example

BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

2008 SEP 24 PM 2:11

IN THE MATTER OF JOHN A. MASENGALE, Member. * * * * * * * * * THELMA L. MASENGALE, Petitioner.	)))))))	PUBLIC EMPLOYEES' RETIREMENT FUND FUND

DECISION ON MOTION FOR SUMMARY JUDGMENT

Thelma Masengale appeals from the initial determination of PERF that she is not entitled to a survivor benefit as beneficiary of PERF member John Masengale upon his death.[1] John had named his former wife, Helen Masengale, as his beneficiary, and he did not change his designation after Helen died and he married Thelma.

The PERF Board filed a motion for summary judgment supported by the affidavit of Steven Barley and six exhibits.[2] Petitioner responded and designated the affidavit of Mary Louise Lovell in opposition to summary judgment. A hearing was held on September 16, 2008. At the hearing, petitioner offered three additional exhibits, to which PERF did not object, and which were admitted as Exhibits B, C and D. Petitioner called Ms. Lovell to testify, upon the parties' agreement that she would not testify beyond matters set forth in her affidavit, and PERF counsel was granted an opportunity to cross-examine her.

Findings of Undisputed, Material Fact

1. John Masengale was born in March 1925, and became employed by the Indiana Department of Revenue on August 16, 1974, at which time he automatically became a member of PERF (PERF Ex. A-1).

2. John completed a Membership Record at the time he was employed (PERF Ex. A-1). On the second page, he identified his wife as Helen L. Masengale, born in June 1929 (PERF Ex. A-1, A-2).

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[1] For ease of reference, and without intending any disrespect, the Masengales will often be referred to by their first names.

[2] Mr. Barley's affidavit refers to exhibits 1-7, but only six exhibits are attached. At the hearing, PERF counsel confirmed that the reference to seven exhibits was a typographical error, and the six exhibits are complete.

3. On the fourth page of the Membership Record, John filled out and signed a section titled "Designation of Beneficiary." The instructions stated that married persons "should usually name the wife or husband as beneficiary in order to give them right to life pension." John designated "Helen Louise Masengale . . . related to me as wife as my beneficiary under the retirement fund." He did not name a contingent beneficiary. The designation he signed included the following statements:

> If the beneficiary herein nominated shall survive me, he or she shall receive all funds due from my participation in the Public Employees' Retirement Fund. If the beneficiary shall not survive me, then the contingent beneficiary shall receive such funds. If neither shall survive me, then the beneficiary shall be my estate.
>
> I reserve the right to change the beneficiary or contingent beneficiary at any time by filing written notice of such change, duly witnessed, with the Board of Trustees of the Public Employees' Retirement Fund of Indiana.

(PERF Ex. A-1.)

4. In January 1990, John submitted an Application for Retirement Benefits, stating that he intended to retire effective February 1, 1990 (PERF Ex. A-2). On the portion of the form for election of retirement option, John selected Option 40, whereby John would be paid a monthly benefit for life, and upon his death his beneficiary would receive a monthly benefit of two-thirds of John's benefit for life (*id.*).

5. The portion of the form for designation of beneficiary provided seven labeled boxes for the entry of information. Under "Beneficiary's name" John entered "Helen L. Masengale." He entered their phone number and address, as well as Helen's birth date and Social Security number. In the last box, marked "Relationship," he wrote "Wife." (PERF Ex. A-2.)

6. After the designation the form stated:

> If you elect to receive benefits under Option 30, 40, or 50, you cannot change your beneficiary after benefits are computed. Under other options, your beneficiary may be changed if approved by the PERF Board.

(PERF Ex. A-2.)

7. John also completed a form to elect an option for payment of his Annuity Savings Account (ASA), by which he elected to have his ASA paid as an annuity (PERF Ex. A-3).

8. Helen died on October 21, 1991 (Lovell Affidavit ¶ 1).[3]

9. After Helen's death, John married the former Thelma Calvert (Lovell Aff. ¶ 2; Ex. D).

10. Thelma was born in February 1928 (Pet. Ex. D).

11. PERF publishes a Member Handbook, excerpts of which have been filed as PERF Ex. A-6. There is no evidence as to when this Handbook was published or whether a copy was provided to John. In a section titled "Changing Your Beneficiary After Retirement," the Handbook states that once a beneficiary has been named on the retirement application and processing is complete, the member can change that designation "only in limited circumstances," depending on the benefit option selected. For Options 30, 40 or 50, the Handbook states that the beneficiary cannot be changed as long as the beneficiary is alive, and that the beneficiary may not be changed in the event of a divorce. An exception is stated where the beneficiary has died, as follows:

> For options 30, 40 and 50, you must furnish a copy of your spouse or beneficiary's death certificate, and, in the case of marriage, a copy of your marriage license. PERF will also need the birth certificate of your new beneficiary. Please note that changing your beneficiary may have a significant impact on your monthly benefit.

(PERF Ex. A-6, p. 33.)

12. There is no evidence that John gave or attempted to give PERF notice, either orally or in writing, of Helen's death, his remarriage, or any desire to change his beneficiary.

13. Mary Louise Lovell is the daughter of John and Helen. On several occasions, John remarked to Ms. Lovell that he had "taken care of everything for Thelma, including pension and retirement benefits." (Lovell Aff. ¶ 3.)

14. Ms. Lovell visited with her father and Thelma on several occasions after they were married. There was no marital or familial tension, and no question that her father loved Thelma and wished to provide for her. (Lovell testimony.)

15. On at least four occasions, during discussions of financial matters, John stated to Ms. Lovell that upon his death, Thelma would be provided for, she would recover retirement benefits from the State of Indiana, and/or she would receive the same benefit as Helen would have received (Lovell testimony). The last time he said this, he was in a nursing home, but his mind was clear and he was alert (*id.*) His mind was clear up to his death (*id.*).

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[3] The ALJ's notes of Ms. Lovell's live testimony record that Helen died on October 21, 1990. Whether Helen died in 1990 or 1991 is immaterial.

16. Before his employment with the State, John had been employed by trucking companies that did not provide pension benefits. The only pension he received upon retirement was from PERF. (Lovell testimony.)

17. Ms. Lovell has no knowledge as to whether John took any action to contact or notify PERF of an intent to change his designated beneficiary (Lovell testimony).

18. On or before April 13, 2006, Thelma wrote a letter to PERF changing the checking account into which John's pension benefit check was being directly deposited (Ex. B). She enclosed a Durable Power of Attorney by which, *inter alia*, John appointed Thelma as his agent and attorney with full powers to conduct his affairs and make health care decisions for him (Ex. C). Neither the letter nor the Durable Power of Attorney identified Thelma as John's wife, notified PERF of Helen's death, or made any reference to John's designation of beneficiary. A computer record indicates that the letter and power of attorney were received by PERF on April 13, 2006 (PERF Ex. A-4).

19. John died on May 26, 2006 (Lovell Aff. ¶ 1, Lovell testimony).

20. PERF staff made a note of the published obituary on May 31, 2006 (PERF Ex. A-5). Presumably, payments then ceased.

21. On June 15, 2006, Thelma's attorney called to ask about survivor benefits, stating that John's first wife, Helen, died in 1990 (PERF Ex. A-4).

22. By letter dated August 30, 2007, PERF attorney Linda I. Villegas, in response to a letter from Thelma dated August 16, 2007 (which is not in the record), set forth PERF's decision that Thelma was not named as beneficiary so PERF could not pay any survivor benefits to her (Letter, Villegas to Masengale, Aug. 30, 2007). The letter stated that the decision would become final unless Thelma initiated an appeal within 15 days after her receipt of it (*id.*).

23. Thelma requested review by letter dated September 14, 2007, and received by PERF on September 1, 2007 (Letter, Masengale to PERF, 9/14/07).

24. PERF concedes that the appeal was timely filed (Letter, Villegas to ALJ Uhl, 10/2/07).

25. Any finding of fact that is contained in the Conclusions of Law is incorporated herein by reference.

Conclusions of Law

Legal Standard

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if

any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b).

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005) (citing cases).

Contrary to federal practice, the movant cannot simply allege that the absence of evidence on a particular element is sufficient to entitle the movant to summary judgment—the movant must prove that no dispute exists on all issues. *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

Petitioner has not formally cross-moved for summary judgment, although her brief in support requests not only that PERF's motion be denied, but also that PERF be directed to process petitioner's eligibility as John's surviving spouse. (Petitioner's Memorandum and Argument for Denial of Respondent's Motion for Summary Judgment at 3-4.) If parties file cross-motions for summary judgment, each motion is considered separately to determine whether the moving party is entitled to judgment as a matter of law, construing the facts most favorably to the non-moving party in each instance. *Keaton and Keaton v. Keaton*, 842 N.E.2d 816, 819 (Ind. 2006); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 160 (Ind. 2005).

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. *Indiana Dept. of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. App. 1989).

Evidence

PERF objects to the Lovell affidavit on the ground that it contains hearsay, the statements of John Masengale to his daughter, Ms. Lovell. Although the statements are hearsay, they are admissible as showing John's then-existing state of mind. Ind. Evid. R. 803(3); *American Standard Insurance Co. of Wisconsin v. Rogers*, 788 N.E.2d 873, 878 n. 6 (Ind. App. 2003).

Genuine Issues of Material Fact

Neither party argues that there are disputes of material fact, and this was confirmed at the hearing. In particular, petitioner's counsel confirmed that all potential evidence in support of her position had been tendered, and PERF's counsel confirmed that PERF's motion presumes the correctness of all factual contentions made by petitioner.

Issue

The sole issue is whether Thelma is entitled to continue to receive a monthly pension benefit, as John's surviving spouse and intended beneficiary.

Discussion

A. Designating and changing beneficiary

Upon his retirement in 1990, John was entitled to either a normal or early retirement benefit, Ind. Code § 5-10.2-4-1, the calculations of which are set forth at I.C. §§ 5-10.2-4-4 and -5. The benefit is paid monthly for five years or until the member's death, whichever is later. I.C. § 5-10.2-4-7(b). The member may select other options which must be the actuarial equivalent of the base benefit. *Id.* One of these is the option John selected, whereby the member receives a decreased benefit during the member's lifetime, and after the member's death a "designated beneficiary" receives a continuing benefit in an amount equal to, one-half of, or two-thirds of the member's benefit. I.C. § 5-10.2-4-7(b)(1)(A).

In order to determine the actuarial equivalence of the joint and survivor benefit, PERF must know and verify the ages of both the member and the designated beneficiary. A change of beneficiary to someone with a different birth date necessarily entails a recalculation of the benefit, to account for the different life expectancy of the new beneficiary. For this reason, PERF's rules require that only one beneficiary be designated for joint and survivor benefits, and the beneficiary "must be a named individual." 35 IAC 1.2-5-13(b).

By statute, if the original designated beneficiary dies first, or if the member marries either for the first time or after the death of the member's spouse, the member may elect to change the designated beneficiary or the benefit option to receive an actuarially adjusted and recalculated benefit for the remainder of the member's life or for the remainder of the lives of the member and the newly designated beneficiary. I.C. § 5-10.2-4-7(c). The cost of recalculating the benefit is assessed to the member and is included in the actuarial adjustment. *Id.*[4]

By rule, PERF requires that a change in benefit option or beneficiary designation cannot be made after the first day of the month when benefit payments are scheduled to be

[4] A different statute, I.C. § 5-10.2-4-7.2, applies after June 30, 2008, so it would not apply here, and in any event did not make changes that would affect this case.

begin. 35 IAC 1.2-5-1(a). This rule does not appear to account for the possibility of a change of benefit option or beneficiary authorized by I.C. § 5-10.2-4-7(c). The Member Handbook, which does not have the force of law, does provide that under limited circumstances the beneficiary may be changed (PERF Ex. A-6).

Neither the PERF statutes nor the rules promulgated by PERF set forth a specific procedure that must be followed in *changing* the designation of beneficiary. By statute, however, the original application for retirement benefits must be on a form provided by the PERF Board, I.C. § 5-10.2-4-1(d)(1), and the application form must include the name, address, birth date, Social Security number and "proof of birth" of the designated beneficiary, I.C. § 5-10.2-4-1.3.[5] From this it is reasonable to conclude that the General Assembly intended that *changes* of designations of beneficiary also be in writing, with the appropriate information provided.

Requiring written designations serves important public policies. A written designation, similar to a will, assures that the member's intent is clearly communicated and guards against fleeting changes of mind. PERF is assured of the identity of the beneficiary so that benefits are not paid to the wrong person or to two persons. As discussed above, the birth date of the beneficiary is crucial to the actuarial calculation that must be made. These policies apply to a change in designation at least as much, and perhaps with even more force, as to the original designation.

B. Actual compliance

The undisputed evidence is that John did not give PERF any notice, oral or written, that he wished to change his designation of beneficiary after Helen died and he married Thelma. Thelma makes arguments to the contrary, but they are not supported by evidence.

First, she argues that there is no evidence that PERF did *not* receive a written change of designation, suggesting that John submitted a change but it was lost. She concedes, however, that she has no evidence that John submitted or even prepared a change of designation, such as a copy among the papers he left. The mere fact that John expressed to his daughter that he believed Thelma would receive continued benefits after his death is insufficient evidence from which to draw an inference that he took action to that effect.

Under the Administrative Orders and Procedures Act, the party seeking relief has the burden of proof. I.C. § 4-21.5-3-14(c); *see Indiana Department of Natural Resources v. Krantz Brothers Construction Corp.*, 581 N.E.2d 935, 938 (Ind. App. 1991) (party seeking exemption from general rule has burden of proof, both under § 4-21.4-3-14(c) and at common law). Traditionally, an applicant for an administratively granted privilege bears the burden of

[5] PERF's rules provide that a change of beneficiary to receive the ASA must be made "on the appropriate form," 35 IAC 1.2-5-13(a) and (c), but no similar requirement is imposed for changing the beneficiary of the joint and survivor option.

demonstrating eligibility. *Leventis v. South Carolina Dept. of Health and Environmental Control*, 530 S.E.2d 643, 651 (S.C. App. 2000), citing 73A C.J.S. *Public Administrative Law and Procedure* § 128 at 35 (1983) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue."); *Division of Motor Vehicles v. Granziel*, 565 A.2d 404, 411 (N.J. Super. 1989).

Furthermore, in the absence of even a shred of evidence that PERF was given notice of a change of beneficiary, and in light of PERF's evidence that its first notice of Helen's death and John's remarriage to Thelma was received in 2006, PERF is not under a burden to prove a negative, *i.e.*, that John did not submit a request to change beneficiary. *See Milledge v. The Oaks, A Living Center*, 784 N.E.2d 926, 931 (Ind. 2003) (refusing to place burden upon party to "prove a negative"); *Liddy v. Liddy*, 881 N.E.2d 62, 67 (Ind. App. 2008).

Second, she argues that John's original designation of beneficiary should be read to mean that he designated his "wife," whoever happened to hold that relationship when he died. That is an untenable reading of the form, which first asks (as required by statute) for the name, birth date and Social Security number of the person, followed by the relationship (which is not required by statute). It would also violate 35 IAC 1.2-5-13(b), which requires the naming of an individual. Such a reading would not permit PERF to calculate actuarial equivalence because it would allow infinite changes to the birth date of the beneficiary without notice to PERF. *See Swartz v. Retirement Plan For Salaried Employees of Combustion Engineering, Inc.*, 2005 WL 1244984 (W.D. Va. 2005) (plan administrator acted reasonably in refusing to substitute second wife as beneficiary in place of deceased first wife; action was "consistent with the system of actuarial analysis essential to retirement plans like the one here.").

Third, she argues that her submission of John's power of attorney put PERF on notice that John had remarried and, by implication, that he intended to make Thelma his beneficiary. But nothing in the letter or power of attorney identified Thelma as John's wife, or otherwise gave notice that John (or Thelma as his legal representative) meant to change the beneficiary designation.

C. Substantial compliance

In the absence of evidence that John gave PERF actual notice of his intent to change beneficiaries, petitioner argues that his mere intent to do so, expressed to his daughter, supports a finding that his intent should be carried into effect, even if John failed to "dot the i's and cross the t's." Although not stated as such, this argument invokes the doctrine of substantial compliance.

Indiana recognizes that, in the context of changing the beneficiary to a life insurance policy, an intended change may be given effect if the insured substantially complied with the

policy's change provisions. For substantial compliance to apply, however, the insured must have "done everything within his power to effect such a change." *Bowers v. Kushnick*, 774 N.E.2d 884, 887 (Ind. 2002), quoting *Quinn v. Quinn*, 498 N.E.2d 1312, 1313 (Ind. App. 1986), and citing *Borgman v. Borgman*, 420 N.E.2d 1261, 1265 (Ind. App. 1981). Clearly this standard cannot be met here, as there is no evidence that John took any action to effect a change of beneficiary. It does not appear that Indiana courts have been presented with the same question with respect to public pensions.

Courts of other jurisdictions use differing tests, but the common thread is that the pension plan member must have taken some positive action to change the designation of beneficiary. *See generally* J.F. Rydstrom, Annotation, *Rights in Survival Benefits Under Public Pension or Retirement Plan As Between Designated Beneficiary and Heirs, Legatees, or Personal Representatives of Deceased Employee*, 5 A.L.R.3d 644 (1966 & Supp.).

One of the most lenient tests was adopted in *Watenpaugh v. State Teachers' Retirement System*, 336 P.2d 165 (Cal. 1959), in which the plan member remarried after the death of his first wife. He executed a written designation form changing his beneficiary to his second wife, but did not submit it to the plan. He told his second wife that she would receive income from the plan if he died. The California Supreme Court held that the member's completion of the form, together with his expressed intent that his wife would receive the benefit as his survivor, were sufficient. Literal compliance with change of beneficiary requirements was not necessary "where it is established that there was an intention to change *and there was some affirmative action evidencing the exercise of the right to change.*" 336 P.2d at 169 (emphasis added). Although the California standard for change of beneficiary of a life insurance policy required that the insured do everything within his power, the court applied this more relaxed substantial compliance standard to the public pension plan because, unlike a life insurance policy, the pension plan was statutory in origin, participation was compulsory, and the change of beneficiary provisions were not subject to negotiation. *Id.* [6]

The difference between the mere expression of intent and evidence of affirmative action was aptly illustrated in *Wicktor v. County of Los Angeles*, 297 P.2d 115 (Cal. App. 1956) (*Wicktor I*), *appeal after remand,* 2 Cal. Rptr. 352 (Cal. App. 1960) (*Wicktor II*). At the first trial, it was shown that Wicktor, while still single, had designated his sister as beneficiary of his county pension. He then married and told his wife that he intended to make her the beneficiary, and later told her and a co-worker that he had done so, even showing her—shortly before his death—the calculation of what she would receive. The trial court ruled for the wife but the decision was reversed on evidentiary grounds in *Wicktor I*. Before the retrial, the decision in *Watenpaugh* came down. At the second trial, there was new evidence that Wicktor had actually filled out and mailed a written change of beneficiary. The trial court again ruled

[6] A federal court applying California law limited *Watenpaugh* to public pension plans, and applied the stricter "everything within his power" standard to a private defined contribution plan. *BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 830 (9th Cir.), *cert. denied*, 531 U.S. 952 (2000).

in favor of the wife. On appeal, the Court of Appeals held in *Wicktor II* that the evidence taken at the first trial would have failed to show the sort of "affirmative action" required by *Watenpaugh*, but that the new evidence received at the second trial met the standard, so the judgment for the wife was affirmed.

In another public pension case, *Sowell v. Teachers' Retirement System of Montana*, 693 P.2d 1222 (Mont. 1984), the member divorced his first wife and told his second wife that she would receive his retirement benefits, but he took no action to change his beneficiary. The Montana Supreme Court recognized a division of authority between literal enforcement of the beneficiary designation and the more relaxed *Watenpaugh* standard, but noted that even the more liberal standard requires affirmative action. Thus, court held that the second wife could not prevail under either standard in the absence of such affirmative action.

Likewise, the Illinois Court of Appeals recognized two lines of authority for substantial compliance, the more relaxed *Watenpaugh* standard and the stricter standard applicable to life insurance changes. But the court noted that under both standards, intention alone does not govern: "The principle to follow is substantial compliance with the statutory provisions and applicable rules of the retirement system. *Intention alone should not govern, as such a rule might well result in the application of unmanifested acts and be based upon unfounded assumptions, actually not justified.* There is no presumption as to the deceased member's intention at the date of his death." *Seipel v. State Employees' Retirement System*, 289 N.E.2d 288, 290 (Ill. App. 1972) (emphasis added). In *Seipel*, the member had designated his mother as beneficiary but she had signed the form in the wrong place. The member filled out and submitted a second form again designating his mother, but his signature was not notarized. He died of gunshot wounds inflicted by his wife (!) who then claimed benefits as his survivor. The court gave effect to the member's attempted change of beneficiary to his mother based on evidence of his intent plus affirmative action.

Many cases on pension and insurance benefits are decided under the Employee Retirement Security Income Act (ERISA), 29 U.S.C. §§ 1001 *et seq*. ERISA does not apply to plans established by states or their political subdivisions. 29 U.S.C. §§ 1002(32), 1003(b)(1). But decisions on changes of beneficiary under ERISA are instructive, because they either apply state law on the theory that ERISA does not preempt state law of substantial compliance, *see BankAmerica Pension Plan v. McMath*, 206 F.3d 821 (9th Cir.), *cert. denied*, 531 U.S. 952 (2000), or find preemption but apply federal common law derived from state law, *Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994); *Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558, 566-67 (7th Cir. 2002). These latter cases find substantial compliance where the insured (1) evidences intent to make the change *and* (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy. Under this test, an insured who merely expressed an intent to change beneficiaries but took no positive action did not substantially comply with the terms of the policy. *Fox v. Special Agents Mutual Benefit Assoc.*, 2006 WL 3613308, *13 (S.D. Ind. 2006).

So even if Indiana were to apply a more lenient substantial compliance standard to change of public pension beneficiaries, the evidence in this case does not meet even the most lenient standard because it is undisputed the John did not take any affirmative or positive action to change his PERF beneficiary.

Petitioner's counsel has eloquently pleaded the equities of Thelma's case. These include the undisputed evidence that there has been no familial rivalry over the survivor benefit, that Thelma and John's relationship was loving to the end, that John would have wanted to provide for Thelma, and that Thelma is not a person of great means. It can be inferred that John chose the joint and survivor option to provide for his first wife and wanted that provision to continue for his second wife.

Further, in response to PERF's argument that changing beneficiaries impacts the actuarial calculations that are necessary to the operation of the fund, it is rightly noted that Helen and Thelma's ages are relatively close (less than 17 months apart), and that the actuarial impact on PERF would be relatively miniscule. Moreover, it is at least theoretically possible that PERF could recalculate Thelma's benefit under I.C. § 5-10.2-4-7(c) as if John had changed beneficiary upon their marriage, adjusting it for any overpayment or underpayment made to John to the date of his death, and deducting the cost of the recalculation. (To this, PERF rightly counters that such action would set an undesirable precedent of recognizing post-mortem changes of beneficiary based solely on parol evidence of the deceased member's intent.)

An administrative law judge is neither a court of equity empowered to sand down the harder edges of the law based on the circumstances of a particular case, nor an appellate court empowered to reconsider and change the law. Where the evidence is clear and the legal standard is beyond debate, the ALJ must grant summary judgment. The evidence is undisputed that John took no action to change his beneficiary, and the legal standard requires the conclusion that he died without a beneficiary.

Order

Based on the foregoing findings of undisputed fact and legal discussion, the PERF Board's motion for summary judgment is granted. To the extent that petitioner's papers might be construed to cross-move for summary judgment, that motion is denied. PERF's initial determination to deny a survivor benefit to Thelma Masengale is AFFIRMED.

DATED: September 23, 2008.

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