

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Request to Change
Retirement Election Option of:

GORDON SONNE,

Respondent,

and

THERESSA MCKINLEY,

Respondent.

Case No. 2013-1119

OAH No. 2016010756

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on June 9, 2016, in Sacramento, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorney Barbara A. Ginsberg represented respondent Gordon Sonne, who was present throughout the hearing.

No one appeared for or on behalf of respondent Theresa McKinley.¹

Evidence was received, the record was closed, and the matter was submitted for decision on June 9, 2016.

¹ Ms. McKinley was duly served with the First Amended Statement of Issues and Notice of Continued Hearing, and this matter was called for hearing on the date and at the time and location specified in the Notice of Continued Hearing. Therefore, this matter proceeded as a default proceeding against Ms. McKinley pursuant to Government Code section 11520, subdivision (a).

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED July 1, 2016

[Signature]

SUMMARY

The sole issue to be decided on appeal is whether respondent Gordon Sonne elected Option 2 benefits when he completed his Disability Retirement Election Application as a result of an error or omission correctable under Government Code section 20160. The persuasive evidence established he did not. Therefore, his appeal to change his retirement option selection should be denied.

FACTUAL FINDINGS

Procedural Background

1. Respondent Gordon Sonne began working as a deputy sheriff for the Monterey County Sheriff's Department on March 8, 1971, and was eventually elected sheriff. He was a local safety member of CalPERS by virtue of such employment.

2. Sheriff Sonne married respondent Theresa (Reese) McKinley in November 1994, while still working for the Monterey County Sheriff's Department. He eventually petitioned for dissolution of their marriage, and a judgment terminating their marriage was entered in February 2006. The termination of their marital status was made retroactive to October 18, 2005.²

3. In the meantime, Sheriff Sonne submitted a Disability Retirement Election Application seeking service pending industrial disability retirement to CalPERS on November 27, 2002. He elected to receive "Option 2" benefits, and named Ms. McKinley as his sole beneficiary. Sheriff Sonne's application was approved, effective December 27, 2002.

4. On January 24, 2006, Sheriff Sonne sent correspondence to CalPERS advising he had mistakenly elected Option 2 benefits when he completed his application. He explained it has always been his intent for his son to receive 74 percent of his retirement allowance after he (Sheriff Sonne) passed away, with Ms. McKinley receiving the remaining 26 percent. Sheriff Sonne requested that his retirement option selection be changed to reflect his original intent.

5. CalPERS denied Sheriff Sonne's request, and provided him with notice of his right to appeal the denial. Sheriff Sonne timely filed an appeal. Anthony Suine, acting solely in his official capacity as the Chief of the Benefits Services Division of CalPERS, signed the First Amended Statement of Issues on April 15, 2016.

² The dissolution of marriage proceeding was the subject of a California Supreme Court decision (*In re Marriage of Sonne* (2010) 48 Cal.4th 118) and a subsequent court of appeal decision (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564).

The Circumstances Surrounding Election of Option 2 Benefits

6. Sheriff Sonne explained at hearing he did not completely understand how to fill out his application. He knew what goal he wanted to accomplish, but did not know how to accomplish it because he found some of the language on the application "complicated" and "convoluted." Therefore, he brought his application with him when he and his undersheriff, Terry Pfau, traveled through Sacramento for business on November 27, 2002. Undersheriff Pfau was also intending to apply for retirement, and he and Sheriff Sonne agreed they would stop at CalPERS, obtain answers to their questions, and submit their applications if they had time during their business trip.

7. Sheriff Sonne and Undersheriff Pfau stopped at CalPERS on November 27, 2002, and met separately with different CalPERS employees to ask their questions and submit their applications. After they each submitted their applications, they returned to Monterey County.

8. Sheriff Sonne stated at hearing he was very honest and upfront with the CalPERS employee with whom he met on November 27, 2002. He told her he was currently married, but might get a divorce in the not too distant future. He also told her he wanted to select a retirement option that would allow his son to receive 74 percent of the retirement allowance after Sheriff Sonne died and Ms. McKinley to receive the remaining 26 percent. He was married to Ms. McKinley for approximately one-fourth of his entire career with the Monterey County Sheriff's Department, and felt that was a "fair" method of allocating the interests in his retirement allowance.

9. According to Sheriff Sonne, he asked the CalPERS employee how to accomplish his goal, and he filled out the application in accordance with her specific instructions for accomplishing that goal. He completed "Section E – Option Election" by selecting "Option 4" and "Option 2W & Option 1 Combined." But the employee then purportedly instructed Sheriff Sonne to cross out his selection, select "Option 2," and initial next to where he had crossed out. For "Beneficiary Information," Sheriff Sonne wrote Ms. McKinley's name and personal information.

The following language was preprinted below the area where Sheriff Sonne wrote Ms. McKinley's name:

I understand that my election is irrevocable and that by electing Option 2W, 3W, or 4, I forfeit my right to an increase in my allowance based on the conditions described in the Guide to Completing Your CalPERS Disability Retirement Election Application.

(Bold original.)

10. One of the options available was "Option 4" and "Multiple Lifetime Beneficiaries (complete information below)." Space was provided for designating as many as three beneficiaries. Sheriff Sonne did not mark those options, and did not name any beneficiaries.

11. Sheriff Sonne also stated he completed "Section F – Retired Death Benefit" and "Section G – Survivor Continuance" pursuant to the CalPERS's employee's specific instructions. He named Ms. McKinley as the lump-sum retired death benefit beneficiary, and listed her as his wife for purposes of the survivor continuance. Sheriff Sonne's son's name was not written anywhere on the application.

12. Last, Sheriff Sonne stated he completed CalPERS Form 509 – Beneficiary Designation pursuant to the CalPERS's employee's instructions. He checked the box next to the designation that read:

I hereby designate the following person(s) who survive me, **SHARE AND SHARE ALIKE**, as **BENEFICIARIES** for any lump-sum death benefits payable under the Public Employees' Retirement Law in the event of my death as a retired person.

(Capitalization original.)

Under "Primary Beneficiaries," Sheriff Sonne identified only Ms. McKinley, even though there were lines for designating a total of three primary beneficiaries.

Under "Secondary Beneficiaries," it read:

In the event I survive the person(s) named above, I hereby designate the following person(s) who survive me, **SHARE AND SHARE ALIKE**, as **BENEFICIARIES**.

(Capitalization original.)

Sheriff Sonne named his son as his sole secondary beneficiary.

13. On December 19, 2002, CalPERS sent Sheriff Sonne correspondence notifying him his "election to receive the Option 2 Allowance has been processed." The correspondence further provided:

BENEFICIARY/SURVIVOR ALLOWANCE:

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.

(Capitalization and bold original.)

Sheriff Sonne's Discovery His Retirement Selection is Contrary to His Goal

14. Sheriff Sonne explained he was in court in his marital dissolution proceeding in 2005 when he heard Ms. McKinley's attorney argue her client would receive approximately one-half of Sheriff Sonne's monthly retirement allowance upon his death. The argument took him by surprise because it was his understanding, and always his goal, she would receive only 24 percent of the allowance, with his son receiving "the lion's share." Sheriff Sonne immediately raised the apparent discrepancy with his family law attorney, but his attorney wanted to wait until the dissolution proceedings were over to resolve the discrepancy. Eventually, Sheriff Sonne wrote a letter to CalPERS, which is discussed in Factual Finding 4.

Testimony of Sabrina Hutchins

15. Sabrina Hutchins is Chief of the Enterprise Strategy and Performance Division of CalPERS. During the relevant timeframe, she worked as a retirement program specialist for CalPERS, and her job duties included answering members' questions about retirement benefits and providing them information for completing their applications for retirement.

16. The Customer Touch Point Notes for Sheriff Sonne indicated he met with Ms. Hutchins when he turned in his application on November 27, 2002, although she had no independent recollection at hearing of having helped him.³ At the time she helped Sheriff Sonne, her last name was "Stroud." Sheriff Sonne explained at hearing he could not recall the name of the employee with whom he met on November 27, 2002, but he was certain it was not Ms. Hutchins because the person was "African-American." Ms. Hutchins is not.

17. Ms. Hutchins explained it was "very common" for members to ask her to help them fill out their applications for retirement when she worked as a retirement program specialist. However, she described the "golden rule" of her job as have been to not give advice or help the member make a decision. Instead, it was her job to give sufficient information about CalPERS's retirement benefits to allow the member to make his own decision.

³ Customer Touch Point Notes are notes CalPERS's employees take simultaneously with any contact they have with a member or regarding a member's account. They contain a general summary of the substance of the particular contact.

Discussion

18. There was a discrepancy in the evidence of whether Sheriff Sonne made a mistake when he selected Option 2 benefits when completing his application on November 27, 2002. On the one hand, he testified he told the CalPERS employee with whom he met he wanted to make sure the “lion’s share” of his monthly retirement allowance would be paid to his son after his death, with only 24 percent paid to Ms. McKinley, and he filled out his application pursuant to the employee’s instructions for accomplishing that goal.

On the other hand, Ms. Hutchins explained she would not have told Sheriff Sonne which retirement option to select to accomplish his stated goal because to do so would have violated the “golden rule” of her job. Instead, she would have provided him information about his unmodified allowance and each of the settlement options so he could make his own decision about which option would best accomplish his intended goal. And since Sheriff Sonne clearly selected “Option 2” on his application, a reasonable inference is that he did so because he concluded that option would best accomplish his goal.

19. The discrepancy in the evidence of Sheriff Sonne’s purported mistake need not be resolved because even if he mistakenly selected “Option 2” on his application, such mistake does not entitle him to relief under Government Code section 20160. Sheriff Sonne’s son’s name appears nowhere on the application, and the language below the area where Ms. McKinley was named the option beneficiary provided clear notice her designation was irrevocable. Additionally, Sheriff Sonne received correspondence from CalPERS within one month of submitting his application, which explained: “Upon your death, benefits will be paid to your beneficiary in accordance with the designation *indicated on your retirement election document.*” (Emphasis added.) No reasonable person would believe Sheriff Sonne named his son as a beneficiary of any portion of Sheriff’s Sonne’s retirement allowance after his death based on the manner in which the application was completed.

While Sheriff Sonne named his son as a beneficiary on CalPERS Form 509, that form clearly indicated it was a beneficiary designation solely for “lump-sum death benefits.” Besides, his son was named only as a *secondary beneficiary*, despite there being space for designating multiple primary beneficiaries.

Summary

20. When all the evidence is considered, Sheriff Sonne did not meet his burden of demonstrating his selection of “Option 2” on his Disability Retirement Election Application was a result of an error or omission correctable pursuant to Government Code section 20160. A reasonable person under the same or similar circumstances would have realized from reading the application that Ms. McKinley was the sole beneficiary designated to receive Sheriff Sonne’s Option 2 survivor’s allowance upon his death. Such conclusion was reinforced when Sheriff Sonne received CalPERS’s December 19, 2002 correspondence. Therefore, his appeal should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. “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).” (Gov. Code, § 20160, subd. (d).) He must meet his burden by a preponderance of the evidence. (Evid. Code, § 115.) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Member's Retirement Allowance

2. The California Supreme Court described a CalPERS member's retirement allowance as follows:

Members of CalPERS, once vested, participate in a defined benefit retirement plan, which supplies a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (which is funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (which is funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (Gov.Code, §§ 21350, 21362.2, subd. (a), 21363.1, subd. (a).)

(*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 121.)

3. When a member completes his application for retirement, he may elect to receive his unmodified allowance, or he may elect one of a group of settlement options. If he elects the former, he receives his full monthly retirement allowance payment. But under the different settlement options, his monthly retirement allowance payments are reduced so a designated beneficiary may receive a “survivor benefit” upon the member's death if the beneficiary survives the member. (*In re Marriage of Sonne* (2010) 185 Cal.App.4th 1564, 1568-1569.)

4. “Option 2” is one of the settlement options available to a member. It provides “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.) And if the designated beneficiary predeceases the member, the member's monthly allowance “pops up” to what his unmodified allowance would have been had he never chosen Option 2. (*Ibid.*) “An Option 2 election

and the designation of the beneficiary are generally irrevocable after retirement. (Gov. Code, §§ 21454, 21456, 21492.)” (*In re Marriage of Sonne, supra*, 185 Cal.App.4th at p. 1569.)

Correction of Errors or Omissions

5. Government Code section 20160, subdivision (a), provides the following with regard to a member’s right to correct an error or omission:

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.⁴

6. The relevant inquiry when determining whether to grant relief for mistake, inadvertence, surprise, or excusable neglect pursuant to Government Code section 20160, subdivision (a), is whether a reasonably prudent person may have made a similar mistake under similar circumstances. (Gov. Code, § 20160, subd. (a)(2); *Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1146 [analyzing the standard for granting relief pursuant to Code Civ. Proc., § 473, subd. (b)].)

⁴ Subdivision (b) pertains to correcting errors or omissions made by an employer or CalPERS.

Conclusion

7. Sheriff Sonne did not meet his burden of demonstrating a reasonable prudent person acting under similar circumstances would have made a similar mistake as he in selecting Option 2 benefits. Therefore, he did not demonstrate his selection of "Option 2" benefits was the result of an error or omission correctable pursuant to Government Code section 20160, and his appeal should be denied.

ORDER

The appeal of Gordon Sonne to change his retirement option selection is DENIED.

DATED: June 29, 2016

DocuSigned by:

Coren D. Wong

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COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings