

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)

SARAH TIMMONS**)

OAH No. 19-0193-PER

Agency No. 2019-010

DECISION

I. Introduction

Sarah Timmons [*a pseudonym*] is a retiree with the State of Alaska Public Employees' Retirement System (PERS). Her husband is Donald Timmons [*a pseudonym*]. When Ms. Timmons initially applied for retirement, she selected the retirement option that provided Mr. Timmons with survivor's benefits. However, shortly before her retirement date, Ms. Timmons and Mr. Timmons changed the retirement paperwork and selected the option that provided no survivor's benefits for Mr. Timmons, a change that required Mr. Timmons to sign a waiver. After Ms. Timmons retired, she requested that her selected option be changed back to provide Mr. Timmons with survivor's benefits. The basis for that request was two-fold. First, that Ms. Timmons did not fully understand the election. Second, that Mr. Timmons, due to his severe dyslexia, could not read and comprehend the no survivor's benefits options that he agreed to.

The PERS administrator denied the request to allow Ms. Timmons to change her retirement benefits back to the survivorship option, because the election made at retirement is ordinarily irrevocable. Ms. Timmons appealed. The evidentiary hearing was held on September 4, 2019. Ms. Timmons represented herself. Assistant Attorney General Kevin Dilg represented the PERS administrator.

The evidence in this case shows that Ms. Timmons and her husband made the decision to elect the no survivor's benefits options upon the advice of their private financial planner, and that Mr. Timmons's dyslexia played no part in that decision. Indeed, Mr. Timmons, who was able to successfully maintain employment and had successful private business ventures, routinely relied upon Ms. Timmons to read and explain documents to him, which is what occurred in this case. Ms. Timmons misunderstanding of the effect of election of no survivor's benefits occurred despite the clear language contained in the survivor's benefits waiver form, which advised the parties of the consequences of electing the no survivor's benefit option. In addition, there is no evidence that the PERS staff played any part in Mr. and Ms. Timmons's election of no survivor's

benefits. Accordingly, the Timmons are bound by their election, and the PERS administrator's determination is AFFIRMED.

II. Facts

Ms. Timmons is a PERS member. She is married to Donald Timmons. She has a bachelor's degree in education and worked as clerical staff for an Alaska School District.¹ On May 14, 2018, she submitted her PERS retirement application to the Division of Retirement and Benefits (Division) with a planned retirement date of September 1, 2018.² In that application, she elected a 50% Joint Survivor Option.³ After she submitted her application, she and her husband met with their financial advisor, who told them that they should change their election to the no-survivor option because they would receive a larger monthly payment.⁴ The financial advisor the Timmons met with was their personal financial advisor; he did not work for, nor was he affiliated with PERS.⁵

After speaking with their financial adviser, Ms. Timmons submitted an amended retirement application to the Division on August 17, 2018.⁶ That amended retirement application selected the "NO SURVIVOR OPTION."⁷ On the first page of that amended retirement application, Mr. Timmons, which Mr. Timmons signed in front of a notary, the portion immediately above his signature reads as follows:

SPOUSE'S WAIVER OF SURVIVOR OPTION

(Complete only if married and NOT selecting a survivor option.)

I acknowledge and approve the benefit selected. I understand the terms of the selection and that by signing this waiver **I freely waive entitlement to continuing survivor benefits, including health coverage**, which may otherwise be payable to me, upon the death of the named applicant. By signing this consent, I agree to waive my right to any benefit that would be paid to me and consent to the naming of another beneficiary.⁸

Mr. Timmons is profoundly dyslexic. He worked for the same employer for over 30 years. He has owned several successful small businesses and is an inventor who obtained a patent. He successfully coped with his dyslexia by throughout the years by having Ms. Timmons

¹ Ms. Timmons' testimony.

² Agency Record (AR), pp. 22 – 29.

³ AR, p. 22.

⁴ Ms. Timmon's testimony; Mr. Timmon's testimony.

⁵ Ms. Timmon's testimony; Ms. Voigt's testimony.

⁶ AR, pp. 19 - 20.

⁷ AR, pp. 19 – 20.

⁸ AR, p. 19 (boldface in original).

read and explain documents to him. This included taking work documents home for Ms. Timmons's assistance with them. After his employer installed a new computer system, he was unable to successfully utilize the same coping skills that had worked for him for over 30 years and resigned from his job.⁹

Ms. Timmons similarly utilized the same mechanism for Mr. Timmons in conjunction with changing the retirement elections from having a survivor's benefit to declining the survivor's benefit. She read the form changing the survivor's benefit and waiving it, and explained it to him before he signed it. However, she did not read the form to him, and both Ms. and Ms. Timmons thought that him giving up survivor's benefits would only result in his losing cash payments, in the event that she predeceased him; they did not also understand that he would also be giving up health coverage.¹⁰ Ms. Timmons was aware that she could have consulted with the Division prior to changing the survivor's election, but did not.¹¹

Ms. Timmons retired effective September 1, 2018. On October 19, 2018, the Division sent her a letter that stated, in pertinent part:

Please remember that since you did not elect one of the survivor options, **all benefits** will stop in the event of your death. If you are married at the time of your death, your surviving spouse will not be entitled to any medical, DVA, or LTC coverage that you may have elected in force during your lifetime. Some insurance may be available through COBRA for a limited time, but your survivor would be responsible for the monthly premium.¹²

On October 25, 2018, the Division of Retirement and Benefits sent Ms. Timmons another letter that summarized her retirement benefits which stated:

This letter is a summary of the benefits that you have selected under your Public Employees' Retirement System (PERS). **Please read this letter carefully.** If you think there is an error or that you may have selected a benefit that is not listed in this letter, contact the Division of Retirement and Benefits immediately. You may only make corrections to your elections within 15 days of the date of this letter or before your next benefit check is issued, whichever is later.¹³

Ms. Timmons then emailed the Division on November 2, 2018, with an attached form changing her retirement options to a survivorship option.¹⁴ In that email, Ms. Timmons wrote that

⁹ See Ms. Timmons's exhibits filed on August 22, 2019; Ms. and Ms. Timmons's testimony.

¹⁰ Ms. and Mr. Timmons's testimony.

¹¹ Ms. Timmons's testimony.

¹² AR, p. 13 (boldface in original).

¹³ AR, p. 11 (boldface and underline in original).

¹⁴ AR, pp. 32 – 33.

“I had noticed, per the letter included with my first check, that I would be able to make updates to my retirement options for 15 days from the 10/25/18 letter.”¹⁵

The Division replied to Ms. Timmons’s November 2, 2018 email on November 13, 2018, directing Ms. Timmons to address the issue of changing her retirement options with Melinda Voigt, a Retirement & Benefits special III Manager.¹⁶ Ms. Timmons followed up with Ms. Voigt with a November 24, 2018 email, which read:

I am submitting this letter of consideration with the hope that you might authorize my request to revert back to my initial selection of the 50 % survivor benefit.

On October 31, I received my first check and the accompanying appointment letter dated 10/25/18. My heart literally stopped when I read the first paragraph stating that medical, DVA, and LTC benefits to my husband stopped upon my death with no survivor option. Up until that moment, I had understood that the selection of the no survivor option meant that my husband would no longer receive my monthly pension payments only. I did not realize that he also would lose the medical, dental, and long-term care coverage. I literally understood the term ‘monthly benefits’ to refer only to the check I would receive (as, for example, does the letter when it references ‘your normal monthly benefit will be \$2,145.12’).

I had made the subsequent No Survivor selection after our financial advisor recommended that I do so. I will request that he (John Blankenship) submit a letter confirming that this was the case, if desired.

Upon receipt of the appointment letter, I made a request on November 2 to correct my survivor option back to my original 50% survivor selection. It was my understanding that the 15 days referred to in the appointment letter meant that I could do so. I initially thought I could even change to the 75% option. I’ve been in contact with several different people since then, and mailed a hard copy of this request on 11/14/18.

I am embarrassed to confess that despite the wording on the application, I did not understand that my later selection meant that my husband would not only fail to receive a monthly pension, but also be precluded from long-term care and health benefits. The appointment letter more clearly spelled that out. Even though I made the change under the counsel of my financial advisor, I realize that it’s ultimately my responsibility. I am horrified that my misinterpretation of a couple of words has so critically impacted our future.¹⁷

Ms. Voigt responded to Ms. Timmons’s November 24, 2018 email on November 26, 2018. In her response, she denied Ms. Timmons’s request.¹⁸ This case follows.

¹⁵ AR, p. 33.

¹⁶ AR, p. 31.

¹⁷ AR, p. 39.

¹⁸ AR, pp. 5 – 6.

III. Discussion

The issue is whether Ms. and Mr. Timmons may change the survivorship option, post-retirement, from one that afforded Mr. Timmons no survivor's benefits to one that provides him with survivor's benefits. The simple answer is a "no" based upon AS 39.35.450(e), which states that "[o]nce the employee is appointed to retirement, the election becomes irrevocable."¹⁹ Ms. Timmons makes several arguments seeking to avoid the express terms of the statute.

Ms. Timmons's first argument is that the Division's October 25, 2018 letter advised her that she could make changes to her retirement elections if done within 15 days:

If you think there is an error or that you may have selected a benefit that is not listed in this letter, contact the Division of Retirement and Benefits immediately. You may only make corrections to your elections within 15 days of the date of this letter or before your next benefit check is issued, whichever is later.²⁰

Given the express language of the statute proscribing change to retirement elections post-retirement, AS 39.35.450(e), the Division's letter merely provided Ms. Timmons the opportunity to correct any errors that the Division may have made in processing her retirement application and the elections she made before she was admitted to retirement. It did not allow her the opportunity to change her elections post-retirement.

Ms. Timmons's second argument was that because she did not understand that her husband would be giving up survivor's health care benefits, etc., and hence failed to communicate that consequence to her husband, that his dyslexia made his execution of the waiver, in which he explicitly agreed to give up his survivor's benefits, ineffective. In addressing this argument, it is important to note that throughout their married life, Mr. Timmons and Ms. Timmons developed a very successful coping mechanism for his dyslexia. She would go over documents with him, sometimes reading them to him, and then he would act based upon the information she provided to him. This mechanism helped them form several small businesses, helped him obtain a patent, and successfully kept him employed with the same employer for over 30 years. They used that same coping mechanism in this case. Ms. Timmons cannot therefore point to Mr. Timmons's dyslexia as the causative factor. Instead, it was Ms.

¹⁹ AR, p. 11. Alaska regulation 2 AAC 35.250 ostensibly allows a retiree "who elects to designate a spouse or dependent as contingent beneficiary" to change that election post-retirement. However, that regulation cannot provide relief to Ms. Timmons because Mr. Timmons was not elected as a contingent beneficiary pre-retirement. It is also important to note that a regulation may not "differ[] substantially from the clear language of the statute." *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1132 (Alaska 2017).

²⁰ AR, p. 11.

Timmons’s admitted misreading of the language in the waiver form that led to Mr. Timmons signing the form that explicitly waived his right to survivor’s benefits, including “any medical, DVA, or LTC coverage.”

This issue is controlled by the case of *Kingik*.²¹ In *Kingik*, Ms. Kingik was the wife of a PERS member. She signed a waiver of her spousal survivor’s rights. After her husband died, she sought to reinstate survivor’s rights, based upon her argument that, after discussing the waiver option with her husband, that she thought she was waiving medical and dental coverage, not the retirement payment. The Division denied her request. After an administrative hearing, in which the Administrative Law Judge, upheld the denial,²² that decision was ultimately appealed to the Alaska Supreme Court. The Supreme Court held that the waiver form provided an adequate explanation to Ms. Kingik, and that Ms. Kingik’s unilateral misunderstanding of the effect of the waiver form was insufficient to set aside the waiver she signed.²³

As in *Kingik*, the waiver form clearly and explicitly warned Mr. Timmons that if he signed the waiver, he would lose benefits:

I understand the terms of the selection and that by signing this waiver **I freely waive entitlement to continuing survivor benefits, including health coverage,** which may otherwise be payable to me, upon the death of the named applicant.²⁴

And, as in *Kingik*, Mr. Timmons’s unilateral mistake, based upon the information conveyed to him by Ms. Timmons, does not make the waiver invalid and allow Ms. Timmons to select a survivor’s option post-retirement.

Ms. Timmons’s final argument is that the Division should have called her and double-checked when the no survivor’s option was selected. However, Ms. Timmons knew she could have contacted the Division pre-retirement if she had questions and did not do so. This argument is not persuasive. It should also be noted that the evidence is undisputed that the Timmons’s financial advisor, who told them to change the retirement option, was their private financial advisor not affiliated with the Division and that the Division itself played no part in the Timmonses choosing, pre-retirement, to change Ms. Timmons’s retirement options from initially electing survivor’s benefits to waiving them.

²¹ *Kingik v. State, Dept. of Admin., Div. of Retirement and Benefits* 239 P.3d 1242 (Alaska 2010).

²² *In the Matter of C. K.*, OAH Case No. 06-0860-PER (Office of Administrative Hearings, 2008).

²³ *Kingik* at 1250 – 1251.

²⁴ AR, p. 19 (boldface in original).

