

ATTACHMENT E

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Lifetime Monthly Benefit
Payable Upon the Deaths of Kim M. Gardner and
Hayley M. Gardner by:**

ROBERT J. GARDNER,

and

RYAN E. GARDNER,

Respondents.

Agency Case No. 2021-1040 (Statement of Issues)

OAH No. 2022030869

PROPOSED DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 25, 2022.

Nhung Dao, Staff Attorney, represented California Public Employees' Retirement System (CalPERS).

Respondents Robert J. Gardner and Ryan E. Gardner each represented themselves.

Oral and documentary evidence was received. The record was held open for CalPERS to submit its written closing brief by 5:00 p.m. on May 25, 2022. Respondents declined the opportunity to file a response to CalPERS' written closing brief. CalPERS' Closing Brief in Support of Determination was timely filed with OAH and served on respondents and marked as Exhibit 21 and admitted as legal argument. The record closed and the matter was submitted for decision on May 25, 2022.

FACTUAL FINDINGS

Parties and Jurisdiction

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.)
2. Kim M. Gardner (decedent) was a school miscellaneous member of CalPERS through her employment with the Capistrano Unified School District (District). She began her employment with the District on August 20, 2001. Decedent passed away on October 11, 2020, from cancer. (Exh. 17.) At the time of her death, decedent had 19.022 years of CalPERS service credit. (Exh. 15.)
3. Decedent was survived by her husband, respondent Robert J. Gardner (Robert); her adult son, respondent Ryan E. Gardner (Ryan); and her adult daughter, Hayley M. Gardner (Hayley).
4. After her death, decedent's retirement benefits (described more fully below) were processed and paid to her named beneficiaries. The first payments were

issued on January 6, 2021. Robert, as the surviving spouse, received the lump sum Retired Death Benefit and the monthly Survivor Continuance Allowance. Ryan and Hayley, as decedent's named beneficiaries, received their shares of the lifetime Option 4 monthly allowance.

5. On January 19, 2021, Robert notified CalPERS by telephone that Hayley had passed away unexpectedly on January 15, 2021. He asked if Hayley's Option 4 monthly allowance could be conveyed to her brother Ryan. Robert was advised that Hayley's benefit was payable only for her lifetime, and the law did not allow CalPERS to make an exception. Robert was advised of the appeal process. (Exh. 20, p. A175.)

6. On January 20, 2021, Robert sent a letter to CalPERS requesting that Hayley's Option 4 monthly allowance be given to Ryan to increase his Option 4 monthly allowance. The letter states, in part:

My wonderful wife Kim worked faithfully for over twenty years for the Capistrano Unified Schools. Kim was beset with cancer almost two years ago, and she and I had a meeting in the CalPERS office with an advisor about a year before she passed just three months ago on October 11, 2020. At that time, we both decided that Kim could help her two children with a legacy gift of monthly income rather than me taking a lump sum payment.

Now, Hayley, our youngest child, has passed away after only three months of receiving benefits set aside by Kim and I. This seems unfair to our family, as well as to Kim and her memory. [¶] I would like to ask the powers that be at

CalPERS to consider some sort of fair and equitable way to compensate our family for this very rare type of situation. I do not know about legalities, or laws, but instead ask only for consideration and fairness. I ask nothing for myself. I ask for some fairness to Kim, and to my son Ryan.

(Exh. 9.)

7. By letter dated April 12, 2021, CalPERS notified Robert that his request to increase Ryan's monthly allowance by an amount equivalent to Hayley's allowance was denied. (Exh. 10.) CalPERS determined that upon Hayley's death, her monthly allowance was no longer payable because the applicable laws mandate that CalPERS benefits are only payable for the lifetime of the member and their named beneficiaries. The letter notified Robert of his right to appeal the denial.

8. On July 1, 2021, CalPERS sent another copy of the April 12, 2021 denial letter to Robert because the original letter had not been delivered to him. By letter dated July 16, 2021, Robert appealed CalPERS' denial of his request to have Hayley's benefit allowance conveyed to his son Ryan. (Exh. 11.)

9. The Statement of Issues was filed on March 9, 2022, and this hearing ensued. As stated in the Statement of Issues, the issue in this appeal is "whether Hayley's monthly Option 4 allowance share could be conveyed to respondent Ryan upon her death to increase his current monthly allowance pursuant to the PERL." (Exh. 1, p. A11.)

10. At hearing, CalPERS presented documentary evidence (Exhibits 1 through 20) and testimony by Shayne Day-Bolar, Staff Services Manager I in the Disability and Survivor Benefits Division of CalPERS. Ms. Day-Bolar has been employed by CalPERS

for 27 years and has worked in the Disability and Survivor Benefits Division for 19 years. She testified regarding the processing of benefits for decedent's beneficiaries. Robert and Ryan testified and presented one letter dated May 16, 2022, which was admitted as Exhibit A.

Decedent's Precautionary Application

11. On January 22, 2020, decedent and Robert went to the CalPERS Orange Regional Office for a retirement counseling session. A CalPERS team member explained the options for service retirement, disability retirement, and death benefits, and assisted decedent with obtaining online estimates for service and disability retirement. (Exh. 20, p. A180.) The CalPERS team member also reviewed and explained a precautionary disability application. (*Ibid.*) When CalPERS is notified that a member has a life-threatening condition, CalPERS will suggest that the member submit a precautionary disability application in case the member needs to retire due to their condition.

12. On January 22, 2020, decedent submitted a Precautionary Disability Retirement Election Application (Application) to the CalPERS Orange Regional Office. (Exh. 12.) In the Application, decedent elected the Flexible Beneficiary Option 4 with Specific Percentage, naming her two children, Ryan and Hayley, as equal share beneficiaries to receive the monthly option benefit payable upon her death. Decedent also named Robert as the beneficiary for the lump sum Retired Death Benefit.

13. "The Flexible Beneficiary Option 4 consists of the right to have a retirement allowance paid to a member until his or her death, and thereafter to have a monthly allowance paid to his or her named beneficiary for life." (Gov. Code, § 21477, subd. (a).) At the time of making the Option 4 election, the member selects the

amount of the beneficiary allowance as either a specific dollar amount or a specified percentage of the member's retirement allowance. (*Id.*, subds. (a)(1), (2).)

Payment of Death Benefits

14. On November 10, 2020, CalPERS determined that the post-retirement death benefits in decedent's case were payable pursuant to Government Code section 21504. That section provides, in pertinent part: "If a member dies on or after the effective date of retirement and prior to the mailing of a retirement allowance warrant and if the member has elected the optional settlement in Section . . . 21477, . . . the death shall be considered to be death after retirement and the applicable benefits shall be payable."

15. By letter dated November 19, 2020, CalPERS notified Robert he was named the beneficiary for the lump sum Retired Death Benefit of \$2,000, and he was also entitled to receive the lifetime monthly Post-Retirement Survivor Allowance. (Exh. 3.) Robert previously submitted an Application for Pre-Retirement Survivor Benefits that he signed on November 6, 2020. (Exh. 6.)

16. By letters dated November 19, 2020, CalPERS notified Ryan and Hayley they were each named as a beneficiary for the lifetime Flexible Beneficiary Option 4 allowance in the amount of approximately \$579 per month and enclosed an Application for Survivor Benefits packet for them to complete. (Exhs. 4, 5.) On December 3 and 4, 2020, CalPERS received completed survivor benefit applications from Ryan and Hayley. (Exhs. 7, 8.)

17. On January 6, 2021, CalPERS issued payment of the Option 4 monthly lifetime allowances to both Hayley and Ryan in equal shares. Each of them were paid \$1,535.44, which included benefits retroactive to decedent's date of death through the

end of 2020, i.e., October 12 through December 31, 2020. Their regular monthly Option 4 benefit payment (\$580.47) was scheduled to issue on the first each of month. The first such payment was set to begin on February 1, 2021.

Request to Transfer Hayley's Beneficiary Allowance to Ryan

18. On January 19, 2021, Robert notified CalPERS by telephone that his daughter Hayley passed away unexpectedly on January 15, 2021. Robert asked what would happen with Hayley's Option 4 monthly allowance now that she had died and whether it could be added to Ryan's Option 4 monthly allowance. The CalPERS team member informed Robert that Hayley's allowance was only payable for her lifetime and the law did not allow CalPERS to make an exception. CalPERS was required to pay benefits according to the law. Robert asked if there was an appeal process if he disagreed. Robert was advised to submit his disagreement in writing. (Exh. 20, p. A175.) Robert sent a letter to CalPERS dated January 20, 2021, explaining his request to transfer Hayley's allowance to Ryan. (Exh. 9.)

19. On February 18, 2021, a CalPERS team member spoke by telephone with Robert to inform him that his request to have Hayley's Option 4 allowance paid to Ryan was denied. The CalPERS Customer Touch Point Report summarizes the telephone call as follows:

Spoke with Robert, advised that I discussed the case with the management team and they will be moving forward with a denial of his claim. CalPERS benefits must be paid in accordance with *[sic]* the law. He understood and stated that he would like a formal denial letter and that he may choose to appeal our determination depending on our legal basis

for denial. He does not want to submit any additional evidence at this time. I advised that a letter will be sent to him explaining our determination and offering a right of appeal. He will have 30 days from the date of the letter to exercise his appeal rights. If no appeal is received he will forfeit his right of appeal. He understood and thanked me for the call.

(Exh. 20, p. A174.)

20. On April 12, 2021, CalPERS sent a determination letter to Robert that explained the basis for the denial of his request to have Hayley's Option 4 allowance paid to Ryan to increase the amount of his Option 4 allowance. (Exh. 10.) The letter explained the basis for denial, in pertinent part, as follows:

Kim applied for disability retirement in January of 2020. She elected the Flexible Beneficiary Option 4 retirement option and named her children, Ha[y]ley and Ryan Gardner, to each receive one-half of the monthly benefit payable upon her death. Our records show that you acknowledged Kim's benefit election and beneficiary designation by your signatures on her retirement election application.

[¶] Kim passed away on October 11, 2020. CalPERS correctly complied with the election that Kim made on her retirement election and paid a lifetime benefit to both Ha[y]ley and Ryan Gardner. It is unfortunate that Ha[y]ley passed away so soon after she began to receive her lifetime monthly

benefit. However, because CalPERS benefits are only payable for a beneficiary's lifetime, our determination that Ha[ly]ley's monthly benefits are no longer payable is correct and in compliance with Government Code Section 21477 subsection (a) that states "The Flexible Beneficiary Option 4 consists of the right to have a retirement allowance paid to a member until his or her death, and thereafter to have a monthly allowance paid to his or her beneficiary(ies) for life."

The laws within the PERL mandate that CalPERS benefits are only payable for the lifetime of a member and their beneficiary(ies), and this is fundamental to our retirement system CalPERS serves about 2 million members and given the size of the population that we serve, to make exceptions to our laws to pay lifetime monthly benefits that are not accounted for in our actuarial calculations or permitted by the PERL would be a considerable expense to both CalPERS members and employersIt also would be in direct violation of the laws that we are required to follow within the PERL.

[¶ . . . ¶]

While I can understand and empathize with your request, we have a fiduciary responsibility to all CalPERS member's [sic] and their beneficiaries. Therefore, CalPERS benefits must be paid in accordance with the law. Unfortunately, this

means that your request to have Ryan Gardner's allowance increased must be denied.

(Exh. 10, pp. A61 to A62.)

Respondents' Contentions

21. Respondents do not dispute the information in the Statement of Issues regarding the sequence of events that took place prior to decedent's passing, and prior to Hayley's passing. (Exh. A.)

22. Respondents contend CalPERS' denial of their request to have Hayley's Option 4 allowance added to Ryan's allowance is not fair or just and is contrary to decedent's intention to leave a lifetime monthly allowance for Ryan and Hayley. Respondents contend it is not fair or just for CalPERS to keep decedent's contributions that were intended to fund Hayley's monthly allowance now that Hayley has passed away, and "use them to pay for other payouts or balance the budget or whatever else they would use that money for." (Exh. A.)

23. Respondents contend the circumstances of their case are unique and justify CalPERS making an exception. In his letter dated July 16, 2021, Robert wrote, in part:

It does not seem just or fair for Kim's contributions to be used to pay for other people's payouts or to balance the budget. [¶ . . . ¶] In life, there are exceptions to every rule for righteousness' sake. In this instance, Hayley, passing only three short months after her mother, and having that be enough to cut off Kim's legacy makes no sense. It is simply

wrong. [¶ . . . ¶] There needs to be some common-sense time period to protect families from this type of unfairness. Perhaps something as simple as a one-year grace period for example. This would also give a period of time to make sure the children would have time to get over being despondent from losing one of their parents.”

(Exh. 11.)

24. Respondents feel there should be “some room for discretion, compromise and fairness to be administered in this matter.” (Exh. A.) They note: “The fact that we are now in a hearing with an administrative judge, opposing counsel and all of the other people necessary to have this hearing take place indicates to us that there is indeed room to dispense justice and fairness differently than what was originally decided by Calpers.” (Exh. A.)

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Generally, the party asserting the affirmative in an administrative hearing has the burden of proof by a preponderance of the evidence (See, *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044; Evid. Code, § 500.) The phrase “preponderance of the evidence” means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) Typically, the party seeking to change the status quo bears the burden of proof.

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Legal Principles

2. CalPERS is a “prefunded, defined benefit” retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) Benefits for CalPERS members are funded by member and employer contributions and by interest and other earnings on those contributions. A public agency may participate in CalPERS only if it has entered into a contract with CalPERS. (Gov. Code, § 20460.)

3. The Board of Administration of CalPERS (Board) is the state agency vested with authority to manage and control CalPERS, to make rules and regulations as it deems proper, and to implement and enforce the PERL and its accompanying regulations. (See, Gov. Code, § 20120, et seq.) The Board is “the sole judge of the conditions under which persons may be admitted to or continue to receive benefits under this system.” (Gov. Code, § 20125.)

4. CalPERS, acting through the Board, owes a fiduciary duty to all its members. As the court in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, explained:

The “assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.”

[Citation.] The fiduciary “shall discharge his or her duties with respect to the system with the care, skill, prudence, and diligence . . .” of “a prudent person acting in a like capacity and familiar with these matters.....” [Citation.]

(City of Sacramento v. Public Employees Retirement System, supra, 229 Cal.App.3d at p. 1494, citing Cal. Const., art. XVI, § 17, subds. (a), (c).)

5. Pursuant to Government Code section 20151, subdivision (a), the Board and its officers and employees are required to “discharge their duties with respect to this system solely in the interest of the participants and beneficiaries,” for the exclusive purpose of (1) providing benefits to members, retired members, and their survivors and beneficiaries, and (2) defraying reasonable expenses of administering this system. The Board’s duties also include “[m]inimizing the employers’ costs of providing benefits under this part,” and “investing with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.” (Gov. Code, § 20151, subds. (b), (c).)

6. Thus, when exercising its fiduciary duty, CalPERS must ensure that all its members receive only those retirement benefits that are legally permitted. To allow a member to receive retirement benefits in excess of the legal limit would cause harm to the other CalPERS members and the fund, in violation of CalPERS’s fiduciary duty.

7. Government Code section 21477, subdivision (a), defines the Flexible Beneficiary Option 4 in pertinent part, as follows (emphasis added):

The Flexible Beneficiary Option 4 consists of the right to have a retirement allowance paid to a member until his or her death, and thereafter to have a monthly allowance paid to his or her named beneficiary **for life**. Subject to Section 21471.2, the member may select the monthly allowance

payable to the named beneficiary or beneficiaries from the options below:

(1) Specific Dollar Amount to a Beneficiary or Beneficiaries.

The member may specify that upon his or her death after retirement, a monthly allowance in an amount determined by the member be paid to a named beneficiary or beneficiaries **for life**.

(2) Specific Percentage to a Beneficiary or Beneficiaries. The

member may specify that upon his or her death after retirement, a monthly allowance in an amount equivalent to a specified percentage of the member's allowance be paid to a name beneficiary or beneficiaries **for life**.

Analysis

8. CalPERS correctly determined that Hayley's Option 4 monthly allowance, following her death, cannot be paid to Ryan to increase his Option 4 monthly allowance.

9. CalPERS' obligation to pay Hayley's Option 4 allowance terminated as a result of her death. Government Code section 21477 clearly and unambiguously states that the Option 4 monthly allowance is payable to a member's named beneficiary "for life." Section 21477 contains no provision or exception authorizing CalPERS to continuing paying an Option 4 monthly allowance beyond the named beneficiary's lifetime. The laws within the PERL that govern the other lifetime retirement benefit option allowances similarly provide that a named beneficiary shall receive a monthly

allowance "for life." (See Gov. Code, §§ 21475 (Option 2), 21475.5 (Option 2), 21476 (Option 3), and 21476.5 (Option 3).)

10. The contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight, unless such construction of a statute is clearly erroneous or unauthorized. (*Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 820.) Here, CalPERS, acting through the Board, is charged with implementing and enforcing the PERL. Thus, CalPERS' interpretation of Government Code section 21477 as precluding CalPERS from continuing to pay Hayley's Option 4 beneficiary allowance after her death, is entitled to great weight. This interpretation is supported by the statutory language and is not clearly erroneous or unauthorized.

11. CalPERS has carried out decedent's intentions in accordance with the PERL. Decedent made a valid designation on her Application naming her children, Hayley and Ryan, as equal share beneficiaries in the Option 4 lifetime beneficiary allowance. After decedent died, CalPERS paid death benefits to her beneficiaries according to her intentions expressed in her Application and in accordance with the PERL. CalPERS has fully complied with all requirements under Government Code section 21477. No statutory authority establishes Ryan's entitlement to the benefit increase he seeks. Ryan is entitled to his Option 4 monthly allowance share, as designated by decedent, for his lifetime. He is not entitled, however, to have his Option 4 allowance increased by Hayley's share following her death. CalPERS' obligation to pay Hayley's Option 4 allowance terminated upon her death.

12. Hayley's unexpected death three months after decedent's death caused a tragic and painful situation for the surviving members of respondents' family. Unfortunately, there is no legal authority that allows CalPERS to continue paying

Hayley's Option 4 allowance after her death. CalPERS' closing brief discusses Government Code section 20160 and the doctrine of equitable estoppel. (Exh. 21.)

13. Government Code section 20160 provides that 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 any active or retired member," if, among other requirements, "the error or omission was the result of mistake, inadvertence, surprise or excusable neglect as defined Code of Civil Procedure section 473," and "the correction will not provide the party seeking the correction with a status, right or obligation not otherwise available under this part." (Gov. Code, § 20160, subd. (a).) The Board may also "correct all actions taken as a result of errors or omissions of . . . this system." (Gov. Code, § 20160, subd. (b).)

14. Government Code section 20160 is not applicable in this case because there is no evidence of CalPERS or decedent making a correctable error. CalPERS has paid decedent's death benefits in accordance with her wishes as expressed in her Application. All her named beneficiaries were paid the benefit for which each was deemed eligible. Ryan has received, and will continue to receive for his lifetime, his Option 4 beneficiary allowance. Decedent made no correctable error or omission in completing her Application and designating her children as her Option 4 beneficiaries. The Application signed by decedent reflects her intention that her children share equally in the Option 4 lifetime monthly allowance payable upon her death.

15. CalPERS contends that it should not be estopped from denying respondents' request to pay Hayley's allowance to her brother Ryan. In order for the doctrine of equitable estoppel to apply, four elements must be established: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a

right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) The required elements of estoppel are not met in this case. Specifically, there is no evidence that respondents are ignorant of the true state of facts or that they have relied upon conduct by CalPERS to their injury.

16. Moreover, it is well-established that estoppel "will not be applied against a government agency if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public,.....'" (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) 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, 869.)

17.... Here, applying estoppel against CalPERS to prevent it from denying respondents' request for Hayley's allowance to be paid to Ryan would be contrary to the public policy underlying the PERL and directly contravene statutory limitations, including Government Code section 21477. CalPERS notes in its closing brief: "There are public policy considerations that inform and condition the decision-making processThey broaden the scope of inquiry so that the consequences of a particular decision can be assessed against the backdrop of its impact on the retirement system." (Exh. 21, p. 11.) CalPERS was granted power to "administer a plan based upon a specific retirement benefit formula." (Id.) The CalPERS Board "has a primary obligation to protect the retirement fund for the benefit of all its members and beneficiaries and to minimize the employers' costs of providing benefits." (Id.) Here, respondents seek an increase in Ryan's lifetime benefit payment not permitted under the statutory scheme of the PERL. Ryan is only entitled to the benefits as any other beneficiary designated for the Option 4 election. He is entitled only to his

beneficiary share, designated by decedent, for his lifetime. Upon Hayley's death, CalPERS' obligation to pay her allowance ended.

18. Based on the foregoing, respondents' appeal shall be denied.

ORDER

The appeal of respondents Robert J. Gardner and Ryan E. Gardner is denied. CalPERS' determination that Hayley M. Gardner's monthly Option 4 allowance share cannot be conveyed to respondent Ryan E. Gardner upon her death to increase his current monthly allowance, is affirmed.

DATE: 06/22/2022

Erlinda G. Shrenger

Erlinda G. Shrenger (Jun 22, 2022 16:15 PDT)

ERLINDA G. SHRENGER

Administrative Law Judge

Office of Administrative Hearings