

ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Appeal of Retirement
Benefits Payable Upon the Death of Floristec
P. Foster by:

Case No. 2018-1111

OAH No. 2019010971

AARON L. FOSTER.

Respondent.

and

QUINCY L. DAVENPORT

Respondent.

and

GLORIA O'NEAL.

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, Office of Administrative Hearings, State of California, on April 24, 2019, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Rory Coffey, Senior Attorney.

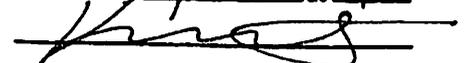
Respondents Aaron L. Foster, Quincy L. Davenport, and Gloria O'Neal were present at the hearing and represented themselves.¹

Evidence was received, the record was closed, and the matter was submitted for decision on April 24, 2019.

¹ Respondent Davenport did not testify or present any evidence at the hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED May 20 2019



ISSUE

The issue on appeal is whether CalPERS is correct in its determination that: (1) decedent Floristee P. Foster's (decedent) Post-Retirement Lump-Sum Beneficiary Designation form (Beneficiary Designation) received by CalPERS on August 29, 2017, designating respondent O'Neal as the beneficiary is valid; and (2) respondents Foster and Davenport are not entitled to the Option 1 balance of contributions or Lump Sum Death Benefit (Death Benefit) payable by CalPERS.

FACTUAL FINDINGS

Procedural History

1. Decedent was employed as a Teaching Assistant with the Department of Corrections and Rehabilitation. On January 10, 2013, decedent signed an application for service retirement pending disability retirement (application). Decedent wrote on the application that she had "bone cancer." Decedent retired for service effective January 12, 2013. By virtue of her employment, decedent was a State Safety member at the time of her retirement.

2. On the application, decedent elected "Option 1" for her "Retirement Payment Option and Beneficiary." Decedent elected to have the balance of her Option 1 contributions and Death Benefit go to her sons, respondents Foster and Davenport, who were listed as the beneficiaries.

3. On August 28, 2017, decedent signed the Beneficiary Designation, in which she designated respondent O'Neal, decedent's sister, as the primary, 100 percent beneficiary. Decedent listed respondent O'Neal as the beneficiary of her Death Benefit and Option 1 balance. CalPERS received the Beneficiary Designation on August 29, 2017.

4. On August 29, 2017, decedent signed a "Special Power of Attorney" form (Power of Attorney) in which she designated respondent O'Neal as her "attorney-in-fact." Decedent checked the boxes on the form to authorize respondent O'Neal to: select any payment option available under the retirement plan, even though it may reduce the monthly allowance that would otherwise be paid to her during her lifetime; to designate or change her beneficiary; and to designate herself as decedent's beneficiary. The signing of the Power of Attorney form was witnessed by Nakia Foster, respondent O'Neal's niece and Katricee Isaac, her daughter.

5. On September 12, 2017, CalPERS sent decedent a letter confirming that the Beneficiary Designation was accepted. CalPERS confirmed that respondent O'Neal was the primary, 100 percent beneficiary of the Death Benefit and Option 1 balance.

6. On September 15, 2017, decedent passed away. On September 18, 2017, CalPERS sent respondent O'Neal a letter that included information and forms to complete to claim decedent's death benefits. Decedent's Death Benefit was \$2,000. The Option 1 balance was \$10,962.88. On October 2, 2017, CalPERS received respondent O'Neal's completed "Application for Retired Member/Payee Survivor Benefits" form (Application for Survivor Benefits form).

7. After respondent O'Neal submitted to CalPERS the Application for Survivor Benefits form, respondent Foster contacted CalPERS to dispute decedent's Beneficiary Designation. Specifically, on February 6, 2018, respondent Foster contacted CalPERS and contended that decedent was not capable of signing the Beneficiary Designation naming respondent O'Neal as her beneficiary.

8. On March 16, 2018, CalPERS sent respondent Foster a letter explaining that he was required to provide a "written statement disputing the beneficiary designation on file" and "[a]ny supporting documentation" he wanted to include. Respondent Foster was informed that if CalPERS did not receive a written dispute within 30 days, decedent's benefits would be "paid according to the valid designation on file."

9. On March 22, 2018, CalPERS received from respondent Foster a handwritten letter stating that decedent intended for her benefits to be given to him and respondent Davenport. Respondent Foster also stated that he had all of decedent's documents. Respondent Foster also included a February 14, 2018 letter from Dr. Deepak Shrivastava, with Optimal Health Services. Dr. Shrivastava wrote that decedent suffered from breast cancer with "metastases to the liver and bones." He explained decedent received hospice services from July 25, 2017, until her death, and that she was "confused and intermittently unresponsive" during that time.

10. On June 2, 2018, CalPERS sent respondent Foster a letter explaining that the note from Dr. Shrivastava he submitted with his March 22, 2018 letter was "not sufficient to deem the designation on file as invalid." Specifically, CalPERS could not confirm based on the note that decedent was "not able to competently sign a new beneficiary designation form on August 28, 2017." CalPERS requested respondent Foster to provide a statement from decedent's treating physician "as to her cognitive state on August 28, 2017." CalPERS explained the "physician must state whether or not [decedent] was mentally competent to make a beneficiary designation at that time." CalPERS directed respondent Foster to submit the information by July 9, 2018. CalPERS also informed respondent that once the information was received, CalPERS would "make a determination of the rightful beneficiary for lump sum death benefits payable."

11. On June 2, 2018, CalPERS sent respondent O'Neal a letter explaining that a dispute about the validity of decedent's Beneficiary Designation had been filed. CalPERS explained that as a result of the dispute, consideration of decedent's competency and ability to sign the Beneficiary Designation would be considered. CalPERS also explained that medical documentation concerning decedent's cognitive state on August 28, 2017, was

requested from the disputing party. CalPERS informed respondent O'Neal that she could submit documentation for CalPERS to consider by July 9, 2018.

12. By letter dated July 5, 2018, respondent O'Neal provided CalPERS information concerning decedent. Respondent O'Neal explained that decedent was of "sound mind, alert and fully aware on August 28, 2017, when she changed her beneficiary assignment." She explained that decedent was in hospice care without life insurance or savings to pay for her funeral or burial expenses. Decedent asked respondent O'Neal to ensure she was buried next to their mother. Neither respondent Foster nor Davenport had jobs or the money to pay for the burial and funeral expenses, and decedent did not trust they would fulfill her final wishes.

Decedent was aware respondent O'Neal and her husband were former state employees and members of CalPERS. Decedent requested respondent O'Neal to contact CalPERS to obtain information about her benefits and handle her affairs. Respondent O'Neal explained to decedent she could not obtain information from CalPERS without the proper documentation. At decedent's request, respondent O'Neal contacted CalPERS and was advised to have decedent sign the Beneficiary Designation and Power of Attorney.

On August 28, 2017, decedent and respondents O'Neal and Foster met to discuss decedent's decision to designate respondent O'Neal the sole beneficiary and person who would handle decedent's affairs. Decedent and respondent Foster briefly spoke privately. Upon respondent O'Neal's return, decedent signed the Beneficiary Designation. Respondent O'Neal explained that respondent Foster indicated he agreed with decedent's wishes.

Respondent O'Neal borrowed money to pay for decedent's funeral and burial costs, which she discussed with respondents Foster and Davenport. Respondent O'Neal intended to use the Death Benefit and Option 1 balance to reimburse her for the funeral and burial expenses. She intended to give any remaining money to respondents Foster and Davenport. Respondent O'Neal stated that respondents Foster and Davenport agreed to the arrangement.

13. On or about July 12, 2018, respondent Foster sent to CalPERS a July 8, 2018 note from Dr. Shrivastava, which again confirmed that decedent was in hospice care from June 25, until September 15, 2017. Dr. Shrivastava stated that decedent was "confused and intermittently unresponsive during the time she received Hospice services." He added that "[d]ue to episodes of confusion, and [decedent] talking about activities that had not happened, on the date of August 28, 2017. I do not believe [decedent] was competent to sign a new beneficiary form."

CalPERS' Determination Regarding Decedent's Death Benefits

14. Shayne Day-Bolar, is a Staff Services Manager in the Benefit Services Division, Survivor Benefit Processing Section of CalPERS. Ms. Day-Bolar was involved in making a determination of who was decedent's designated beneficiary at the time of her death. Ms. Day-Bolar explained that the forms decedent completed and the information

respondents submitted were reviewed by her and her staff. As a result of the review and application of laws set forth in the Public Employees' Retirement Law (PERL), the determination was made that in 2013, when decedent retired, she named respondents Foster and Davenport as her beneficiaries. On August 28, 2017, decedent signed the Beneficiary Designation, naming respondent O'Neal as her sole beneficiary, who was the named beneficiary at the time of defendant's death.

15. Ms. Day-Bolar's staff prepared a letter dated September 18, 2018, explaining the basis for CalPERS's determination. Ms. Day-Bolar reviewed the letter before it was forwarded to Keith Riddle, Assistant Chief, Benefit Services Division, for approval. The letter states that respondent Foster had not provided sufficient information to conclude the Beneficiary Designation was not valid. Additionally, Mr. Riddle explained that CalPERS was not able to verify the validity of the information respondent Foster submitted from various physicians. As a result, CalPERS determined the benefits must be paid "in accordance with the law to the most recent designated beneficiary on file." Respondent Foster was notified of his appeal rights.

16. By letter dated October 18, 2018, respondent Foster appealed CalPERS's determination. Respondent Foster stated in his appeal that respondent O'Neal offered to help him take care of decedent's death benefit paperwork, so that he and respondent Davenport could receive decedent's CalPERS death benefits and properly bury his mother. Respondent Foster further stated respondent O'Neal "manipulated [him] into giving her all [his] information" and respondent Davenport's information. Respondent Foster contended she used this information to change decedent's beneficiary designation. He contended that there was "no way" decedent was in her "right faculties (of sound mind and body)" and that "foul play" had occurred.

Respondent Foster's Evidence

17. Respondent Foster explained that when decedent was in hospice care, he asked respondent O'Neal to with help with his mother's affairs. Respondent Foster claimed that prior to decedent's death, he was not aware the Beneficiary Designation had been changed to list respondent O'Neal as the sole beneficiary. He contended decedent was confused prior to her death and did not sign the form. Respondent Foster denied he was present for any discussions with decedent and respondent O'Neal regarding decedent changing her beneficiary designation.

18. Respondent Foster submitted the February 14, 2018, and July 6, 2018 letters from Dr. Shrivastava, who he believes treated his mother for cancer. He met Dr. Shrivastava a "few times." Respondent Foster asked Dr. Shrivastava to prepare the letters. However, he does not know when Dr. Shrivastava observed or evaluated decedent prior to August 28, 2017. Respondent Foster also submitted three patient medical discharge instruction pages dated August 11, 2017, which noted that decedent was not able to sign the instructions because she was "confused." Respondent Foster could not identify the individual who prepared and signed the forms, but believed it was someone from a nursing home.

19. Respondent Foster admitted that respondent O'Neal paid for part of the cost of decedent's burial and funeral. Respondent Foster and other family members also paid some of the costs.

Respondent O'Neal's Evidence

20. Respondent O'Neal testified consistent with the information she provided to CalPERS in her letter dated July 5, 2018. Respondent O'Neal added that she is a retired Parole Agent, with almost 30 years of state service. She is a member of CalPERS. She is also the co-chair of the Women's Ministry at her church and a volunteer Chaplin at University of California, Davis Medical Center. Respondent O'Neal was at decedent's bedside daily during the last months of her life. Decedent was aware she had a \$2,000 Death Benefit but had no other life insurance. Decedent wanted respondent O'Neal to handle her affairs, including arranging for her funeral and burial. Decedent was concerned respondents Foster and Davenport were not capable of carrying out her wishes. She asked respondent O'Neal to obtain the required forms from CalPERS, and use the money to pay for her funeral and burial expenses.

21. Respondent O'Neal explained that decedent could have made the beneficiary changes without respondent Foster and Davenport's knowledge. However, respondent O'Neal asked decedent to speak to respondent Foster first and decide how to proceed. On August 28, 2017, decedent and respondent Foster had a discussion about decedent's intent to change her beneficiary. Respondent O'Neal left the room while they discussed the issue. When she returned, decedent signed the Beneficiary Designation in the presence of respondents O'Neal and Foster.

22. Respondent O'Neal disputes respondent Foster's contention that decedent was confused or not fully aware of her surroundings when she signed the Beneficiary Designation. Minutes prior to signing the Beneficiary Designation, decedent admonished respondent Foster and told him to listen to respondent O'Neal and others when he did not know or understand something. Likewise, decedent remembered respondent O'Neal and her husband were members of CalPERS. She also talked to respondent O'Neal about painful family issues from the past. Decedent was also aware of who visited her while she was in hospice care, which further demonstrated she was not confused. Respondent O'Neal explained that despite all the time she spent with decedent in the months prior to her death, she never met or heard of Dr. Shrivastava.

Discussion

23. When all the evidence is considered, CalPERS correctly determined decedent's Beneficiary Designation received by CalPERS on August 29, 2017, designating respondent O'Neal as the sole beneficiary is valid. CalPERS also correctly determined respondents Foster and Davenport are not entitled to the Death Benefit or Option 1 balance of contributions payable by CalPERS. Respondents Foster and Davenport have the burden of proving that CalPERS's determination was incorrect. Respondent Foster presented

medical discharge documents and two letters from Dr. Shrivastava that decedent was "confused." However, because Dr. Shrivastava and the authors of the discharge documents were not available at hearing for cross-examination, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings. (Gov. Code, § 11513, subd. (d).) Respondent Foster did not provide any testimony concerning his observations of decedent's cognitive state on August 28, 2017.

24. In contrast, respondent O'Neal provided credible testimony about the circumstances under which decedent completed the Beneficiary Designation and Power of Attorney, including the discussions she had with decedent concerning her desire for a proper funeral and burial. Respondent O'Neal also credibly testified respondent Foster was present when decedent signed the Beneficiary Designation and explained her reasoning for making the change. There was no credible evidence submitted to conclude that the Beneficiary Designation CalPERS received on August 29, 2017, is invalid.

25. In sum, respondents Foster and Davenport did not submit sufficient evidence to overturn CalPERS's determination. Consequently, CalPERS's determination that respondent O'Neal is entitled to the Death Benefit and Option 1 balance of contributions, should be upheld.

LEGAL CONCLUSIONS

Applicable Law

1. CalPERS is governed by the provisions of the Public Employees' Retirement Law (PERL), Government Code section 20000, et seq. In accordance with Government Code section 20134 of the PERL, the hearing in this matter was conducted under the Administrative Procedure Act (APA), Government Code section 11500 et seq.

2. As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051). Respondents Foster and Davenport have the burden of proving decedent's Beneficiary Designation is invalid, and that they are entitled to her Death Benefit and Option 1 balance of contributions.

3. Government Code section 21455 provides:

Optional settlement 1 consists of the right to have a retirement allowance paid to the member until his or her death and if the member dies before he or she receives in annuity payments the amount of his or her accumulated contributions at retirement, to have the balance at death paid to his or her beneficiary or estate.

This section shall apply to any member who retires on or before December 31, 2017.

4. Government Code section 21490 provides the following relating to beneficiary designation, in relevant part:

(a) Except as provided in subdivision (b), a member may at any time, including, but not limited to, at any time after reaching retirement age, designate a beneficiary to receive the benefits as may be payable to his or her beneficiary or estate under this part, by a writing filed with the board.

(b)(1) No designation may be made in derogation of the community property share of any nonmember spouse when any benefit is derived, in whole or in part, from community property contributions or service credited during the period of marriage, unless the nonmember spouse has previously obtained an alternative order for division pursuant to Section 2610 of the Family Code.

(b)(2) No designation may be made by an unmarried member who has attained the minimum age for voluntary service retirement applicable to the member in his or her last employment preceding death if that designation is in derogation of the rights of the member's unmarried, dependent children who are under the age of 18 years at the time of the member's death.

(c) The designation, subject to conditions imposed by board rule, may be by class, in which case the members of the class at the time of the member's death shall be entitled as beneficiaries. The designation shall also be subject to the board's conclusive determination, upon evidence satisfactory to it, of the existence, identity or other facts relating to entitlement of any person designated as beneficiary, and payment made by this system in reliance on any determination made in good faith, notwithstanding that it may not have discovered a beneficiary otherwise entitled to share in the benefit, shall constitute a complete discharge and release of this system for further liability for the benefit.

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5. Government Code section 21492 provides:

The designation of a beneficiary under the optional settlements in Sections 21456, 21457, 21459, 21475, 21475.5, 21476, 21476.5, and 21477, and in Section 21458, if a benefit involving the life contingency of the beneficiary is provided, is irrevocable from the time of the first payment on account of any retirement allowance. Otherwise a designation of beneficiary under this system is revocable at the pleasure of the member who made it. A member's marriage, dissolution of marriage, annulment of his or her marriage, the birth of his or her child, or his or her adoption of a child shall constitute an automatic revocation of his or her previous revocable designation of beneficiary. A member's termination of employment and withdrawal of contributions shall constitute an automatic revocation of the previous revocable designation of beneficiary. Subsequent reemployment or reinstatement from retirement to employment covered by this system shall not reinstate the previous designation of beneficiary.

Upon revocation of any beneficiary designation, a member may designate the same or another beneficiary by a writing filed with the board, except as otherwise provided in Section 21490.

6. As set forth in Factual Findings 1 through 16, and 20 through 25, CalPERS correctly determined, pursuant to Government Code sections 21490 and 21492, that decedent's Beneficiary Designation received by CalPERS on August 29, 2017, naming respondent O'Neal as the primary, 100 percent beneficiary for the Death Benefit and Option 1 balance of contributions is valid. Respondents Foster and Davenport did not submit sufficient evidence to establish that CalPERS's determination should be overturned. Consequently, their appeal must be denied.

ORDER

The appeal of respondents Aaron L. Foster and Quincy L. Davenport is DENIED. The Lump Sum Death Benefit and Option 1 balance of contributions shall be paid to respondent Gloria O'Neal.

DATED: May 16, 2019

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Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings