

**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 Lifetime Monthly Benefit  
Payable Upon the Death of Philip S. Ryan by:**

**DINA D. BITTON, Respondent.**

**Agency Case No. 2019-0388**

**OAH No. 2019060147**

**PROPOSED DECISION**

Karen Reichmann, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on September 24, 2019, in Oakland, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees' Retirement System.

James A. Lassart, Attorney at Law, represented respondent Dina Bitton, who was present throughout the hearing.

The record remained open for the submission of closing briefs. CalPERS's brief was timely filed and marked as exhibit 20. Respondent's brief was timely filed and marked as exhibit 227.

The record closed and the matter was submitted for decision on October 11, 2019.

## **FACTUAL FINDINGS**

1. Philip S. Ryan was employed by the California Unemployment Insurance Appeals Board. By virtue of this employment, Ryan became a state miscellaneous member of the California Public Employees' Retirement System (CalPERS). Ryan was an attorney.

2. Ryan retired for service on March 1, 1999. At the time, he was in a relationship with respondent Dina Bitton, but they were not married and had not registered as domestic partners. On his retirement application, Ryan selected his daughter Kelly as the beneficiary for the Retired Death Benefit. He elected to receive the Unmodified Allowance, which is the maximum retirement benefit. This benefit does not provide payment of benefits to any survivor or beneficiary, other than a lump sum death benefit. Ryan began receiving a monthly retirement allowance and health benefits upon his retirement.

3. Ryan and respondent married in January 2002. The marriage entitled Ryan to modify his retirement benefits. Ryan did not seek to modify his retirement benefits within one year of the marriage. Had he done so, the modification would have taken effect immediately. After one year of marriage, Ryan was still entitled to modify his retirement benefits to designate respondent as his beneficiary, but subject to a requirement that the modification would not go into effect for one year, and would only go into effect if neither he nor respondent died before the yearlong waiting period ended. Modification of retirement benefits to designate a beneficiary causes a

reduction in the monthly retirement benefit. The modification of election must be done in writing.

4. In the summer of 2002, Ryan contacted CalPERS to add respondent to his CalPERS medical plan, because her employer had stopped providing her with health benefits. A surviving spouse can only continue to receive health benefits after a member's death if the spouse is also receiving a monthly benefit as the retired member's beneficiary.

5. Ryan was diagnosed with cancer in 2005. Over the course of several years, he had extensive treatment including multiple surgeries, numerous rounds of chemotherapy, and radiation. He suffered a heart attack in 2016 and was frequently hospitalized.

6. In January 2016, Ryan went with his daughter Kelly, a lawyer, to the CalPERS office in Sacramento. They met with a CalPERS representative. According to notes of the meeting made by the CalPERS representative,

Mbr [member] came into SRO [Sacramento Regional Office] to inquire about death benefits. Educated on unmodified allowance and RD [Retired Death] benefit and pro-rata check. Educated on marriage being a qualifying event to modify option. Will need copy of marriage certificate and proof of spouse birthdate. Provided Changing Bene pub and both spouse and mbr needing to be alive for 12 mos after submission of election form. Educated on health after mbr passes for spouse if mbr elects to leave spouse a monthly benefit.

The "Changing Bene pub" referred to in the meeting notes is a CalPERS publication containing information on modifying retirement benefits, including information applicable to Ryan. The publication explains the 12-month waiting period applicable when a spouse was not designated within one year of the date of marriage. The publication describes how to obtain estimates and submit a change of benefits request online. The meeting notes from January 2016 also reflect that Ryan was provided with a Power of Attorney form at the meeting, which was never executed.

7. Fourteen months later, on March 27, 2017, Ryan called the CalPERS call center. According to the notes made by the representative who spoke with him,

Member called to inquire what spouse will receive when he passes away. Specifically he wants to make sure she's eligible to receive a monthly benefit so he's assured the health coverage will continue for spouse as a survivor.

The call center representative forwarded the note to the Benefit Services Division with the direction, "Please send to verified address." This entry served to direct the Benefit Services Division to generate what CalPERS calls a "Death Estimate Letter." It is unknown what the representative verbally informed Ryan during the conversation.

8. Due to a backlog at CalPERS, the Death Estimate Letter was not sent until October 17, 2017. Ordinarily, the letter would have been sent within 90 days. The October 2017 letter informed Ryan that he could fill out a modification of option form online to designate respondent as his beneficiary. The letter advised that there is a one-year waiting period before the modification goes into effect. The letter did not

include an actual estimate of retirement benefits should Ryan designate respondent as his beneficiary.

9. On October 27, 2017, Ryan went online as instructed and filled out a modification request form. He submitted the form three times, apparently due to confusion using the website, each time selecting "Option 3w" with respondent as the beneficiary.

10. On October 27, 2017, CalPERS sent Ryan a letter acknowledging his request to modify and enclosing a form to be signed by respondent and notarized. Respondent completed the form as directed and returned it to CalPERS. On November 6, 2017, CalPERS sent Ryan a letter notifying him that his modification of election at retirement had been processed, and that the change would go in effect on December 1, 2018.

11. Ryan died on July 20, 2018, less than one year after selecting respondent as his beneficiary. The designation of respondent as his beneficiary had not yet gone in effect. Accordingly, CalPERS determined that she is not entitled to a monthly benefit and she is not entitled to continuing health benefits. CalPERS notified her of this by letter dated August 21, 2018. Respondent disputed the determination by letter dated August 26, 2018.

12. On November 27, 2018, CalPERS sent respondent a more detailed letter explaining its determination and explaining respondent's appeal rights. Respondent appealed the denial.

13. Respondent testified that she was not involved with Ryan's interactions with CalPERS, and was unaware that her health benefits would not continue upon his death, until he gave her the form to sign in October 2017. Up until that time, she had

always assumed that she would retain the health care coverage when Ryan died. Respondent testified that Ryan did not share details of his discussions with CalPERS with her. As his illness progressed, he became forgetful and had difficulty concentrating, but he was resistant to help. He was hospitalized frequently during the last year of life, and his health and comfort were respondent's priorities. She feels strongly that Ryan intended for her to have health care after his death, and blames CalPERS's delay in sending the Death Estimate Letter for preventing Ryan from changing his retirement benefit earlier.

14. Respondent is a computer scientist. She has held academic positions, worked for private employers, and worked as a consultant.

## **LEGAL CONCLUSIONS**

1. Government Code section 21462 provides that a retired member who was not married at the time of retirement may modify his or her retirement election to designate the new spouse as a beneficiary. The election is irrevocable and must be made within 12 months of marriage. If not made within 12 months of marriage, the retired member can still make the election, but it will not go into effect for 12 months, and only if both the member and the beneficiary do not die by that time.

2. Respondent contends that CalPERS abused its discretion by failing to grant her lifetime pension and health insurance benefits, even though Ryan's modification had not yet gone into effect prior to his death. She cites to Government Code section 20160, subdivision (a), which provides that CalPERS may, in its discretion, correct the errors or omission of any active or retired member, or any beneficiary of an active or retired member, if:

(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.

Subdivision (d) provides that the party seeking correction of an error has the burden of presenting evidence establishing the right to correction.

Ryan could have added respondent as a beneficiary at any time after they married in January 2002. Ryan (and respondent) enjoyed the benefit of the unmodified allowance for many years. In January 2016, Ryan met with a CalPERS representative who explained to him the process of adding a beneficiary. He failed to act for over a year, at which point he made a telephone inquiry. It is regrettable that CalPERS did not send the Death Estimate Letter earlier, but Ryan could have submitted the

modification form without waiting for receipt of the letter. It cannot be found that Ryan's failure to designate respondent as his beneficiary more than a year before his death was the result of mistake, inadvertence, surprise, or excusable neglect. Nor can it be found that Ryan made the inquiries that a reasonable person in his circumstances would have made. Respondent is not entitled to relief based on Government Code section 20160.

3. Alternatively, respondent contends that she is entitled to relief based on the doctrine of equitable estoppel. She contends that Ryan made a clear statement of his intent to modify his benefit election in the March 2017 telephone call, and that he was prevented from timely submitting his modification form by CalPERS's delay in sending him the Death Estimate Letter.

*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, sets forth the elements that must be present to establish estoppel against a public agency: (1) the party to be estopped must be apprised of the true facts; (2) the party must intend that its conduct shall be acted upon, or must so act that the party asserting estoppel had a right to believe it was so intended; (3) the party asserting estoppel must have been ignorant of the true state of facts; and (4) that party must have relied upon the conduct to its injury. In cases involving public employee pensions, estoppel may not be invoked where to do so would "directly contravene statutory limitations." (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870.)

Respondent has not established that estoppel should be applied in this case. The record does not establish that Ryan was instructed during the March 2017 phone call that he was required to wait for receipt of the Death Estimate Letter before he could submit his modification request. Furthermore, Ryan had visited the Sacramento CalPERS office more than one year earlier and had been provided with verbal

instructions and a written publication with directions for submitting a modification request. Respondent has not established that she is entitled to relief under the doctrine of equitable estoppel.

4. Respondent has not established that CalPERS erred in its determination that she is not entitled to pension or health care benefits. Accordingly, respondent's appeal should be denied.

### ORDER

The appeal of respondent Dina Britton is denied.

DATE: October 31, 2019

DocuSigned by:  
*Karen E Reichmann*  
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KAREN REICHMANN  
Administrative Law Judge  
Office of Administrative Hearings