ATTACHMENT E

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

In the Matter of the Request to Change
Retirement Option Beneficiary of Kanna S.
Birkeland by:
LISA FREDERIKSEN,
Respondent.

Case No. 2017-1041
OAH No. 2018031026

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of
Administrative Hearings, heard this matter on August 9, 2018, in Oakland, California.

Staff Attorney Charles H. Glauberman represented the California Public Employees’
Retirement System (CalPERS).

Lisa Frederiksen appeared at the hearing and represented herself.

The matter was submitted for decision on August 9, 2018.

FACTUAL FINDINGS

1. Kanna S. Birkeland was employed as a teacher at the Redwood City School
   District. Birkeland retired for service in 1998. At the time of retirement, Birkeland selected
   Option 2¹ and designated her spouse, Steffen Birkeland, as her Option 2 beneficiary, and as
   her Retired Death Benefit² beneficiary.

¹ Under Option 2, the member receives a lower monthly allowance and designates a
   beneficiary to receive a monthly allowance upon the member’s death. (Gov. Code, § 21456.)
   If the beneficiary predeceases the member, the member’s monthly allowance is increased OR
   the member may elect a replacement beneficiary, as will be discussed further in Legal
   Conclusion 1, below. (Gov. Code, §§ 21456, 21462.)

² The Retired Death Benefit is a lump sum benefit paid upon the member’s death.
   The beneficiary does not have to be the same as the Option 2 beneficiary. The Retired Death

CALIFORNIA PUBLIC EMPLOYEES’
RETIREMENT SYSTEM
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2. Respondent Lisa Frederiksen is Birkeland's sole surviving child.

3. Steffen Birkeland died on December 5, 2010. At no time during the year following his death did Birkeland contact CalPERS to report his death, or to request an increase in her benefits, or to elect a replacement beneficiary.

4. On March 19, 2013, respondent sent a letter to CalPERS, enclosing a Durable Power of Attorney (POA) document originally signed by respondent on August 15, 2012. Respondent stated in the letter that she had previously sent it to CalPERS in August 2012, but it was never acted on. The POA designates respondent as Birkeland's agent. The POA states, in part:

   No Agent acting under this instrument, except as specifically authorized in this instrument, shall have the power or authority to (a) gift, appoint, assign or designate any of my assets, interests or rights, directly or indirectly, to such Agent, such Agent's estate, such Agent's creditors, or the creditors of such Agent's estate, (b) exercise any powers of appointment I may hold in favor of such Agent, such Agent's estate, such Agent's creditors, or the creditors of such Agent's estate, or (c) use any of my assets to discharge any of such Agent's legal obligations, including any obligations of support which such Agent may owe to others, excluding those whom I am legally obligated to support.

   Attached to the POA is a "Notice to Person Accepting the Appointment as Attorney-in-Fact." This document was also signed by respondent on August 15, 2012. Included in this document is the following passage:

   You may not transfer the principal's property to yourself without full and adequate consideration or accept a gift of the principal's property unless this Power of Attorney specifically authorizes you to transfer property to yourself or accept a gift of the principal's property.

   There is no authorization within the POA document specifically authorizing respondent to designate Birkeland's retirement benefits to herself. There is no provision in the POA expressly granting respondent the authority to designate a beneficiary to receive any benefit upon Birkeland's death, as required by Probate Code section 4264, subdivision (f).

5. According to CalPERS's records, respondent called CalPERS on April 2, 2014, and was advised that Birkeland was eligible for a "pop-up" increase. "Pop-up" Benefit is paid upon the member's death, regardless of whether the named beneficiary predeceased the member or if the member failed to name a beneficiary.
increase is the term CalPERS uses when a member's benefits increase after the Option 2 beneficiary has died. CalPERS's notes from the April 2, 2014, phone call also reflect that a "PUB-98" booklet was sent. This booklet contains information and forms for designating a replacement Option 2 beneficiary.

6. On May 27, 2014, CalPERS sent a letter to Birkeland, in care of respondent, explaining what choices a member has in the event that the Option 2 beneficiary dies. The letter set forth:

   Under Option 2, if Steffen should predecease you, your allowance would “pop-up” to the Unmodified amount which would currently be about $1,550.00 per month. The Unmodified benefit would cease upon your death and no allowance would be payable to anyone. However, if Steffen were to pass away you could modify your option to name a new beneficiary to receive a monthly option death benefit. If this unfortunate event should occur, please download or order the “Changing Your Beneficiary or Monthly Benefit after Retirement” (PUB-98 booklet) that contains the application forms for Pop-Up increase and for a modification of option. Also you may update the lump sum beneficiary designation at any time via the self-service feature on your on-line [CalPERS] account or by completing the BSD-509 form which is also included in the PUB-98 booklet.

7. On May 2, 2016, CalPERS sent a letter to Birkeland, in care of respondent, notifying her that the request to designate respondent as the Retired Death Benefit beneficiary had been accepted.

8. On May 19, 2016, CalPERS received a “Request for Option 2 or 3 Pop-Up Increase” form, signed by respondent. The box on the form stating “Death of current life option beneficiary” as the qualifying event was checked off with an “x.” Respondent wrote on the form that she was enclosing Stefan Birkeland's death certificate and a copy of the POA described above in Finding 4.

9. On June 17, 2016, CalPERS sent a letter to Birkeland, in care of respondent, notifying her that her monthly benefit was being increased due to a “Pop-up adjustment.” The adjustment was made retroactive to the death of Steffen Birkeland.

10. On June 21, 2016, CalPERS sent a letter to Birkeland, in care of respondent, enclosing a partially completed “Modification of Original Election at Retirement” form, electing respondent as the new beneficiary. The letter directed Birkeland to complete, sign, and notarize the form, and return it to CalPERS by July 31, 2016. The letter advised:
Please be aware your election does not become effective until August 1, 2017. There is a delay in the effective date when the election is made 12 months or more after the date of a member’s qualifying event. The election will only be effective if both you and your designated beneficiary are alive on the effective date.

11. The Modification of Original Election at Retirement form was signed and notarized by respondent, acting as Birkeland’s agent, on July 5, 2016. Birkeland died later that same day. The form was sent to CalPERS and received on July 8, 2016.

12. On April 6, 2017, CalPERS sent a letter to respondent, notifying her that it was “unable to process [the] Modification of Original Election at Retirement election due to [Birkeland’s] passing prior to the effective date of the election.”

13. Respondent sent a letter dated May 8, 2017, requesting that CalPERS reverse its decision and designate her as Birkeland’s Option 2 beneficiary.

14. CalPERS sent respondent a letter on August 15, 2017, in which it adhered to its denial. In addition, the letter set forth that upon review of the POA, CalPERS determined that respondent was not authorized to name herself as a beneficiary of Birkeland’s retirement benefits. CalPERS apologized for accepting respondent’s Modification of Original Election at Retirement form in error, in light of the POA’s prohibition on her transferring Birkeland’s retirement benefits to herself.

15. Tara Hench is an Associate Governmental Program Analyst for CalPERS. She reviewed Birkeland’s file to determine whether the request to designate respondent as the replacement beneficiary could be approved under Government Code section 20160, the statute governing mistakes. Hench concluded that this section could not be applied to permit CalPERS to approve respondent’s request.

16. Respondent submitted her appeal on October 5, 2017. This hearing ensued.

**Respondent’s evidence and contentions**

17. Respondent explained that Birkeland was diagnosed with dementia in 2012. Respondent began taking over responsibility for Birkeland’s affairs. Birkeland was admitted to the hospital for pneumonia in late April 2016. She was diagnosed with terminal lung cancer, and died just a few months later.

18. Respondent asserts that she was never aware that Birkeland had Option 2 benefits until May 2016, two months before Birkeland died. She asserted that she never received a PUB-98 in the mail in 2014 and also never received the May 27, 2014, letter from CalPERS, described above in Finding 6. Respondent explained that Birkeland was not aware of her own benefits and did not maintain documents in an orderly manner. Respondent discovered important documents hidden in a cabinet when Birkeland moved out of her home.
of many decades into an assisted living facility in 2014. At this time, respondent discovered that Birkeland had purchased long term care insurance from CalPERS, and so respondent contacted CalPERS to make a claim. Respondent asserts that she contacted CalPERS several times beginning in 2014, asking for information regarding changing beneficiaries, and that CalPERS never provided her any information until May 2016. At this point, she was unable to meet the requirements for electing a new beneficiary because her mother did not live for another year. Respondent insisted that she would have acted sooner if she had been sent this information sooner, and that she did the best she could.

19. Respondent believes that Birkeland would have wanted her to receive her Option 2 benefits. She noted that her mother had selected Option 2, reflecting her preference for someone to receive her retirement benefits after her death.

20. Respondent contends that CalPERS should have notified her in 2013 that the POA did not entitle her to designate benefits to herself. She also contends that, as Birkeland’s sole heir, she should be treated as a beneficiary under Government Code section 21493, which sets forth the order of payment of death benefits to surviving family members when a member dies without designating a beneficiary. This provision is of no avail because it applies only to death benefits and does not apply to retirement benefits.

LEGAL CONCLUSIONS

1. Government Code section 21462 provides that if a member retires under Option 2, and the designated beneficiary predeceases the member, the member may name a different beneficiary. Subdivision (b) directs that the election of a new beneficiary “shall be made within 12 months following the death of the beneficiary who predeceased the member.” When done during this timeframe, the election shall be effective “on the date specified on the election, provided that this date is not earlier than the day following receipt of the election [by CalPERS].” Subdivision (c) provides that if the member fails to elect a new beneficiary within 12 months of the death of the original beneficiary, the member may still elect a new beneficiary; however, this election “shall become effective no earlier than 12 months after the date it is filed with the board, provided that neither the member nor the designated beneficiary die prior to the effective date of election.” Birkeland died the same day that the document designating respondent as beneficiary was signed. Therefore, the election never became effective. Furthermore, CalPERS correctly refused to honor the election on the grounds that respondent lacked the authority to designate benefits to herself pursuant to the language of the POA as well as Probate Code section 4264, subdivision (f).

2. Government Code section 20160 sets forth under what circumstances a request to correct an error may be approved. Pursuant to subdivision (a), an error or omission by a member or beneficiary may be corrected only if all of the following criteria are met:

(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.

CalPERS correctly determined that respondent was not entitled to approval of her request for modification of Option 2 beneficiary under this statute. Birkeland was only entitled to elect a new beneficiary if both she and the beneficiary were both still alive 12 months after the election was submitted. To grant respondent’s appeal would deviate from Government Code section 21462 and provide a right that would not otherwise be available to a member. Furthermore, it was not reasonable for Birkeland and/or respondent not to act to change beneficiaries until more than five years after Steffen Birkeland died. Finally, CalPERS never received a request to elect respondent as Birkeland’s Option 2 beneficiary from anyone having the authority to make such a request.

3. Respondent’s remaining contentions were considered and found to lack merit.

ORDER

Respondent Lisa Frederiksen’s appeal is denied.

DATED: September 7, 2018

KAREN REICHMANN
Administrative Law Judge
Office of Administrative Hearings