS's denial of such benefits should be denied.

FACTUAL FINDINGS

Application for Service Retirement and Election of Retirement Benefits

1. Grantland L. Johnson was employed by the California Health and Human Services Agency, and was a state miscellaneous member of CalPERS as a result of such employment. He applied for service retirement on November 12, 2003,² and retired for service four days later. In completing the application, he had a choice of one of seven retirement options – an "unmodified monthly allowance" or "Option 1," "Option 2," "Option 2W," "Option 3," "Option 3W," or "Option 4" benefits.³ Mr. Johnson elected to receive "Option 2" benefits, and named his then-wife, Charlot Bolton, his life option beneficiary, despite the fact that they had been living separate and apart since April 1, 2002. He received payment of his first monthly retirement benefit around January 1, 2004.

2. On December 4, 2003, CalPERS sent Mr. Johnson correspondence acknowledging receipt of his application for service retirement and election of Option 2

² Mr. Johnson dated the application "12/12/2003." The notary public who notarized Mr. Johnson's signature, however, wrote on the notary certificate that Mr. Johnson appeared on "11/12/03," and dated the certificate "11/12/2003." Therefore, the date Mr. Johnson wrote appears to have been a typographical error.

³ As explained further in the Legal Conclusions below, the unmodified allowance would have provided Mr. Johnson with the maximum monthly allowance possible for the remainder of his life, but neither his estate nor his beneficiary would have received a lump sum payment consisting of the amount of his accumulated contributions at retirement, less the total sum of annuity payments received prior to death, or monthly payments for the duration of the beneficiary's life. Options 1, 2, 2W, 3, 3W, and 4 would have provided him a lower monthly allowance for the remainder of his life, but his estate or beneficiary would have received the lump sum payment or monthly benefits upon his death.

benefits. The correspondence provided the following information regarding benefits payable upon his death:

Upon your death, benefits will be paid to your beneficiary in accordance with the designation indicated on your retirement election document. If you elected a benefit which requires marriage and/or birth documentation and you have not submitted these documents, please send them immediately to the Benefit Services Division. If the documents are not in [*sic*] file at the time of your death, it may be necessary to delay payment of benefits to your beneficiary.

If your beneficiary predeceases you, your allowance will increase to the Unmodified allowance. You may modify your election to Option 1, 2, 2W, 3, 3W, or 4 and name a new beneficiary. You may also modify your election upon marriage after retirement if a former spouse was not named as a beneficiary. If a former spouse was named, you must have a court order that awards you the entire interest in your CalPERS benefits before you can name a new spouse as beneficiary. You may modify your election upon divorce, annulment or legal separation if you have a court order that awards you the entire interest in your CalPERS benefits.

To request a modification of election to name a new beneficiary for a lifetime option allowance, please contact the Benefit Services Division for information about a recalculation of allowance and the required documentation.

Mr. Johnson and Ms. Turner Johnson's Relationship

3. Mr. Johnson first met Ms. Turner Johnson in 1996 in a professional capacity. At the beginning of 2003, Mr. Johnson filed a petition for dissolution of his marriage to Ms. Bolton, and on October 21, 2013, the family law court entered a judgment terminating the parties' marriage, effective November 9, 2013.⁴ He and Ms. Turner Johnson were married on November 15, 2013.

⁴ Prior to entering judgment, the family law court issued an order bifurcating trial of the issues of termination of marital status, on the one hand, and the division of the community estate and confirmation of the parties' interests in their respective separate property, on the other. (See, Fam. Code, § 2337, subs. (a) [court may bifurcate issue of termination of status of marriage from all other issues], (f) [judgment terminating status of marriage must "expressly reserve jurisdiction for later determination of all other pending issues"]; see also, *In re Marriage of Fink* (1976) 54 Cal.App.3d 357, 363-364 [public policy favor bifurcation to allow for early entry of judgment terminating status only].) The October

4. Mr. Johnson sent CalPERS correspondence requesting that Ms. Bolton be removed from his health benefits through CalPERS two days prior to his marriage to Ms. Turner Johnson. On December 12, 2013, he sent additional correspondence requesting that Ms. Turner Johnson be added to those benefits. And on June 23, 2014, he sent correspondence, which read, in part:

I want my wife Lee Anne Turner Johnson, [*sic*] to be named as beneficiary with my CalPERS retirement and all death benefits (previously named for Charlot Bolton and Patrice Bolton Johnson).

As of November 15, 2013, we were legally married. A court judgment or marital agreement will soon be filed and sent to you, finalizing all property with my former wife, Charlot Bolton. Upon receipt of this final settlement agreement, please immediately change all of my retirement benefit and all death benefit to my wife, Dr. Lee Turner Johnson....”

CalPERS's Process for Modifying Option and/or Life Option Beneficiary

5. Robin Owens is a retirement program specialist employed in the Retirement Administration and Support Unit of CalPERS's Benefit Services Division. Her unit handles Applications to Modify Option and/or Life Option Beneficiary from members, and she provided persuasive, uncontested testimony about the process a member must go through to change his settlement option and/or life option beneficiary.

6. Applications received by the Retirement Administration and Support Unit are logged in and assigned to staff for processing on a first-come, first-served basis. Once assigned, staff reviews the Application to confirm the member identified a proper qualifying event that allows him to change his settlement option and/or life option beneficiary under Government Code section 21462 – death of the named beneficiary, remarriage (as long as a prior spouse was not named as the beneficiary), or dissolution or annulment of marriage or legal separation in which the member is awarded the total interest in his CalPERS pension. Staff also confirms all documents necessary for establishing the occurrence of the alleged qualifying event were included with the application. Any deficiencies in the Application and/or supporting documents are brought to the member's attention by a letter requesting the necessary correction(s).

7. Once the Application is deemed complete and all necessary supporting documents have been received, staff prepares estimates of the Option 1, 2, 2W, 3, 3W, and, if requested in the Application, Option 4 benefits the member and his beneficiary would receive if the particular option is ultimately elected and/or a new life option beneficiary

21, 2013 judgment did not award Mr. Johnson any interest in his CalPERS pension, and that issue was not resolved until the following year as discussed further below.

named. While Section 2 of the Application allows the member to provide “New Beneficiary Information,” including a proposed beneficiary’s name and date of birth, providing that information alone is insufficient to change the life option beneficiary. But such information is necessary to prepare the estimates, which are calculated by applying actuarial factors and option factors to the member’s and beneficiary’s respective ages. It generally takes 60 days to prepare the estimates.

8. The estimates are sent to the member with an election form for him to elect the desired settlement option (or re-elect the same one) and/or name a new life option beneficiary. He must have his signature notarized on the election form and return the form within 30 days, or his application would be cancelled. And because electing a new retirement option (or re-electing the same one) and/or naming a new beneficiary often results in a change in the amount of the monthly allowance the member receives, no changes would be made unless and until CalPERS timely receives the signed, notarized election form.

Mr. Johnson’s Attempt to Name Ms. Turner Johnson his Life Option Beneficiary

9. On August 3, 2014, Mr. Johnson signed an Application to Modify Option and/or Life Option Beneficiary, which CalPERS received four days later. He identified Ms. Turner Johnson and provided her date of birth in Section 2 of the Application. The instructions for Section 3 of the Application stated: “We will provide Options 1 2 2W 3, and 3W. If these do not meet your needs you can request one of the approved Option 4 types shown” [*Sic*]. While Mr. Johnson initially checked one of the boxes indicating a desire to receive information about one of the Option 4 types, he subsequently crossed out his selection and initialed it.

By signing the Application, Mr. Johnson made the following certification:

I understand that this form is a request for an election form to modify my option and name a new beneficiary(ies). I further understand that my new option/beneficiary change will not be processed until the properly completed election form is submitted to CalPERS. I hereby certify under penalty of perjury that the foregoing information is true and correct.

(Italics added.)

10. Mr. Johnson passed away on August 19, 2014, prior to CalPERS sending him an election form and the retirement option estimates he had requested. The following month, Ms. Turner Johnson signed the Marital Settlement Agreement in the marital dissolution action as Mr. Johnson’s “Attorney in Fact.” That Agreement divided Mr. Johnson’s and Ms. Bolton’s community estate, and awarded him his entire CalPERS pension as follows:

Any and all interest in the CalPERS defined plan attributable to Husband's employment, including but not limited to all member contributions and rights to past and future benefits, survivor and death benefits [Mr. Johnson] is entitled to select and assign according to the terms of the plan.

The family law court entered judgment approving the Marital Settlement Agreement on December 31, 2014, and Ms. Turner Johnson sent a certified copy of the judgment to CalPERS on February 11, 2015.

Request for Lifetime Option 2 Benefits and Continued Health and Dental Benefits

11. Ms. Turner Johnson's February 11, 2015 correspondence forwarding a certified copy of the family law court judgment to CalPERS included a demand for lifetime Option 2 benefits and continued enrollment in employer-sponsored health and dental benefits. CalPERS denied both demands, and explained that Ms. Turner Johnson was not entitled to any monthly benefits from CalPERS. And, she was no longer eligible for employer-sponsored health or dental benefits through CalPERS because she was not entitled to any monthly benefits. Ms. Turner Johnson timely appealed the denial. Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues on August 26, 2015, solely in his official capacity.

Discussion

12. CalPERS properly denied Ms. Turner Johnson lifetime Option 2 benefits. While Mr. Johnson provided her name and date of birth under "New Beneficiary Information" on his August 3, 2014 Application to Modify Option and/or Life Beneficiary, the Application was never approved and she was never named the life option beneficiary because Mr. Johnson passed away before CalPERS sent the settlement option estimates he had requested. Therefore, he never returned a signed, notarized election form. As previously explained, the Application was merely Mr. Johnson's request for settlement option estimates based on his and Ms. Turner Johnson's respective ages, and was insufficient in and of itself to make her his beneficiary.⁵ Mr. Johnson certified his understanding of the process for making the change when he signed the Application.⁶

⁵ That is not to say Ms. Bolton, Mr. Johnson's life option beneficiary at the time of his death, was entitled to lifetime Option 2 benefits. Upon receipt of the certified copy of the December 31, 2014 family law judgment, CalPERS removed her as the beneficiary, and concluded Ms. Johnson Turner was entitled to a lump-sum payment of the amount of Mr. Johnson's accumulated contributions at retirement, less the total amount of retirement benefits paid at the time of death, pursuant to Government Code section 21454. That statute provides, in relevant part:

The modification shall provide that payment shall be continued during the retired person's lifetime in accordance with the

And because Ms. Turner Johnson is not entitled to lifetime Option 2 benefits or any other type of monthly benefits from CalPERS, she is no longer eligible for employer-sponsored health or dental benefits through CalPERS.

13. The arguments raised in Ms. Turner Johnson's closing brief are not persuasive. Whether Mr. Johnson clearly intended to name her as his life option beneficiary was not the issue. Rather, he irrevocably named Ms. Bolton his beneficiary when he applied for service retirement on November 12, 2003. A statutory exception allowing Mr. Johnson to change his beneficiary arose when the family law court entered judgment awarding him his CalPERS pension in its entirety, but he was unable to complete the process for changing his beneficiary prior to his death.

14. Ms. Turner Johnson's reliance on the statute that allows CalPERS to correct errors or omissions that are based mistake, inadvertence, surprise, or excusable neglect (Gov. Code, § 20160) was misplaced. She did not clearly articulate what the alleged "error" or "omission" was. To the extent she claimed it was that "Grantland Johnson's Election Form was not submitted because of his untimely death," he never received an election form in the first place because CalPERS had not had the opportunity to prepare the settlement option estimates before he passed away.⁷

For the same reasons, Mr. Johnson did not substantially comply with the requirements of Government Code section 21462.

15. The contractual doctrine of "impossibility of performance" does not excuse someone's inability to comply with a substantive statute, and Ms. Turner Johnson cited no

optional settlement then in effect but that no monthly allowance shall be paid following the retired person's death, and in lieu thereof there shall be paid in a lump sum to the member's estate or a beneficiary designated by him or her the amount, if any, by which the member's accumulated contributions at retirement exceed the total payments made to the retired person to the date of his or her death.

The propriety of CalPERS's decision to remove Ms. Bolton as the beneficiary is not part of this appeal.

⁶ The argument in Ms. Turner Johnson's closing brief that the certification at the bottom of the Application was ambiguous and subject to different interpretations was premised on a gross misrepresentation of the language of the certification.

⁷ There may have been a different outcome had he passed away after signing the election form, but before returning it. Or even if he had received the settlement option estimates and election form, but passed away before he could consider them. But those were not the facts of this appeal.

legal authority providing otherwise. And whether CalPERS breached its fiduciary duty by not providing her timely, complete, and accurate information about the process for changing a life option beneficiary would not be outcome determinative. Entry of the family law court's December 31, 2014 judgment was a *prerequisite* to Mr. Johnson being able to change his life option beneficiary. He passed away before that had occurred. In fact, he passed away before signing the Marital Settlement Agreement that was incorporated into the judgment (Ms. Turner Johnson signed it as his "Attorney in Fact").

LEGAL CONCLUSIONS

Applicable Law

1. The Service Retirement Election Application Mr. Johnson completed on November 12, 2003, required him to choose one of seven retirement options. (Gov. Code, § 21451.) An "unmodified allowance" would have entitled him to a monthly allowance for life, with no return of his member contributions or monthly benefits payable upon his death. The six "optional settlements," on the other hand, entitled him to a reduced monthly allowance for life, with payment upon his death of either: 1) a lump sum consisting of the amount of his accumulated contributions at retirement, less the total sum of annuity payments received prior to death, payable to his estate or beneficiary (Option 1) (Gov. Code, § 21455); or 2) monthly payments to his beneficiary for the remainder of the beneficiary's life (Options 2, 3, or 4) (Gov. Code, §§ 21456-21459).⁸

2. As previously discussed, Mr. Johnson elected to receive Option 2 benefits, which "consists of the right to have a retirement allowance paid a member until his or her death and thereafter to his or her beneficiary for life." (Gov. Code, § 21456.) Such election became irrevocable "30 calendar days after the making of the first payment on account of any retirement allowance." (Gov. Code, § 21453.) He named his then-wife, Charlot Bolton, as his life option beneficiary, and that election was irrevocable "from the time of the first payment on account of any retirement allowance." (Gov. Code, § 21492; *In re Marriage of Cooper* (2008) 160 Cal.App.4th 574, 577.) He received payment of his first monthly retirement benefit around January 1, 2004.

3. The family law court's December 31, 2014 judgment awarding Mr. Johnson all rights to his CalPERS pension gave rise to a statutory exception to the rule that his election of Option 2 benefits and naming of Ms. Bolton as his life option beneficiary were irrevocable. Government Code section 21454 provides:

⁸ If Mr. Johnson selected Option 2 or 3 and his beneficiary predeceased him, his monthly allowance would have increased "to reflect the benefit that would have been paid had [he] not selected an optional settlement." (Gov. Code, §§ 21456, 21457.) But if he selected either "Option 2W" or Option 3W," he would have received a larger monthly allowance because he would have waived any increase if his beneficiary predeceased him. (Gov. Code, § 21459.)

Notwithstanding Section 21453, an election of optional settlement 2 or 3, or optional settlement 4 involving life contingency in which a spouse is designated as the beneficiary, may be modified as provided in this section in the event of a dissolution or annulment of the marriage or a legal separation in which the division of the community property awards the total interest in the retirement system to the retired member. The modification shall provide that payment shall be continued during the retired person's lifetime in accordance with the optional settlement then in effect but that no monthly allowance shall be paid following the retired person's death, and in lieu thereof there shall be paid in a lump sum to the member's estate or a beneficiary designated by him or her the amount, if any, by which the member's accumulated contributions at retirement exceed the total payments made to the retired person to the date of his or her death.

Government Code section 21462, subdivision (a)(1), allowed Mr. Johnson to name Ms. Turner Johnson his life option beneficiary as follows:

Notwithstanding any other provision of this part, a member who elected to receive optional settlement 2, 3, or 4, involving a life contingency of the beneficiary, may, if the beneficiary predeceases the member or if the member marries and the former spouse was not named as beneficiary, or, if a former spouse was named, in the event of a dissolution or annulment of the marriage or a legal separation in which the judgment dividing the community property awards the total interest in the retirement system to the retired member, elect to have the actuarial equivalent reflecting any selection against the fund resulting from the election as of the date of election of the allowance payable for the remainder of the member's lifetime under the optional settlement previously chosen applied to a lesser allowance during the member's remaining lifetime under one of the optional settlements specified in this article and name a different beneficiary.

Mr. Johnson's August 3, 2014 Application to Modify Option and/or Life Option Beneficiary was insufficient in and of itself to name Ms. Turner Johnson his life option beneficiary. (Gov. Code, § 21462, subd. (d) ["This section shall not be construed to mean that designation of a new beneficiary causes the selection of an optional settlement. An optional settlement shall be selected by a member in a writing filed by the member with the board"].) The Application merely constituted his *request* for estimates of the different settlement option benefits they would have received had he ultimately elected one of the options and/or named her as the beneficiary. Mr. Johnson passed away before CalPERS

could send those estimates and he could return a signed, notarized election form. Therefore, his life option beneficiary was never changed to Ms. Turner Johnson.

Conclusion

4. Mr. Johnson made an irrevocable election of Option 2 benefits and irrevocably named Ms. Bolton his life option beneficiary when he applied for service retirement on November 12, 2003. While the exception codified in Government Code section 21462, subdivision (a)(1), would have allowed him to name Ms. Turner Johnson his life option beneficiary, he passed away before completing the process. Therefore, Ms. Turner Johnson is not entitled to lifetime Option 2 benefits or employer-sponsored health and dental benefits through CalPERS, and her appeal of CalPERS's denial of such benefits should be denied.

ORDER

Respondent Lee Turner Johnson's request for lifetime Option 2 benefits and employer-sponsored health and dental benefits is DENIED. CalPERS's decision to deny her such benefits is AFFIRMED.

DATED: January 8, 2016

DocuSigned by:

Coren D. Wong

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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings