ATTACHMENT A

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

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

DANIEL I. GOLDFIELD,

Respondent.

Agency Case No. 2017-1028
OAH No. 2018031062

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Orange, California on December 12, 2018, and March 8, 2019.

Preet Kaur, Senior Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System.

Samuel Wells, Attorney at Law, represented Daniel Goldfield.

The matter was submitted on April 12, 2018.¹

FACTUAL FINDINGS

1. Anthony Suine filed Accusation Case No. 2017-1028 in his official capacity as Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

2. By virtue of his employment with the City of West Covina, beginning on February 16, 1989, Donald I. Goldfield (respondent) became a safety member of CalPERS.

¹ The hearing in this matter concluded on March 8, 2015. The record remained open to allow the parties to file briefs. Respondent filed his brief on April 12, 2019, and it was marked Exhibit B for identification. Complainant did not file a brief.

On April 12, 2019, the record was closed, and the matter was submitted.
3. On February 29, 2008, respondent filed an application for industrial disability retirement, with an effective date of May 4, 2008. Respondent elected Option 1 and named his daughter as his beneficiary.

4. Commencing January 31, 2012, and on three occasions thereafter, respondent began discussing the possibility of marriage and changing his retirement option with CalPERS staff. According to the respondent's Touch Point Report, on August 14, 2012, CalPERS staff mailed respondent a copy of a CalPERS pamphlet entitled “Changing Your Beneficiary or Monthly Benefit After Retirement (PUB 98)”; on August 16, 2012, respondent reported to CalPERS staff that he had downloaded PUB 98.

5. On October 9, 2014, respondent married.

6. On October 22, 2014, respondent informed CalPERS staff that he had married, provided a copy of his marriage certificate and submitted his Application to Modify Option and/or Life Option Beneficiary (Application), naming his wife as beneficiary.

Between October 22, 2014, and January 21, 2015, respondent had multiple conversations with CalPERS about changing his retirement benefit option. During this time, there was at least one occasion when CalPERS staff made an unintentional mistake providing information to respondent; on at least one occasion, CalPERS staff received necessary documents but later stated that respondent needed to provide the documents again.

Respondent recalled that he received and reviewed PUB 98 in 2014.

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2 "Service Retirement Election Application," March 2014 (PUB 43), describes Option 1 as follows:

This retirement option provides a lump sum payment of your remaining member contributions to your beneficiary after your death. The reduction to your monthly benefit to provide this payment is based on your life expectancy and the amount of your contributions. You may designate more than one person as beneficiary, and you may change your beneficiary at any time.

The foregoing language was contained in a publication subsequent to the date that respondent filed his retirement application. However, the publication in existence at or about the time that respondent filed his application was not included in the record. No evidence was offered to establish that the description of Option 1 was changed after respondent filed his application.

3 Presumably PUB 98 was in existence in 2012, and the similar publication in the record is a modified version.
7. On January 21, 2015, CalPERS staff mailed the Modification of Options Election documents to respondent and informed him that the signed and notarized documents were due back by February 28, 2015, in order to have the effective date of March 1, 2015.

8. On February 9, 2015, respondent and his wife appeared in the Orange Regional Office (ORO) and submitted his Application to Modify Option and/or Life Option Beneficiary. Respondent recalled that he received PUB 98 and that he reviewed this CalPERS publication prior to going to the ORO.

Page 17 of PUB 98 explained the difference among Options 2, 2W, 3 and 3W. If a CalPERS member elected Option 2 or 3 and the beneficiary died, or the parties divorced, and the beneficiary had no community property interest or the beneficiary disclaimed entitlement to the monthly allowance, the member could receive an increase to his allowance equal to his unmodified benefit, and the beneficiary would no longer be entitled to a monthly benefit. "This is known as a 'pop-up' increase." If a member elected Option 2W or 3W and the beneficiary died or the member and his spouse divorced, the member’s benefit would not increase, and his former spouse would still be entitled to a monthly death benefit. "The 'W' indicates 'without pop-up increase.'"

Page 19 of PUB 98 stated, in part: “You can modify your current retirement option and name a new beneficiary for a lifetime option benefit only after a qualifying event, and provided your current lifetime option beneficiary” is not a former spouse with a community property interest in the member’s CalPERS retirement. A member may change his election of Option 2W to another option other than the Unmodified Allowance and name a new beneficiary.

9. While at the ORO, respondent and his wife spoke with Renzo Vergara, a CalPERS staff member.

At or prior to the meeting with Mr. Vergara, respondent received a CalPERS document entitled “Modification of Original Election at Retirement/Retirement Allowance and Optional Settlement Information (Modification of Original Election at Retirement).” The document contained a chart that identified the benefit amount that respondent would receive during his lifetime as well as the amount that his wife would receive upon his death, based on his current gross allowance, depending on the option that he chose. Below the chart were two asterisks which stated the following:

**Options 2W & 3W [sic] As an alternative to Option 2 or Option 3 you may elect to receive the higher Option 2W or 3W allowance with the understanding that you forfeit your right to a pop-up allowance increase in your monthly allowance upon the death or removal of your beneficiary [sic]**

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According to the Modification of Original Election at Retirement form, respondent's gross allowance was $8,290.97. Respondent chose Option 2W; his reduced monthly allowance was $7,174.53; upon respondent's death, his wife's monthly allowance would be $7,312.12.

10. After reviewing PUB 98, respondent had questions about his retirement options. Mr. Vergara answered these questions about Option 1, 2, 2W, 3, 3W and 4.

According to respondent, Mr. Vergara explained that if respondent chose Option 2, he would be eligible for pop-up benefit; however, if he chose Option 2W and his wife preceded him in death, he would not be eligible for the pop-up benefit; Mr. Vergara did not explain to him that his decision to elect Option 2W was irrevocable, and, if he and his wife divorced, he would not be entitled to receive the pop-up benefit.

Mr. Vergara did not specifically recall what he stated to respondent and his wife and described what he "normally" does. Normally he explains general information and provides information in response to frequently asked questions; he does not provide specifics unless asked because he does not have time to do so; also, there are publications with the information. Mr. Vergara explained that it is impossible to cover every scenario.

11. Thereafter, on February 9, 2015, respondent and his wife signed the Modification of Original Election at Retirement form in the presence of Mr. Vergara. By letter, dated February 12, 2015, CalPERS notified respondent that his election to name his wife as beneficiary for Option 2W would be effective on March 1, 2015, and his April 1, 2015, check would reflect his new election. After election of Option 2W, the first payment was made on April 1, 2015.

Respondent testified that he chose Option 2W because he wanted to provide for his wife upon his death, especially since she had just lost her son in Afghanistan; his wife was younger than he was and relatively healthy; respondent had a number of medical conditions and therefore anticipated that he would predecease his wife.

12. On June 8, 2015, respondent informed CalPERS staff that he was considering getting an annulment and wanted to know if he could reverse his decision to provide a monthly allowance to his spouse. Respondent requested a call back about his question.

On June 10, 2015, respondent informed CalPERS staff that he might be getting a divorce. He was advised to submit the divorce decree, but benefits would remain the same because he elected Option 2W, and he was not entitled to pop-up benefits.

13. In September 2016, respondent contacted CalPERS staff on three different occasions, stating that he was getting divorced and requesting the pop-up benefit. On September 22, 2016, respondent informed CalPERS staff that he was not advised that Option 2W would not allow him to increase his pension in the event of divorce. CalPERS staff informed respondent that the Modification of Original Election at Retirement document that
he signed specifically stated with an “asterisk” that the selection of Option 2W or 3W would forfeit his right to a pop-up allowance increase upon the death or removal of the beneficiary and forwarded a copy of the document to respondent. CalPERS staff requested a copy of respondent’s divorce decree.

14. On October 6, 2016, when he walked into ORO, respondent met with and spoke to Mr. Vergara about Option 2W that he elected in 2015; now, he was getting divorced, and his spouse would give up any right to his retirement benefit; Mr. Vergara reported that respondent “had been informed by CalPERS staff that his pension would not revert back to it’s [sic] original value.” Respondent stated to Mr. Vergara the election document did not state that “in the event of divorce or separation that he waived the pop-up”.

In respondent’s Customer Touch Point Report, Mr. Vergara wrote, “I was the analyst that accepted and witnessed his signature on the election to modify his payment option, [sic] I am fairly certain that I did not tell member specifically that if he divorced he was waiving his pop-up option, [sic] I just stated that if his beneficiary died before him that his amount would remain the same. I don’t normally mention specifics such as that unless I am specifically asked.”

Respondent’s testimony was consistent with the statements in the foregoing paragraphs.

15. On May 29, 2017, respondent submitted an email to Mr. Vergara, appealing the decision that he made selecting Option 2W and stated, in part:

I am humbly coming to you and asking you to recall the conversation we had post my decision where it was discussed and you recalled not explaining fully the ramifications of my selection of the 2W\(^5\). At this time this is severely impacting my ability to earn my deserved and earned wages without this sacrifice of a permanent reduction of approximately 900.00 per month for Life.

I worked as a FireFighter/ParaMedic for three decades and was proud to have had the privilege to serve the Public [sic]. I have always prided myself to be the good guy. I honestly thought I was following thru with making the right decision especially after the loss of [his ex-wife’s son] being KIA during Operation Freedom in Afghanistan I just wanted to provide

\(^5\) Respondent did not include periods at the end of sentences in his email.
Please assist me and help initiate me to go back to an Unmodified Allowance and/or returning me to something other than this punitive and permanent 2W Option.

Mr. Vergara arranged for the email to be a part of respondent’s CalPERS file.

18. By letter, dated June 5, 2017, respondent requested that CalPERS correct his mistake of selecting Option 2W because he selected Option 2W without knowing or fully understanding that by selecting Option 2W he would be waiving the possibility of going back to the Unmodified Allowance.

19. On June 23, 2017, Tara Hench, a CalPERS employee with Retirement Administration and Support, responded in writing to respondent’s request that CalPERS “allow [him] to change [his] retirement payment option from Option 2W to Option 2, which would allow [him] to increase to the Unmodified Allowance as a result of dissolution of marriage.” In her letter, Ms. Hench

20. On August 1, 2017, CalPERS staff notified respondent of his appeal rights.

21. On September 19, 2017, Jim Niehaus, president, California Public Pension Advisers, filed an appeal on respondent’s behalf, requested a hearing, and stated, in part:

The attached letter from [Ms. Hench], dated June 23, 2017, forms the basis for this appeal. Basically, we disagree that Mr. Goldfield’s mistake is not a correctable mistake under the Public Employees’ Retirement Law. Gov. Code §20160 (a) provides ‘the board may, in its discretion and upon any terms it deems just, correct the errors . . . of any . . . retired member . . . ’ We don’t believe there was adequate focus on how this member’s mistake occurred. There are notes in [respondent]’s CalPERS record where Mr. Renzo Vergara admits to withholding crucial information during an in-person meeting at the regional office that would have led to Mr. Goldfield taking the option 2 pop-up rather than waiving his rights to “pop up” in the event of a divorce.

When Mr. Goldfield signed his election document, his election of 2W was based on what he learned from Mr. Vergara. Had Mr. Vergara explained that if the couple ended up divorced, [respondent] would continue receiving the reduced allowance for the rest of his life. Had Mr. Goldfield been so informed, he would have purchased the extra protection of option 2, no question about it. His incredibly short marriage to [his wife] was unforeseen but it was not the “change in circumstance” noted in the June 23, 2017 from Ms. Hench. The mistake
happened before the marriage failed. The correctable mistake happened at the regional office and has been acknowledge [sic] by Renzo Vergara. Mr. Goldfield's mistake or his inadvertence or excusable neglect can be traced to that fateful meeting with CalPERS staff, Renzo Vergara.

22. The evidence in the record included the testimony of Tara Hench, Mr. Vergara and respondent. In addition, it included all relevant documents in the CalPERS file, including: (1) respondent's Customer Touch Point Report, his application for disability retirement, and application to modify benefits, (2) CalPERS PUBs 43 and 98, and (3) communications between CalPERS staff and respondent.

The witnesses in this case were credible; for the most part, there was no inconsistency between the documented statements in respondent's Customer Touch Point Report and the testimony in this hearing. Respondent did not question the credibility of any documents admitted into evidence, including the statements made in his Customer Touch Point Report.

23. There is no dispute that Mr. Vergara did not inform respondent that if he elected Option 2W and later divorced he would not be allowed to pop-up benefits.

24. The appeal is limited to the issue of whether respondent should be allowed to change his retirement option section from Option 2W to another option settlement.

25. It was established that respondent made an informed decision when he elected to change from Option 1 to Option 2W.

A careful review of respondent's Customer Touch Point Report demonstrates that respondent asked questions when he had them. He began asking questions about changing his option as early as 2012. There is no dispute that mistakes were made when he asked questions. There is no evidence that any of mistakes made by CalPERS staff were intentional or impacted his decision regarding his retirement option.

Prior to changing his option, respondent reviewed PUB 98. There is information in this publication about Option 2W, what the "W" means and the benefit and consequences of choosing 2W over other options.

There is no evidence that respondent asked CalPERS's staff specific questions about Option 2W.

Most significantly, respondent explained that he chose Option 2W to provide for his wife and the reason he was concerned about doing so.

As such, for the foregoing reasons, it was not established that respondent made a mistake when he chose Option 2W.
LEGAL CONCLUSION

Burden and Standard of Proof

1. A disability retirement applicant has the burden of establishing eligibility by a preponderance of the evidence. (Evid. Code, §§ 115 and 500; See also Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.) A CalPERS active or retired member seeking correction of an error or omission pursuant to Government Code section 20160 “has the burden of presenting documentation or other evidence to the board establishing the right to correction.” (Gov. Code, § 20160, subd. (d).)

2. “‘Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.]” (Glage v. Hawes Firearms Company (1990) 226 Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant.” (Ibid., italics emphasis in original.) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation].” (People v. Mabini (2001) 92 Cal.App.4th 654, 663.)

3. CalPERS is governed by the California Public Employees' Retirement Law, and the following relevant provisions of the Government Code were in effect at all times pertinent to respondent’s appeal.

4. Government Code\textsuperscript{6} 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 the 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.

\textsuperscript{6} Hereinafter all reference is to the Government Code unless otherwise stated.
(3) The correction will not provide the party seeking protection 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 the 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 subdivision (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.

5. Section 21453 provides in part:

An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance or, in the event of a change of retirement status after retirement, within 30 calendar days after the making of the first payment on account of any retirement allowance following the change in retirement status. “Change in retirement status” includes, but is not limited to, change from service to disability retirement, from disability retirement to service retirement, from nonindustrial disability retirement to industrial disability retirement or from industrial to nonindustrial disability retirement.

6. Section 21462, subdivision (a)(1), states:

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 . . . in the event of dissolution or annulment of the marriage . . . 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 beneficiary.

Evaluation

7. In 1989 respondent became a member of CalPERS. In 2008 CalPERS authorized him to receive industrial retirement benefits, and respondent elected to receive the maximum retirement benefit amount, naming his daughter as the beneficiary. In October 2014 respondent married. In February 2015, after considering his options and wanting to provide for his wife should he pass away, he elected to change to Option 2W. After this election, he received the first warrant on April 1, 2016. Pursuant to Section 21453, he was required to request a retirement option change on or before May 1, 2016. Respondent’s first inquiry about changing his retirement option to allow for a pop-up was over four months later on September 19, 2016.
8. Section 20160 authorizes CalPERS to correct certain types of errors or mistakes. These include “mistake of fact,” or a “mistake of law,” or the result of inadvertence, surprise or excusable neglect, as defined in Code of Civil Procedure section 473. Such correctable errors or omissions cannot be the result of the member making a knowing decision and later changing his mind. CalPERS cannot correct a mistake that is a result of change of circumstances; in addition, the mistake must pass the “reasonable person in like or similar circumstances” standard.

Respondent made an informed decision to elect Option 2W. The Modification of Original Election at Retirement form that respondent executed and submitted indicated Option 2W would provide a higher allowance, but respondent would forfeit his right to a pop-up increase upon the death or removal of his beneficiary. Respondent elected Option 2W and named his wife as the option beneficiary in order to provide for her upon his death. Respondent’s dissolution of marriage was a change of circumstance and not a correctable mistake.

9. Respondent is, thus, not allowed to change his retirement option selection from Option 2W.

ORDER

The decision of the California Public Employees’ Retirement System denying Daniel I. Goldfield’s request to change his retirement option is sustained. The Request of Daniel I. Goldfield to change his election of Option 2W is denied.

DATED: May 28, 2019

[Signature]

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings